IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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

Plaintiff-Respondents,

v. **NO. S-1-SC-40768**

CITY OF RIO RANCHO, a municipal corporation; and HAROLD'S GRADING & TRUCKING, INC.,

Defendants-Petitioners,

and

CITY OF RIO RANCHO, a municipal corporation

Cross-Claimant,

HAROLD'S GRADING & TRUCKING, INC.,

Cross Defendant.

DEFENDANT-PETITIONER'S BRIEF IN CHIEF

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STATEMENT OF COMPLIANCE

Undersigned counsel hereby certifies that this brief was prepared in 14-point Times New Roman typeface and the boy of this brief complies with the page limit requirement of Rule 12-318(G), with a word count of 9,447 words using Microsoft Word, version 2504.

COMES NOW Defendant/Petitioner, the City of Rio Rancho (the "City"), by and through its attorneys, NM Local Government Law, LLC (David M. Wesner and Kenneth J. Tager) and, pursuant to Rule 12-318(A) NMRA, hereby submits its Brief in Chief in the above-captioned appeal.

STATEMENT OF PROCEEDINGS

Plaintiffs filed their Complaint for Damages for Inverse Condemnation, Trespass and Conversion on October 17, 2018, against Defendant/Petitioner, the City of Rio Rancho (the "City"), and against Harold's Grading and Trucking, Inc. ("HGT"), which is not a party to this appeal. **[1RP 1-7]** On November 7, 2018, Plaintiffs filed their First Amended Complaint for Damages for Inverse Condemnation, Trespass and Conversion. **[1RP 10-16]** On May 2, 2019, Plaintiffs filed their Second Amended Complaint for Damages for Inverse Condemnation, Trespas [*sic*], Public and Private Nuisance, Negligence, Negligence *Per Se* and Conversion, which served as Plaintiffs' pleading for the remainder of the proceedings below. **[1RP 90-105]** At all times, Plaintiffs pled a single cause of action as against the City: inverse condemnation pursuant to NMSA 1978 Section 42A-1-29. ***Id.***

All of Plaintiffs' claims related to unimproved vacant lots Plaintiffs owned on the northern half of Epazote Road, a platted, but unimproved and impassable, public right-of-way in Rio Rancho, New Mexico that had never been accepted by – or

offered to – the City for maintenance. **[1RP 260 ¶¶ 5, 7] [1RP 260 ¶¶ 7, 8] [2RP 368, n.1] [2RP 371] [8TR-43:2-9]** Epazote runs roughly north-south, with its northern terminus at Idalia Road, an east-west local thoroughfare, and its southern terminus at Chayote Road. In 2016, as part of a major development project to improve Idalia Road (the "Idalia project"), the City placed curb and gutter along Idalia, as a component of Idalia's stormwater control system.

For reasons of public safety and drainage, the City temporarily placed concrete curbing in the location where Epazote would have intersected Idalia, had a physical intersection been planned and constructed. The northern half of Epazote was not only impassable to regular passenger vehicles **[7TR-93:24 – 94:3]**, it had, as Plaintiffs admit, a steep drop off its east edge that would have posed a danger to the public if accessible from Idalia. **[1RP 92 ¶ 21]** Also, because no improvements had yet been constructed on the northern half of Epazote, opening the curbing would have directed stormwater away from the storm-drainage system on Idalia and onto the unprotected native soils of Epazote and the surrounding lots. **[8TR 54:12 – 55:9]** It is undisputed that under Rio Rancho's practice for new development, the developer – *i.e.* Plaintiffs – not the taxpayer, is responsible for building roads, which are then offered to the City for maintenance. **[2RP 371] [2RP 384 ¶¶ 7-9]**

No part of the Epazote right-of-way – <u>including its northern access from Idalia</u> – was ever vacated. **[1RP 260 ¶ 9] [2RP 369-370]** The curbing that was placed

across Epazote was therefore temporary by definition. **[2RP 374-75]** At all times, the City retained the right and ability to open the curbing, if and when any of the Plaintiffs initiated the process to construct improvements on their land indicating a preference for northern access instead of, or in addition to, the southern access onto Epazote, from Chayote Road. **[2RP 374-75] [2RP 384 ¶ 9]** The southern route remained unaffected by the Idalia Project, providing access to Plaintiffs' portion of Epazote at least as reasonable as the northern access had been. **[1RP 249 ¶ 5] [1RP 253-54] [1RP 258] [1RP 260 ¶ 9]** In fact, during the Idalia project, the City graded and improved the southern half of Epazote, which – unlike the northern half – it had accepted for maintenance. **[6RP 1394] [8RP 1978 ¶ 39] [11RP 2583]**

Despite the facts discussed above, Plaintiffs sued the City and the landowner on the opposite (east) side of Epazote – HGT – alleging, *inter alia*, that they had lost "all" access to their lots. Plaintiffs tried their case to a jury from May 16-26, 2022. **[1 TR-3]** Plaintiffs spent the majority of their trial time on issues against HGT, whose excavations had created or contributed to the steep drop from the eastern edge of Epazote. **[12 RP 2900-2902; 2905-08]** The jury rendered an award of $225,850.00 in compensatory and punitive damages against HGT, on theories of

"public or private nuisance, trespass or conversion." **[11 RP 2814-16]** The jury awarded $60,000.00 against the City. **[11 RP 2813] [5-25-22 8 TR 56:24 – 59:5]**

Following trial, Plaintiffs sought, as against the City, an award of attorney fees in the amount of $130,221.00. In so doing, Plaintiffs relied solely on the only New Mexico reported decision ever to award fees in inverse condemnation, the concurrence in *Landavazo v. Sanchez*, 1990-NMSC-114, 111 N.M. 137, 802 P.2d 1283. **[11 RP 2823-38]** The district court awarded Plaintiffs' fee claim in its entirety, and the City appealed to the Court of Appeals.

The City appealed under *Landavazo* and a later Court of Appeals decision that declined to expand *Landavazo*, but because the *Landavazo* concurrence was wrongly decided, the City requested that the Court of Appeals certify to this Court the question of reversing *Landavazo*. **[BIC 18-21]** The City also appealed the district court's impermissible award of fees and costs incurred in Plaintiffs' case against HGT, which the City demonstrated, contrary to Plaintiffs' allegations, could be "extricated" from fees and costs incurred against the City. **[12 RP 2900-2902; 2905-08]** The City appealed on the additional basis that the district court's award of fees incurred against HGT violated the anti-donation clause of the New Mexico Constitution. **[12 RP 2898-2901]** Finally, the City appealed on the basis that the specific fees Plaintiffs sought in their Motion were excessive and improper – and

based on incorrect information – and would not have been recoverable as claimed even if Plaintiffs had valid legal authority for seeking them. **[12 RP 2901-03]**

Following oral argument on October 22, 2024, the Court of Appeals held, without explanation, that "our Supreme Court has held that NMSA 1978, Section 42A-1-25 (1981) supports an attorney fee award for inverse condemnation plaintiffs, and we decline to certify the matter for reconsideration by that Court." **[DOA ¶ 3]** The Court of Appeals' opinion essentially reverses its earlier opinion in *Primetime Hosp, Inc. v. City of Albuquerque*, 2007-NMCA-129, ¶ 52, 142 N.M. 663, 168 P.3d 1087 ("*Primetime*"), *rev'd in part on other grounds, Primetime Hosp, Inc. v. City of Albuquerque*, 2009-NMSC-011, 146 N.M. 1, 206 P.3d 112, which had held that an inverse-condemnation plaintiff must show "aggravated and objectionable" conduct on the part of the defendant public body in order to recover its fees. **[DOA ¶ 51]**

The Court of Appeals rejected the City's arguments as to the anti-donation clause of the New Mexico Constitution, stating:

> The district court did not award attorney fees to Plaintiffs that were solely related to the prosecution of the claims against HGT. As we have explained, the district court found that Plaintiffs' attorney time that was spent prosecuting the inverse condemnation claim at trial could not be separated from the time spent prosecuting the claim against HGT because the claims were either related to each other or the City's actions assisted HGT's defense of Plaintiffs' claims.

[DOA ¶ 56] (emphases added). That ruling rested, in turn, on the Court of Appeals' unsupported conclusion that the City could be charged attorney fees incurred against HGT because the City allegedly "took action that supported HGT's defense":

> Plaintiffs explained that they had extracted attorney fees that only "applied to [HGT]," but they were unable to segregate the time spent at trial on the City and HGT because the City took action that supported HGT's defense—both in and out of court—that caused evidence against HGT and the City to become intertwined.

[DOA ¶ 54]

The Court of Appeals also rejected the City's arguments under the anti-donation clause by stating that the City did not "explain how an order of the court compelling a municipality to involuntarily pay fees incurred in litigation causes the City to make a donation in the sense that is prohibited by the Antidonation Clause. *See* [*Vill. of Deming v. Hosdreg Co.*, 1956-NMSC-111, 62 N.M. 18, 303 P.2d 920] ¶ 36 (defining a donation as a 'gift' under N.M. Const. art. IX, § 14)." **[DOA ¶ 56]** As is discussed below, the Court of Appeals erred in its rulings on all the points identified above.

ARGUMENT

I. The District Court Committed Legal Error or Abused its Discretion When it Applied the Condemnation Statute, NMSA 1978 Section 42A-1-25, to Plaintiffs' Claim for Attorney Fees on their Inverse-Condemnation Claim.

A. Standard of Review

Ordinarily, the "standard of review applicable to an award of attorney fees is abuse of discretion." *State for Use of Rock Scapes v. RVC, Inc.*, 2018 WL 7045251, at *10 (N.M. Ct. App. Dec. 12, 2018) (non-precedential) (*citing Gardner v. Gholson*, 1992-NMCA-122, ¶ 46, 114 N.M. 793, 845 P.2d 1247). A district court abuses its discretion "when it applies an incorrect standard, incorrect substantive law, or its discretionary decision is premised on a misapprehension of the law." *Aragon v. Brown*, 2003-NMCA-126, ¶ 9, 134 N.M. 459, 78 P.3d 913. Here, although the district court did apply an incorrect standard by, *inter alia*, awarding fees in the absence of a "condemnation proceeding" seeking to acquire property with no "right" to do so, and hence abused its discretion, a *de novo* standard applies to the district court's award of fees as against the City.

"[E]ven when we review for an abuse of discretion, our review of the application of the law to the facts is conducted *de novo*. Accordingly, we may characterize as an abuse of discretion a discretionary decision that is premised on a misapprehension of the law." *Harrison v. Bd. of Regents of the Univ. of N.M.*, 2013-NMCA-105, ¶ 14, 311 P.3d 1236 (internal quotation marks and citations omitted). Here, the fee award in question is based on misinterpretation of a statute. The Court will "review questions of statutory interpretation *de novo*. . . . In construing the language of a statute, our goal and guiding principle is to give effect to the intent of

the Legislature. . . . In determining intent we look to the language used. . . . We generally give the statutory language its ordinary and plain meaning unless the Legislature indicates a different interpretation is necessary." *Grisham v. Reeb*, 2021-NMSC-006, ¶ 12, 480 P.3d 852 (citations and internal punctuation marks omitted). In awarding fees as against the City, the district court incorrectly interpreted NMSA 1978 Sections 42A-1-25 and 42A-1-29. That error is properly reviewed under a *de novo* standard. *See Strata Prod. Co. v. Mercury Expl. Co.*, 1996-NMSC-016, ¶ 12, 121 N.M. 622, 916 P.2d 822 (stating that the appellate court will defer to facts found by the trial court, but reviews questions of law de novo).

B. The District Court Committed Legal Error – or, at a Minimum, Abused its Discretion – When it Applied the Condemnation Statute, NMSA 1978 Section 42A-1-25, Rather Than the Inverse-Condemnation Statute, Section 42A-1-29, to Plaintiffs' Claim for Attorney Fees.

1. Argument.

It "has long been the rule in New Mexico that a party is only entitled to those fees resulting from the cause of action for which there is authority to award attorney fees." *Bernhardt v. Advance Concept Constr., LLC*, 2019 WL 5098355, at *2 (Ct. App. Sept. 10, 2019) (citing *Dean v. Brizuela*, 2010-NMCA-076, ¶ 16, 148 N.M. 548, 238 P.3d 917). "[I]n view of the well-established 'American Rule', courts have often stated that statutory attorney fees may be awarded only when 'expressly,' 'explicitly,' or 'specifically' authorized by statute, and that statutes allowing an award of fees will be strictly construed"). *Parkview Cmty. Ditch Ass'n v. Peper*,

2014-NMCA-049, ¶ 24, 323 P.3d 939 (emphasis added; internal punctuation marks omitted). "This rule means that the courts will not add to such a statutory enactment, by judicial decision, words [that] were omitted by the legislature." *Sims v. Sims*, 1996-NMSC-078, ¶ 22, 122 N.M. 618, 930 P.2d 153 (internal punctuation marks omitted). "[W]e believe this rule is meant to assure that statutes will be read strictly so that no innovation upon the common law that is not clearly expressed by the legislature will be presumed." *Id.*

In Plaintiff's [*sic*] Motion to Award Attorney Fees Against City of Rio Rancho on Inverse Condemnation Claim **[11 RP 2823-38]**, Plaintiffs represented to the district court that their "action against the City was based entirely on the Eminent Domain Code, NMSA §42A-1-1 et seq and specifically the Inverse Condemnation section thereof, NMSA §42A-1-29." **[11 RP 2823]** (Emphases added.) Then, immediately after announcing that their action was based "entirely" on the inverse-condemnation statute, Plaintiffs shifted to citing the condemnation statute, "NMSA §42 [sic] -1-25." **[11 RP 2823-24]** By citing Section 42A-1-29 with identifying language (*i.e.* "specifically the [i]nverse [c]ondemnation section thereof"), then citing Section 42[A]-1-25 without identifying language, Plaintiffs obscured the fact that they were citing statutes governing completely different causes of action. Plaintiffs also did not acknowledge below that their lawsuit was not a "condemnation proceeding" in which property was "sought to be acquired," as would bring it within

the scope of Section 42A-1-25. *See* NMSA 1978 Section 42A-1-25(A)(3), authorizing a fee award only if "the condemnor does not have a right to take the property sought to be acquired in the condemnation proceeding" (emphasis added).

In seeking their fees, Plaintiffs relied heavily on the only New Mexico reported decision to award fees in inverse condemnation, the concurrence in *Landavazo v. Sanchez*, 1990-NMSC-114, 111 N.M. 137, 802 P.2d 1283, which announced the holding of the Court on the attorney-fee issue. **[11 RP 2823-38]** No fee award was justified even under *Landavazo*, as the Court of Appeals had held "aggravated circumstances" were a prerequisite to an award of attorney fees in inverse condemnation. **[12 RP 3027-29]**; NMSA 1978 Section 42A-1-29 (1983); *Primetime, supra*, 2007-NMCA-129, ¶ 52. Plaintiffs had never obtained – nor had they sought – any jury finding of "aggravated circumstances" or "wrongfulness" so as to make the present case analogous to *Landavazo*. Nonetheless, the district court granted Plaintiffs' request in its entirety.

In fact, the *Landavazo* Court was mistaken when it held that Section 42A-1-25 did not expressly preclude application in inverse condemnation. As the City showed the courts below, statutory attorney fees are only available in a "condemnation proceeding," and inverse condemnation is, by definition, action

taken without a condemnation proceeding. See NMSA §42A-1-25, defining the entire universe of eminent-domain actions giving rise to attorney-fee awards:

> A. The court shall award the condemnee his litigation expenses whenever:
> (1) the condemnor has abandoned the condemnation proceeding;
> (2) the condemnation proceeding has been dismissed for any reason except when a bona fide settlement has been reached; or
> (3) there is a final determination that the condemnor does not have a right to take the property sought to be acquired in the condemnation proceeding."

[11 RP 2823-24] (Emphases added.) See also NMSA 1978 Section 42A-1-29(A), defining inverse condemnation as a public body's action to "take or damage any property for public use without making just compensation . . . without instituting . . . any proceeding for condemnation." (Emphasis added.) Lest Plaintiffs contend that their lawsuit satisfies the requirement of a "condemnation proceeding," the Legislature foreclosed that argument by specifying a "condemnation proceeding" in which private property is "sought to be acquired," which clearly does not apply to any proceeding below. Because neither the Court of Appeals nor district court below, nor the *Landavazo* concurrence, applied strict construction to the condemnation statute's fee provision, all three courts erred.

Plaintiffs also misrepresented the holding in *Primetime*, claiming – without citation to any language in the decision – that "Primetime's holding was limited to cases where the taking is a true accident." **[11 RP 2826]** *Primetime* contains no

such holding. **[12 RP 2898]** In response to Plaintiffs' allegation that Epazote was "closed," the City notified the district court both that access to Epazote was still fully open from the south, and that the curbing was temporary because the northern access had not been vacated. *See* **[2RP 374-75]**, *citing, e.g., Heritage Associates v. Columbia Planning & Zoning Comm'n*, 2019 WL 2872295, at *1 (Conn. Super. Ct. May 28, 2019) for the proposition that "a 'permanent' cul-de-sac is one which is not proposed to, or is not reasonably capable of, future extension into adjoining property. A 'temporary' cul-de-sac is one for which an extension is reasonably feasible given the surrounding circumstances." (Emphases added; internal punctuation marks omitted.) Plaintiffs failed to show that Epazote was *not* capable of "future extension" to Idalia, or that the "cul de sac" created by blocking the northern access to Epazote was, in any legal sense, permanent.

Plaintiffs falsely alleged – invoking Section 42A-1-25(A)(3), part of the inapplicable condemnation statute – that the jury found "the [C]ity did not have the right to take the property." Of course, the City "does have a right to re-route traffic, even permanently, provided the degree of resulting circuity is reasonable." **[12 RP 2893]** (emphasis in original); **[1RP 251-52]** (*citing State ex rel. State Highway Comm'n v. Danfelser*, 1963-NMSC-138 ¶ 22, 72 N.M. 361 for the proposition that "circuity of travel, as long as it is not unreasonable, and any supposed loss in land value by reason of the diversion of express traffic, are non-compensable") (internal

punctuation marks omitted). Plaintiffs had neither sought nor elicited a jury finding that the City had no "right" to block access temporarily, from one of two directions, onto undeveloped land, in the interest of public safety, or a finding that southern access by way of Chayote Road imposed an "unreasonable" degree of circuity. *See* special-verdict form **[11 RP 2813]**, asking jurors only "[d]o you find that the City of Rio Rancho eliminated all reasonable access to any of Plaintiff's [*sic*] property and, as a result, took or damaged that Plaintiff's property?" The question of a "right" to "take" access onto Epazote from the north, and the question of "wrongfulness" under *Landavazo*, were simply never placed before the jury. Of course, since there was no proceeding in which "property [was] sought to be acquired," any question of a "right" to do so would have been misplaced in a jury instruction. Because no such findings were in the record, the district court had no basis on which to expand *Landavazo* to apply the condemnation statute's fee-award provision in the absence of a condemnation action in which property is "sought to be acquired," let alone in the absence of "aggravated and objectionable" conduct. *See* Order on Plaintiffs' Motion for Attorney Fees Against the City of Rio Rancho, finding, with no record support and contrary to the holding in *Primetime*, that the "City of Rio Rancho did

not have the right to take or damage Plaintiffs' property without compensation and thus its actions were wrongful." **[12 RP 3028, ¶ 2]**

The Court of Appeals' Opinion misstated the City's position as arguing that "statutory attorney fees should not be available for inverse condemnation claims" **[DOA ¶ 1]**, and that "attorney fees were not warranted under [the condemnation statute]" (***id.* ¶ 46**). The City had argued, not that statutory attorney fees "should not be available" in inverse condemnation, or "were not warranted" here, but that fees are not available under the plain language of the inverse-condemnation statute. **[BIC 6-7]**

The Court of Appeals also misconstrued the City's arguments regarding the *Primetime* Court's view of *Landavazo*, stating that "the City maintains that this Court limited the application of *Landavazo* in *Primetime*." **[DOA ¶ 47]** The City had not argued that *Primetime* "limited the application of *Landavazo*." Rather, the City had noted the *Primetime* Court's efforts to harmonize its holding, based on the plain language of the inverse-condemnation statute, with the earlier *Landavazo* opinion, concluding that the *Landavazo* Court must have intended that fee awards in inverse condemnation be reserved for cases of "aggravated and objectionable" conduct. **[12 RP 2895-96]** In other words, the *Primetime* Court had not "limited the application" of *Landavazo*; it had declined to "expand *Landavazo* and hold that Section 42A-1-25(A)(3) supports a rule that attorney fees are presumptively

appropriate in all inverse condemnation cases." *Primetime*, 2007-NMCA-129 at ¶ 49 (emphasis added). **[12 RP 2895]** Advised of the above authority, the Court of Appeals nonetheless held that "a district court may award attorney fees under [the fee provision in the condemnation statute] in an inverse condemnation situation if a condemning authority proceeds wrongfully in taking a landowner's property." ***Id.* ¶ 50**. Plaintiffs had neither obtained nor sought a jury finding that the City's conduct had been "wrongful." **[12 RP 2895]**

The Court of Appeals acknowledged the requirement of "aggravated and objectionable" conduct set forth in *Primetime*, but did not acknowledge that the jury had never been tasked with finding "aggravated," "objectionable," or "wrongful" conduct on the part of the City. **[DOA]**, *passim*. In its Opinion, though, the Court of Appeals relieves itself of the obligation to find "aggravated" or "objectionable" conduct at all, by deeming all inverse condemnation "wrongful." *See* **[DOA ¶ 51]**, defining "wrongful" conduct as follows:

> Instead of offering compensation or initiating a condemnation proceeding, the City essentially forced Plaintiffs to initiate an inverse condemnation proceeding to determine whether they were entitled to receive compensation for the lack of access. The jury's verdict, which the City does not challenge, therefore supported a finding that the City proceeded wrongfully when it installed the curb without compensating Plaintiffs.

In other words, the Court of Appeals held that whenever a plaintiff prevails in "an inverse condemnation proceeding to determine whether they were entitled to receive

compensation," the public defendant has "proceeded wrongfully," and is therefore liable for attorney fees under *Landavazo*. That description applies to *all* successful inverse-condemnation actions, including *Primetime*. By its nature, the cause of action in inverse condemnation exists solely to provide relief to a property owner "forced" to seek compensation when its property is taken by a public body that proceeds "without making just compensation or without instituting . . . any proceeding for condemnation." Section 42A-1-29. The Court of Appeals' holding, therefore, does make attorney fees available in inverse condemnation "presumptively," "as a matter of course," with no need for a showing of "aggravated and objectionable" conduct. By so holding, the Court of Appeals effectively overruled *Primetime*.

The idea that a court may import the condemnation statute's attorney-fee authorization into an inverse-condemnation action if the defendant public body "proceeds wrongfully" originated in *Landavazo*. Justice Montgomery, specially concurring, attempted to make the phrase "the condemnor does not have a right to take the property sought to be acquired in the condemnation proceeding," from Section 42A-1-25(A)(3), fit into the context of inverse condemnation under Section

42A-1-29. At ¶ 27, the concurrence notes, as to the phrase "does not have a right," that:

> The phrase can be construed as Justices Baca and Ransom construe it—namely, by holding that it applies only when the court determines that the public authority either did not have the power of eminent domain in the first place or that the taking was not for a public purpose. But if so construed, the statute becomes somewhat meaningless in the inverse condemnation situation . . . .

Rather than simply concluding that the Legislature meant what it said, that the statute is meaningless in inverse condemnation because it does not apply to inverse condemnation, and that fees are only available to a property owner defending against a meritless condemnation action, the concurrence instead states:

> It seems to us to make more sense to hold that the phrase "does not have a 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, supra, at ¶ 28.

Of course "taking the landowner's property without paying or offering just compensation" is the very definition of inverse condemnation. *See* Section 42A-1-29(A), defining inverse condemnation as the taking or damaging of "any property for public use without making just compensation or without instituting and prosecuting to final judgment in a court of competent jurisdiction any proceeding for condemnation." If the *Landavazo* Court intended "wrongfulness" to be a separate element of 42A-1-25 related to the *manner* of the taking, as the *Primetime*

Court suspected, it did not clearly say so, and certainly provided no guidance as to the manner or amount of "wrongfulness" it believed should subject a public entity to the payment of attorney fees in inverse condemnation. More significantly, of course, the Legislature never provided that fees could be awarded absent a "condemnation proceeding" seeking property, on a showing of "wrongfulness" or otherwise. Therefore, to the extent to which the *Landavazo* Court amended Section 42A-1-25 to include such an element – and in authorizing fees at all in inverse condemnation – the *Landavazo* Court exceeded its authority.

At the trial of the present case, Plaintiffs neither obtained nor sought a jury finding that the City had "proceeded wrongfully." **[11 RP 2813] [12 RP 2895]** Yet with its holding, the Court of Appeals effected the very expansion of *Landavazo* it had declined to implement in *Primetime*. *See* **[DOA ¶ 51]**, defining "wrongful" conduct as "[i]nstead of offering compensation or initiating a condemnation proceeding, the City essentially forced Plaintiffs to initiate an inverse condemnation proceeding to determine whether they were entitled to receive compensation for the lack of access."

In the same breath, the Court of Appeals muddied the waters. Despite deeming all inverse condemnation "wrongful," the Court nonetheless announced, without explanation, that the "present case resembles the uncompensated taking in *Landavazo* more than the misplaced waterlines in *Primetime*." **[DOA ¶ 51]** The

Court acknowledged some of the City's stated reasons for declining to reopen the northern access to Epazote Road: "Throughout this case the City insisted that Plaintiffs had not requested access to build on their vacant lots, that the access after the curb was installed was sufficient to 'get the building process started,' and that the City's actions had 'not eliminate[d] all reasonable access to any Plaintiff[s'] property'." ***Id***. But the Court never explained why it felt any of those reasons was invalid, nor did it acknowledge the City's reasons – also stated throughout the case below – for temporarily blocking the northern access in the first instance: To protect Plaintiffs' properties and others from erosion by preserving the drainage system along Idalia, and to protect the public from the precipitous drop off the east edge of the Epazote right-of-way into the HGT gravel pit. *See* **[12 RP 2898]** arguing that:

> witnesses including Scott Perkins and Jamie Marrufo testified that the closure was temporary, appropriate to the needs of Plaintiffs' unimproved land, and in furtherance of public safety, and that the southern access remained available and adequate. The City did not make an "inadvertent" or "unintentional" error; it *did not make an error at all*. That the City intentionally re-routed traffic, in view of the use of Plaintiffs' land and in the interest of public safety, distinguishes the present case from *Landavazo*, not from *Primetime*.

(Emphasis in original.) In other words, because Epazote Road had never been offered to the City for maintenance, or improved so as to be tied into the Idalia Road storm-drainage system – or to address the drop off its eastern edge – the City had no choice but to block the northern access until the curbing could safely be opened. Compromising public safety and public drainage infrastructure could well have been

"wrongful," but the City's declining to do so was not, and Plaintiffs elicited no jury finding otherwise. Accordingly, the fee award at issue should not have been made even under Landavazo. But it remains true that the *Landavazo* concurrence was wrongly decided, and, as is discussed below, is ripe for reversal.

2. The *Landavazo* Concurrence was Wrongly Decided, and Should Be Reversed.

Any call for a court to reverse a prior decision – its own or of any court – requires consideration of *stare decisis*. "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." *Padilla v. State Farm Mut. Auto. Ins.* Co., 2003-NMSC-011, ¶ 7, 133 N.M. 661, 664, 68 P.3d 901, 904 (*citing Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)) (internal punctuation marks omitted). "However, the principle of *stare decisis* does not require that we always follow precedent and may never overrule it." *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 34, 125 N.M. 721, 965 P.2d 305. "While *stare decisis* is not an inexorable command, . . . we require a compelling reason to overrule one of our prior cases." *Padilla, supra*, at ¶ 7 (citation and

punctuation marks omitted). In evaluating the reversal of prior precedent, the reviewing court must consider "particular questions":

> 1) whether the precedent is so unworkable as to be intolerable; 2) whether parties justifiably relied on the precedent so that reversing it would create an undue hardship; 3) whether the principles of law have developed to such an extent as to leave the old rule "no more than a remnant of abandoned doctrine;" and 4) whether the facts have changed in the interval from the old rule to reconsideration so as to have "robbed the old rule" of justification.

Trujillo, supra, at ¶ 34 *citing Planned Parenthood v. Casey*, 505 U.S. 833, 854, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

The first of these factors is "whether the precedent is so unworkable as to be intolerable." The district court's and Court of Appeals' decisions below – both in this case and in *Primetime* – illustrate exactly how unworkable *Landavazo* is. The *Primetime* plaintiff sought an award of fees under *Landavazo*, whereupon the Court of Appeals declined to "extend the holding of *Landavazo* and allow attorney fees as a matter of course in inverse condemnation cases." *Primetime*, 2007-NMCA-129 at ¶ 46. The *Primetime* Court, seeing before it, not a public entity's brazen theft of land as in *Landavazo*, but a simple – if costly – surveying error, was forced to speculate as to the meaning of *Landavazo's* nebulous "wrongfulness" requirement, concluding that "wrongful" must mean "aggravated":

> The Supreme Court's decision in Landavazo "that the county did not have the right to take the property," id., includes the implicit limit "in the way it did here." In this sense the aggravated circumstances present in Landavazo are an integral part of the decision. The absence of such

> aggravated circumstances argues against the expansion of the Landavazo rule to all inverse condemnation cases, and we decline to expand it in this case.

Primetime, supra, at ¶ 52. But – unable to alter the opinion of a higher court, and in attempting to make sense of *Landavazo's* "wrongfulness" language – *Primetime* only substituted one vague value judgment for another.

In the present case, Plaintiffs relied solely on *Landavazo*, as the only New Mexico reported decision ever to award attorney fees to a prevailing inverse-condemnation plaintiff. Plaintiffs were unable to show "aggravated" conduct here, where Epazote had not been improved to carry vehicular traffic or connect to Idalia's drainage system, and thus could not be accepted for maintenance even had it been offered, and certainly could not safely be connected to Idalia. *See McGarry v. Scott*, 2003-NMSC-016, ¶ 11, 134 N.M. 36, 72 P.3d 608, noting that when a "paper road" such as Epazote is dedicated to a local government, "dedication is not synonymous with acceptance by the county for maintenance. The subdivider, or any succeeding entity, must petition the local government for maintenance" (emphasis and internal punctuation marks omitted). The City therefore did not have (and Plaintiffs never identified) any alternative but to block the northern access to Epazote, temporarily,

in the interest of public safety. Plaintiffs could not, and did not, show "aggravated," "objectionable," or "wrongful" conduct, let alone want of a "right to take."

Neither the district court nor the Court of Appeals explained its reasoning in any useful detail, but both appeared to take at face value Plaintiffs' apparent contention that simply because the jury awarded some damages to Plaintiffs on their inverse-condemnation claim, the City had acted "wrongfully," and had no "right to take" the northern access, even temporarily, from Idalia to Epazote. Both conclusions are incorrect, and further illustrate the confusion created by the *Landavazo* concurrence. The City unquestionably does have the condemnation power over rights of way in its jurisdiction, a fact Plaintiffs did not, and could not, refute. **[12 RP 2893] [BIC 14]**

The *Landavazo* Court's conclusion that the county before it did not have the right to take the property at issue was also in error. However reprehensibly the county in *Landavazo* proceeded, its wrongdoing did not lie in the lack of a right to exercise the condemnation power. Attempting to make sense of the *Landavazo* concurrence, the *Primetime* Court surmised at ¶ 52 that the "Supreme Court's decision in *Landavazo* 'that the county did not have the right to take the property,' *id.*, includes the implicit limit 'in the way it did here'." But if the language in 42A-1-25 authorizing an award of fees carries anything other than its literal meaning, it has no meaning at all. As Justice Montgomery himself observed at ¶ 27 of

Landavazo, the "right to take" language in Section 42A-1-25 is "somewhat meaningless" in the context of inverse condemnation, because public bodies do have the power to condemn, and no public body ever has a right to take property without paying for it. Accordingly, if "no right to take" means no right to take *without paying*, then "no right to take" applies to all public bodies at all times, and its inclusion in the statute would therefore be mere surplusage. *See Amdor v. Grisham*, 2025 WL 718840, at *7 (N.M. Mar. 6, 2025), *citing Grisham v. Romero*, 2021-NMSC-009, ¶ 23, 483 P.3d 545, for the proposition that the Court is to read each statute before it "in its entirety and construe each part in connection with every other part to produce a harmonious whole, thereby rendering no part of the statute surplusage or superfluous" (internal punctuation marks omitted). The *Landavazo* concurrence's tortured construction of the fee authorization, the *Primetime* Court's gymnastics in attempting to make sense of it, and the current Court of Appeals' unannounced reversal of *Primetime*, are all evidence that the *Landavazo* concurrence is unworkable.

Ultimately, *Landavazo* is unworkable because it effects a *de facto* revision of Section 42A-1-25, rather than the strict construction the Court was called upon to apply. The plain language of the condemnation and inverse-condemnation statutes simply does not indicate that the Legislature intended attorney fees to be awarded without a "condemnation proceeding" in which property is "sought to be acquired"

by a public body that has no "right to take" the property. The *Landavazo* concurrence has sown confusion, and with its expansion by the current Court of Appeals to apply in all inverse-condemnation actions as a matter of course, that confusion invites further litigation at unwarranted public expense. *Landavazo* was unworkable from the outset, and if it was not already, the Court of Appeals has now made it "so unworkable as to be intolerable." Fortunately, as the second reversal factor illustrates, correcting the *Landavazo* concurrence's error will not have any ill effects.

The second *Planned Parenthood* factor is "whether parties justifiably relied on the precedent so that reversing it would create an undue hardship." *Trujillo, supra*, at ¶ 34. Here, as is noted above, the *Landavazo* concurrence remains the *only* New Mexico decision to uphold an award of fees to a plaintiff in an inverse-condemnation action. *Primetime* served as a buffer of sorts, cautioning litigants that attorney fees are not available in all inverse-condemnation actions" presumptively," "as a matter of course." *Primetime*, ¶¶ 46, 49. With its *de facto* reversal by the Court of Appeals in this matter, though, *Primetime* no longer stands as a barrier to the unrestrained grant of attorney fees without clear legislative authorization, in the absence of abusive litigation by a public entity to acquire property without the right to do so. As of this writing, no party in any reported decision, including Plaintiffs, has "justifiably relied on the precedent" of *Landavazo*. As such, the time is ripe to

reverse the *Landavazo* concurrence's misreading of Section 42A-1-25, before the Court of Appeals' erroneous decision in this matter prompts further litigation financed by the public without statutory authorization.

The third *Planned Parenthood* factor is "whether the principles of law have developed to such an extent as to leave the old rule 'no more than a remnant of abandoned doctrine'." *Trujillo, supra*, at ¶ 34. The only instances in which the "principles of law have developed" *vis à vis Landavazo* were *Primetime* and, arguably, *Moongate Water Co., Inc. v. City of Las Cruces*, 2014-NMCA-075, 329 P.3d 727. *Moongate* involved only an award of costs in inverse condemnation to the prevailing defendant public body, not an award of fees under Section 42A-1-25, so its "development" of *Landavazo*, if any, is immaterial to this action. And as has been discussed above, *Primetime* "developed" "principles of law" in an attempt to contextualize *Landavazo*, and explain the narrowness of its reach, but the Court of Appeals has now retreated from its prior determination not to award fees to inverse-condemnation plaintiffs "as a matter of course." The time has come for one "principle of law" to return to this arena: the strict constraint of statutory attorney-fee awards to their clear textual authorization, erasing from the common law the Landavazo concurrence's deviation from that time-honored principle.

The fourth and final *Planned Parenthood* factor is "whether the facts have changed in the interval from the old rule to reconsideration so as to have 'robbed the

old rule' of justification." *Trujillo, supra*, ¶ 34. Here, as is argued at length both above in this Brief and below in the lower courts, the "old rule" of *Landavazo* was never justified. It was an unwarranted, if understandable, deviation from the principle that statutory authorizations of attorney-fee awards, being in derogation of the common law, must be strictly construed. *Parkview, supra*, ¶ 24. That principle retains its full vitality today, whereas the justification for deviating from it, in *Landavazo*, was constrained to the "aggravated" facts of that case. Plaintiffs' invocation of *Landavazo* here, where the City had no alternative but to block the northern access to Epazote Road until it was needed, demonstrates the lack of justification in the district court's and Court of Appeals' expansion of *Landavazo*, deviating from clear legislative intent "presumptively," "as a matter of course." The *Planned Parenthood / Trujillo* factors weigh strongly in favor of reversing the concurrence in *Landavazo*.

3. Preservation of issues.

The City preserved the arguments in the previous section during the proceedings below. In response to Plaintiffs' Motion seeking their fees, the City argued that the statute authorizing fee awards only applies to condemnation, not inverse-condemnation, cases, and that the concurrence in *Landavazo* should not have read into the statute a fee authorization in inverse condemnation that the Legislature had not seen fit to include. *See* **[12 RP 3055-56]** The City noted that in *Primetime*,

supra, the Court of Appeals had declined to extend *Landavazo* to award fees in all inverse-condemnation actions "presumptively," "as a matter of course." **[12 RP 2895]** Rather, the *Primetime* Court had concluded that "the aggravated circumstances present in *Landavazo* are an integral part of the decision." **[12 RP 3027-29]**; NMSA 1978 Section 42A-1-29 (1983); *Primetime, supra*, 2007-NMCA-129, ¶ 52. The City showed that *Primetime* had held that statutory attorney fees are not available "presumptively" in inverse condemnation absent aggravated and objectionable conduct on the part of the public body, such as had been present in *Landavazo*. **[12 RP 2896]**

The City demonstrated below that it has "a right to re-route traffic," and that "circuity of travel, as long as it is not unreasonable" is "non-compensable." **[12 RP 2893]; [1RP 251-52]** The City showed below that the curbing across Epazote on Idalia was temporary because the northern access had not been vacated. *See* **[2RP 374-75]** The City also showed that Plaintiffs' lawsuit was not a "condemnation proceeding" in which property was "sought to be acquired," as would bring it within the scope of Section 42A-1-25. *See* NMSA 1978 Section 42A-1-25(A)(3), authorizing a fee award only if "the condemnor does not have a right to take the property sought to be acquired in the condemnation proceeding" (emphasis added). **[11 RP 2823-24] [12 RP 2892]**

II. Compliance With the District Court's Award Would Violate the Anti-Donation Clause of the New Mexico Constitution.

A. Standard of Review

The City's argument regarding anti-donation – that the award to Plaintiffs of attorney fees generated other than in litigation against the City violated the anti-donation clause set forth in Article IX, Section 14 of the New Mexico Constitution – arises under the Constitution itself. The Court will "review questions of statutory and constitutional interpretation *de novo*." *State v. Maestas*, 2025 WL 868089, at *1 (N.M. Mar. 20, 2025) (*citing State v. Boyse*, 2013-NMSC-024, ¶ 8, 303 P.3d 830).

B. Payment of Fees Incurred Against HGT Would Be an Allocation or Appropriation of Something of Value, Without Consideration.

For the reasons discussed above, no fees should have been awarded against the City. But in addition to its error in awarding fees without statutory authorization, the district court also erred in awarding fees that Plaintiffs incurred against the City's co-Defendant, HGT, or in "general trial time," which fees Plaintiffs claimed were "inextricably intertwined" with fees incurred against the City. In other words, in addition to erroneously ordering that the City pay attorney fees incurred against the City, the district court also ordered that the City pay attorney fees incurred against HGT or in "general trial time," granting a windfall to Plaintiffs and their counsel at public expense.

The term "donation" is broader as used in the anti-donation clause than in common parlance. In "the anti-donation context, the term 'donation' means 'a gift,

an allocation or appropriation of something of value, **without consideration** to a person, association or public or private corporation'." *Vill. of Deming v. Hosdreg Co.*, 1956-NMSC-111, ¶ 36, 62 N.M. 18, 303 P.2d 920 (emphasis added). As enshrined in the New Mexico Constitution, the anti-donation clause reads: "Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation . . . ." N.M. Const. art. IX, § 14. The City paying Plaintiffs' counsel any attorney fee incurred against another litigant would, by definition, be payment by the City 'of something of value, without consideration to a person . . . or private corporation. Neither Plaintiffs nor either court below cited authority to show that payment of fees incurred against HGT would not be the "use of public money to pay a claim predicated on facts [that] generate no [City] liability."

Replying in support of their Motion for Attorney Fees, Plaintiffs stated, "this is not a case where there were 'facts which generate no state liability.' To the contrary, the jury found that the City had incurred liability by inversely condemning Plaintiff's [*sic*] access rights." **[12 RP 2992]** Of course, substituting the City for the "state," the City had not argued that "no state liability" had been generated <u>in the case</u>. The City had argued that "no state liability" had been generated in Plaintiffs' case <u>against HGT</u>, which point Plaintiffs failed to address at all. Plaintiffs appeared

to misunderstand the City's central argument on this issue: the City does not allege an anti-donation violation in the award of fees incurred against the City. The City argues that the district court violated the anti-donation clause in awarding against the City attorney fees incurred in "general trial time" and against HGT.

Not only did Plaintiffs mischaracterize the City's argument, *i.e.* that only fees not incurred against the City violated the anti-donation clause, but Plaintiffs also mischaracterized their basis for seeking such fees from the City in the first place. Specifically, Plaintiffs alleged that it was impossible to distinguish fees incurred in "general trial time" from fees incurred against the City, because the two categories of fees were "inextricably intertwined." **[11 RP 2827]** In response to that contention, the City showed that despite Plaintiffs' conclusory allegations to the contrary, they had expended less than half of their attorney time at trial – and throughout the prior pendency of the case – litigating their claim against the City. Yet Plaintiffs sought payment as against the City for, e.g., the entire amount of their trial time. **[12 RP 2900]**

The City showed that "an analysis of the time actually spent at trial reveals that Plaintiffs expended much more time on their case against HGT than they did against the City." The City provided a litany of examples, including a "status conference" that was in fact a motion hearing solely involving HGT, a "four-hour block" of time spent solely against HGT, and an entire trial day spent litigating solely

against HGT. Nonetheless, the district court found that "Plaintiffs incurred $130,221.00 in litigation expenses (attorney fees) in connection with Plaintiffs' prosecution of the inverse condemnation claim tried herein." **[¶ 4, 12 RP 3028] [11 RP 2827-28]**

The Court of Appeals also rejected the City's arguments under the anti-donation clause by stating that the City did not:

> explain how an order of the court compelling a municipality to involuntarily pay fees incurred in litigation causes the City to make a donation in the sense that is prohibited by the Antidonation Clause. See [Vill. of Deming v. Hosdreg Co., 1956-NMSC-111, 62 N.M. 18, 303 P.2d 920] ¶ 36 (defining a donation as a "gift" under N.M. Const. art. IX, § 14).

[DOA ¶ 56] The Court of Appeals omitted the remainder of the cited passage, which states, in its entirety: "We think it fair to say from a review of the cases cited dealing with the term 'donation,' as found in this proviso of the Constitution, that the word has been applied, in its ordinary sense and meaning, as a 'gift,' an allocation or appropriation of something of value, without consideration to a 'person, association or public or private corporation'." *Vill. of Deming v. Hosdreg Co.*, 1956-NMSC-111, ¶ 36, 62 N.M. 18, 303 P.2d 920 (emphasis added). While of course the City's forced payment of attorney fees incurred against HGT would not be a "gift" in the

ordinary sense, it is unquestionably "an allocation or appropriation of something of value, without consideration," and no authority cited in this matter shows otherwise.

C. The Courts Below Erred in Awarding Fees Due to Plaintiffs' Allegation that the City "Supported HGT's Defense."

In addition to their contentions discussed above, Plaintiffs also raised the conclusory allegation below that the City was responsible for paying fees incurred against HGT because the City allegedly took some "action that supported HGT's defense." Without citation to authority, Plaintiffs claimed the City's alleged "support" of HGT's defense caused some unidentified "evidence against HGT and the City to become intertwined." **[DOA ¶ 54]** In rejecting the City's arguments regarding the anti-donation clause, the Court of Appeals echoed Plaintiffs' allegation in that regard, stating:

> The district court did not award attorney fees to Plaintiffs that were solely related to the prosecution of the claims against HGT. As we have explained, the district court found that Plaintiffs' attorney time that was spent prosecuting the inverse condemnation claim at trial could not be separated from the time spent prosecuting the claim against HGT because the claims were either related to each other or the City's actions assisted HGT's defense of Plaintiffs' claims.

[DOA ¶ 56] (emphases added). That ruling rested, in turn, on the Court of Appeals' conclusion – also stated without citation to authority – that the City could be charged

attorney fees incurred against HGT because the City allegedly "took action that supported HGT's defense":

> Plaintiffs explained that they had extracted attorney fees that only "applied to [HGT]," but they were unable to segregate the time spent at trial on the City and HGT because the City took action that supported HGT's defense—both in and out of court—that caused evidence against HGT and the City to become intertwined.

[DOA ¶ 54] Neither Plaintiffs nor either court below ever cited any authority for the proposition that if one defendant "takes action" of some unspecified nature that is alleged to have somehow "supported [the] defense" of a co-defendant, it becomes responsible for attorney fees incurred against the co-defendant. Plaintiffs having cited no authority for this novel and self-serving assertion, this Court should disregard it out-of-hand. *See McCabe v. Clark*, 2021 WL 1977163, at *3 (Ct. App. May 17, 2021), citing *Jojola v. Fresenius Med. Clinic*, 2010-NMCA-101, ¶ 7, 149 N.M. 51, 243 P.3d 755 for the proposition that "where a party fails to provide any authority for an argument, we will presume that none exists." Moreover, a rule that fees are awardable against a defendant for "supporting" a co-defendant would invite abuse any time a fee-award authorization applies as against one or more, but not all, defendants. Defendants often manage resources efficiently by, for example, sharing experts, or joining in motions rather than drafting separately. Those efficiencies

should not be discouraged, particularly where the resources saved are those of taxpayers.

The City therefore respectfully requests that this Court review the lower courts' dispositions of the City's arguments under the anti-donation clause of the New Mexico Constitution, and the related issues pertaining to the amount of Plaintiffs' attorney-fee claim, and remand this case to allow the district court to correct its errors. At a minimum, if the Court is disinclined to rule that an award against a public body of attorney fees incurred against another litigant is per se a violation of the anti-donation clause, it should provide guidance as to when payment of another litigant's attorney's fees would, and when it would not, be violative of the anti-donation clause.

D. The District Court Awarded Inappropriate and Excessive Fees and Costs.

As is discussed above, Plaintiffs attached to their Motion to Award Attorney Fees Against City of Rio Rancho a "pre-bill" ledger purporting to show $130,221.31 in fees incurred on Plaintiffs' claim for inverse condemnation. **[11 RP 2829-37]** Plaintiffs' "pre-bill" ledger included "$14,070.00 in fees attributable solely to issues raised, motions[] filed, or depositions noticed, by Defendant HGT." Plaintiffs sought "charges . . . for work that Plaintiffs' counsel undertook on his own initiative, with no external necessity, and with no concomitant benefit in litigation." **[12 RP 2901]** The ledger also included no fewer than 64 entries for two tenths of an hour,

and not a single entry for one tenth. **[12 RP 2902]** Other entries reflect emails that do not appear to have been sent. ***Id.*** The district court and Court of Appeals disregarded out-of-hand the City's showing of Plaintiffs' improper and excessive charges. **[12 RP 2038] [DOA ¶ 52-54; 57-61]**

The district court also abused its discretion in awarding Plaintiffs costs for several items that are not allowed under Rule 1-054(D). Plaintiffs claimed the costs for ten depositions they did not use at all, whether at trial or otherwise in the litigation, but for which Plaintiffs nonetheless sought and received an award of associated expenses. **[12 RP 2871]** The district court awarded duplicative expert costs, and costs for another expert whose opinion was neither elicited as against the City nor relied on by the jury. **[12 RP 2871-72]** The district court erred in awarding the expense of subpoenas for witnesses who testified only against HGT, as violative of the anti-donation clause of the New Mexico Constitution. **[12 RP 2872-73]** The City objected to the award of jury costs against the City, because the City had not demanded a jury. **[12 RP 2874]** Other objectionable costs included those for Plaintiffs' survey and appraisal, mediation, trial supplies not related to admitted evidence, double recovery of gross-receipts tax, and filing fees not incurred as

against the City. **[12 RP 2874-77]** Here too, neither the district court nor the Court of Appeals offered any explanation for their rejection of the City's arguments.

As concerns the anti-donation clause, Plaintiffs offered only the conclusory allegation of their counsel that the "Anti-Donation clause has no application to the imposition of costs by a court." **[12 RP 2922]** The district court, too, ruled on the issue without citation to authority. *See* **[12 RP 3024]**, stating only that the "City of Rio Rancho's objection that awarding costs incurred litigation against Harold's Grading and Trucking, Inc. would violate the anti-donation clause set forth in N.M. Const. art. IX, § 14 is overruled." For the reasons discussed above, including, but not limited to, the reasons discussed above in conjunction with Plaintiffs' claim to attorney fees not incurred against the City, the district court erred in awarding costs of litigation incurred against HGT, and otherwise not incurred in litigating against the City.

E. Preservation of issues.

The City preserved the arguments in the preceding sections during the proceedings below. When Plaintiffs sought an award of attorney fees from the City after trial, the City objected to the award of any fees not incurred specifically against the City as violative of the anti-donation clause of the New Mexico Constitution. **[12 RP 2898-2901]** The City showed that Plaintiffs had spent the majority of their trial time on issues against HGT, whose excavations had created or contributed to

the steep drop from the eastern edge of Epazote. **[12 RP 2900-2902; 2905-08]** The City demonstrated, contrary to Plaintiffs' allegations, that fees and costs incurred against HGT could be "extricated" from fees and costs incurred against the City. **[*Id.*]** And the City showed that the specific fees Plaintiffs sought in their Motion were excessive and improper – and based on incorrect information – and would not have been recoverable as claimed even if Plaintiffs had valid legal authority for seeking them. **[12 RP 2901-03]** The City argued that the term "donation" is broader as used in the anti-donation clause than in common parlance **[12 RP 2899]**, and that the City paying Plaintiffs' counsel any attorney fee incurred against another litigant would, by definition, be payment by the City 'of something of value, without consideration to a person . . . or private corporation. **[12 RP 2899-90]** The City also provided several examples of excessive and improper charges. **[12 RP 2900-02]**

CONCLUSION AND RELIEF REQUESTED

An overarching principle throughout the City's appeal to this Court is that the district court failed in its duty as gatekeeper, to assure that Plaintiffs were awarded no fees or costs to which they were not entitled. Whether in awarding fees without statutory authority, in imposing on taxpayers an unconstitutional burden to pay fees and costs not incurred against them, or in awarding fees and costs patently excessive on their face, the district court owed the taxpayers of Rio Rancho better. Not only

was the district court's award of fees and costs against the City a disservice to the public, though, it was also contrary to law.

In each of the contexts discussed above – the lack of "aggravated" circumstances justifying a fee award in inverse condemnation, violation of the anti-donation clause, and the patent excessiveness of Plaintiffs' counsel's claimed fees and costs – the district court failed to follow New Mexico law. It "has long been the rule in New Mexico that a party is only entitled to those fees resulting from the cause of action for which there is authority to award attorney fees." *Bernhardt, supra*, at *2 (N.M. Ct. App. Sept. 10, 2019) (citing *Dean, supra*, at ¶ 16). "[S]tatutory attorney fees may be awarded only when 'expressly,' 'explicitly,' or 'specifically' authorized by statute, and . . . statutes allowing an award of fees will be strictly construed." *Parkview, supra*, 2014-NMCA-049, ¶ 24 (emphasis added; internal punctuation marks omitted). But even though the district court erred in assessing fees against the City at all, even under *Landavazo*, the *Landavazo* concurrence remains wrongly decided, for its failure to construe Section 42A-1-25 strictly. This Court should therefore reverse the concurrence in *Landavazo*.

For the reasons discussed above, and as presented to – and disregarded by – the courts below, the district court did not ensure that only recoverable fees and costs were awarded. This matter should be remanded to the district court to allow its errors to be rectified. The award of attorney fees against the City should be vacated in its

entirety, because Plaintiffs failed to establish entitlement to fees even under the "wrongfulness" standard of *Landavazo*, but also in recognition of the fact that the *Landavazo* concurrence was wrongly decided and should be reversed. Even if there were statutory justification for an award of fees to Plaintiffs, the district court would still have erred by awarding excessive fees and costs, and fees and costs not incurred against the City. At the barest minimum, even if the Court finds some justification to award fees at all, this Court should promulgate an objective standard under which it will be clear to public entities when inverse-condemnation claims will and will not subject their taxpayers to the award of attorney fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of May, 2025 I filed the foregoing pleading electronically through the court's Odyssey file and serve system. I FURTHER CERTIFY that a copy of the foregoing was also transmitted via electronic mail to the following:

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