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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2011-NMCA-108

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Docket No. 29,812

DELMA E. PRATHER, as Trustee of the DELMA E. PRATHER REVOCABLE TRUST,

Plaintiff-Appellant,

v.

PATRICK H. LYONS, Commissioner of Public Lands of the State of New Mexico,

Defendant-Appellee,

and

MAINLINE ROCK & BALLAST, INC.,

Defendant.

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OPINION

SUTIN, Judge.

{1} State trust land was originally sold in 1930 to a purchaser who bought the land for grazing purposes. This original purchaser received a patent in 1947 and sold the land in 1982. The land contained surface and subsurface metamorphic rock, and the character of the surface and its use for grazing did not change from 1930 to 1982. After the 1982 sale, the successor landowner's lessee mined, crushed, and sold the rock for use primarily as ballast for railroad beds and paid the landowner-lessor royalties. In this action, Plaintiff Delma E. Prather, as trustee of the Delma E. Prather Revocable Trust, is the successor to the original purchaser of the state trust land. She sued Patrick H. Lyons, Commissioner of Public Lands of the State of New Mexico, to quiet title to the rock when the Commissioner asserted ownership of the rock and a right to royalties based on a general mineral reservation in the 1947 patent, which we refer to in this opinion as "the mineral reservation." After a bench trial, the district court held for the Commissioner. Our issue is whether the rock in the state trust land acquired by the original and successor purchasers constituted a mineral reserved to the State under the mineral reservation.

{2} On appeal, Plaintiff requests that we adopt and apply the "surface destruction doctrine" in arriving at a decision that the parties to the original 1930 purchase transaction did not intend the rock to be considered a mineral within the mineral reservation. Relying in part on *Bogle Farms, Inc. v. Baca*, 1996-NMSC-051, 122 N.M. 422, 925 P.2d 1184, which states that title to state trust land should be determined on a case-by-case basis considering the intent of the original parties and not by a rule of property nor by conveyance by implication, the Commissioner argues against adoption of the surface destruction doctrine and further argues that the evidence of intent, considering the totality of circumstances, supported the district court's decision. In regard to the evidence, Plaintiff contends that the district court misread critical transactional documents and that its decision was based on irrelevant and insubstantial evidence. We hold that substantial evidence supported the district court's findings of fact under *Bogle Farms'* required analysis of the intent of the parties to the original sale transaction that the intent of the conveyance transaction was that the rock was included in the reservation of "all minerals of whatsoever kind" in the patent.

BACKGROUND

{3} The background recited here is largely taken from undisputed findings of fact of the district court. There exist two purchase transactions. J.C. Shelton acquired a fee simple interest in Section 16, Township 5 North, Range 12 East, Torrance County, New Mexico (Section 16), pursuant to a 1930 purchase contract with the then Commissioner of Public Lands of the State of New Mexico. Ms. Prather and her husband purchased Section 16 in 1982 from Shelton's successor in interest and, after her husband's death, Ms. Prather created her trust and transferred Section 16 into her name as trustee. Ms.

Prather, as trustee of the Delma E. Prather Revocable Trust, is Plaintiff in the present action. For convenience, in this opinion we refer to Ms. Prather, individually and as trustee, and also to Mr. and Mrs. Prather, as "Plaintiff." We refer to Defendant Commissioner Lyons and past Commissioners of Public Lands as "the Commissioner." Pertinent documentary history relating to Shelton's and Plaintiff's acquisitions of Section 16 is as follows.

{4} The State acquired title to Section 16 pursuant to an Act of Congress approved June 21, 1898, called the Ferguson Act, confirmed in an Act of Congress approved June 20, 1910, effective as of November 16, 1915, called the New Mexico Enabling Act. *See Bogle Farms*, 1996-NMSC-051, ¶ 9 (reciting the history of the transfer of land by the federal government to New Mexico when New Mexico attained statehood to be held in trust for schools, citing the Enabling Act). Under the Ferguson Act, the United States granted Section 16, among other lands, to the Territory of New Mexico for the support of common schools, but excluded lands that were mineral in character. In confirming the grant, the Enabling Act also excluded mineral lands. The district court found that "mineral lands" is a term of art that means "lands known (at the time) to be more valuable for minerals and must contain minerals in sufficient quantity to justify expenditure for their extraction[,]" and "[t]he land must also be more valuable for mineral extraction than other uses." Title was confirmed in Patent No. 1205336 issued by the United States on February 23, 1960.

{5} The district court found that in 1919 when there was a rush to obtain leases from the State for oil and gas exploration, the State Legislature authorized the Commissioner to classify the lands owned by the State as mineral or non-mineral. The State Land Office (SLO) Administrative Rule No. 1, 1919, dated April 4, 1919, designated and classified all lands of the State as mineral lands. *See State ex rel. Otto v. Field*, 31 N.M. 120, 128-31, 241 P. 1027, 1030-32 (1925) (recounting the history of Administrative Rule No. 1); *see also* 1912 N.M. Laws, ch. 82, § 1 (creating the SLO). Administrative Rule No. 1 was issued to afford the State "maximum protection from the purchase of lands as non-mineral, which may in fact be mineral lands or subject to classification as such[.]" The district court also found that in 1925 the SLO issued regulations requiring the State to reserve all minerals when selling state trust lands. The district court further found that, prior to 1930, Section 16 was owned in fee by the State, was uncultivated and was useful for pasture or grazing purposes, and was largely composed of Pre-Cambian metamorphic rock.

{6} In August 1930, Shelton applied to purchase Section 16 from the Commissioner. In the form application, Shelton stated that Section 16 was grazing in character; that there was no growing timber, coal, minerals or oil and gas known to be on the land; that Shelton intended to use the land to "graze sheep or raise cattle"; and Shelton signed under a paragraph which read, "the land applied for herein is essentially non-mineral land, and that this application is not made for the purpose of obtaining title to mineral, coal, oil or gas lands fraudulently, but with the sole object of obtaining title to the land applied for for grazing and agricultural purposes." According to the district court's findings, the law required that state trust lands such as Section 16 be sold at their "appraised true value," and Shelton provided an appraisal for Section 16 on a form provided by the SLO entitled "Appraisement of Grazing and Agricultural Lands" which was sworn to and

addressed to the Commissioner. *See* NMSA 1978, § 19-7-9 (1981) (amended 1989 and 2009); 1910 N.M. Laws, ch. 310, § 10 (Enabling Act). In this appraisal, the appraiser answered "no" to the question: "Is there mineral or coal on the land?" He stated that the land was "all grazing land" and swore in a non-mineral affidavit that he was well acquainted with the land and that:

> there is not, to my knowledge, within the limits thereof, any vein or lode of quartz or other rock in places bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not, within the limits of said land, to my knowledge, any placer, cement, gravel, salt or other valuable mineral deposits; that no portion of said land is worked for mineral during any part of the year by any person or persons; and said land is essentially non-mineral in character.

{7} In the contract for the purchase of land between Shelton and the Commissioner that followed, dated in November 1930, Shelton agreed that the land was being purchased "for the purpose of grazing and agriculture only." He also agreed that:

> while the land herein contracted for is believed to be essentially non-mineral, should mineral be discovered therein it is expressly understood and agreed that this contract is based upon the express condition that the minerals therein shall be and are reserved in the fund or institution to which the land belongs, together with right of way to the Commissioner, or anyone acting under his authority, at any and all times to enter upon said land and mine and remove the minerals therefrom without let or hindrance.

{8} In 1947 the Commissioner issued Patent for State Land No. 1906, pursuant to which he conveyed to Shelton's widow the State's interest in Section 16, but reserved to the State, by way of the mineral reservation, "all minerals of whatsoever kind, including oil and gas, in the lands so granted," and also reserved the "right to prospect for, mine, produce and remove the same, and perform any and all acts necessary in connection therewith[.]" Plaintiff purchased Section 16 in 1982 for the purpose of using it to graze cattle. The mineral reservation was noted in the chain of title. The character of Section 16 remained unchanged from the time of Shelton's purchase to the time of Plaintiff's 1982 acquisition.

{9} In 1998 Plaintiff entered into a license agreement with Ralph J. Conway to explore for quarry rock that might be suitable for railroad ballast and other construction aggregates. Mainline Rock and Ballast, Inc. (Mainline) entered the picture in 2003 and collected surface rocks, had this rock tested to determine if Section 16 would be suitable for extracting rock and creating railroad ballast, sought to secure an exclusive contract with Burlington Northern Santa Fe Railroad (BNSF) to supply railroad ballast, had the mineral content of the rock analyzed and tested to determine if it met BNSF's specifications, and drilled test holes and had subsurface samples tested. Further, after obtaining an option of Conway's right, title, and interest in his lease, and after exercising that option with Plaintiff's consent, Mainline sought and obtained a zoning change of 120 acres of Section 16 from agriculture to a special use district to construct its quarry.

{10} In 2004 Plaintiff and Conway entered into a twenty-five-year lease agreement, which stated that Plaintiff owned the subsurface mineral estate of Section 16 and referred to mining and characterized the rock as minerals. Mainline constructed a quarry and began removing rock and crushing it primarily for railroad ballast and also for other aggregates, including mainline ballast, yard ballast, modified ballast, chips, fines, rip-rap, surge, and roadbase. The district court's findings contain a detailed discussion and history relating to rock, natural aggregates, industrial minerals, crushed stone, railroad ballast, and sales of crushed stone and railroad ballast. Mainline removed thousands of cubic yards of overburden and used explosives to blast the rock out of the deposit. It employed ongoing testing of samples to assure that it met BNSF's ballast specifications. As of April 2009, when the court's findings were entered, Mainline had sold over 2.5 million tons of ballast to BNSF and over 300,000 tons of byproduct. Mainline paid full royalties to Plaintiff until representatives of the Commissioner asserted the State's mineral interest; following a settlement agreement with Mainline and a Rule 5 Mining Lease issued by the Commissioner obligating Mainline to make royalty payments to the Commissioner, Mainline reduced its royalty payments to Plaintiff.

{11} Plaintiff filed a complaint against the Commissioner for declaratory judgment and other relief and later filed an amended complaint joining Mainline as a party defendant. Plaintiff sought to quiet title in Section 16 including the rock and to recover damages as well as remission of the royalties paid to the Commissioner. The Commissioner counterclaimed seeking to quiet title in the mineral interest in Section 16 and for other relief. The district court entered a partial final judgment in which the court determined that the Commissioner was "the owner of all crushed stone mined, produced[,] and sold from Section 16 . . . including, but not limited to, all crushed stone mined, produced[,] and sold pursuant to leases issued by Plaintiff and by the Commissioner." Plaintiff appeals.

{12} Plaintiff contends on appeal that we should adopt the surface destruction doctrine and apply it in determining that the intent of the original parties was to exclude the rock from the mineral reservation. She further contends that the transactional documents reflecting Shelton's purchase are at variance with the district court's ruling, that the court's decision was based on irrelevant and insubstantial evidence, and that statutes in effect at material times all buttress the conclusion that the rock in Section 16 was not a mineral or was not intended to fall within the mineral reservation. The rock with which we are dealing is described by Plaintiff as "common rock," which Plaintiff claims means rock with no particular or valuable mineral content and rock that is just "hard and heavy."

DISCUSSION

{13} All arguments attempt to provide a route for the elusive quests for (1) the understanding of what "minerals" is intended to mean and include within the mineral reservation, and (2) the intent of the parties to the 1930 original purchase contract as to whether the rock was to be considered a mineral within the mineral reservation. We preface our discussion of the parties' arguments with a discussion of *Bogle Farms'* mandated intent-of-the-original-parties test and rejection of case law establishing a rule of property governing reservation of mineral rights in state trust land sales. We also set out the district court's findings of fact and

conclusions of law in regard to intent.

The Intent Issue: *Bogle Farms* and the District Court's Findings and Conclusions in the Present Case

{14} In *Bogle Farms*, our Supreme Court reviewed an appeal by the Commissioner from a district court's partial summary judgment entered in favor of twenty-six plaintiffs who sought a declaratory judgment holding that their contracts for the purchase of state trust lands did not reserve sand and gravel to the State. 1996-NMSC-051, ¶ 1. The district court had ruled based on collateral estoppel that the Commissioner was precluded from arguing that the general mineral reservations in the contracts effectively reserved the State's interest in sand and gravel. *Id.* The estoppel issue arose based on our Supreme Court's decision in *Roe v. State ex rel. State Highway Department*, 103 N.M. 517, 710 P.2d 84 (1985), *overruled by Bogle Farms*, 1996-NMSC-051. *Bogle Farms*, 1996-NMSC-051, ¶ 1. In *Roe*, the Court ruled that title to sand and gravel passed to the purchaser along with the surface estate where the purchase contracts and patents did not specifically reserve sand and gravel to the State. *Bogle Farms*, 1996-NMSC-051, ¶ 1; *Roe*, 103 N.M. at 521, 710 P.2d at 88. Before we discuss *Bogle Farms* further, we must discuss *Roe* in more detail, along with *Burris v. State ex rel. State Highway Commission*, 88 N.M. 146, 538 P.2d 418 (1975), which preceded and was overruled by *Roe*.

{15} In *Burris*, state land was sold to the plaintiffs by contract and a patent followed. *Id.* at 146, 538 P.2d at 418. The purchase contract stated that the land was being purchased for the purpose of grazing and agriculture only, and the patent reserved "to the [S]tate . . . all minerals of whatsoever kind, including oil and gas, in the lands so granted[.]" *Id.* at 147, 538 P.2d at 419 (internal quotation marks omitted). The application to purchase stated that "the land . . . is essentially non-mineral land, and that this application is not made for the purpose of obtaining title to mineral, including but not limited to caliche, sand and gravel, coal, oil or gas lands fraudulently but with the sole object of obtaining title to the surface of the land applied for." *Id.* (internal quotation marks omitted). In approaching a decision, the Court in *Burris* stated that "apart from any governing statute, the issue is whether the parties intended that sand and gravel are, or are not, to be . . . classified [as a mineral,]" a question that "is normally resolved by the pertinent documents and the actions of the parties[.]" *Id.* The *Burris* Court distinguished and did not follow *State ex rel. State Highway Commission v. Trujillo*, 82 N.M. 694, 487 P.2d 122 (1971), *overruled by Champlin Petroleum Co. v. Lyman*, 103 N.M. 407, 708 P.2d 319 (1985), which was decided on a factual underpinning consisting solely of a patent that reserved to the United States "all the coal and other minerals in the lands" and which held that sand and gravel were not minerals. *Burris*, 88 N.M. at 147, 538 P.2d at 419 (internal quotation marks omitted). *Burris* rejected *Trujillo* as applicable authority because in *Burris* there was "a great deal more documentation casting light on the intention of the parties," namely, the application and the contracts. *Id.* Relying on those documents, the Court in *Burris* held "the parties intended to reserve sand and gravel," because under the terms of the documents, the State "expressly reserv[ed] all minerals in very clear, unambiguous and all-inclusive language, without qualification, restriction[,] or limitations of any kind." *Id.* at 147-48, 538 P.2d at 419-20.

{16} *Roe*, an inverse condemnation action, overruled *Burris*. *Roe*, 103 N.M. at 517, 521, 710 P.2d at 84, 88. The *Roe* Court noted that, in *Burris*, the application, but not the purchase contract, contained the words "sand and gravel." *Roe*, 103 N.M. at 521, 710 P.2d at 88. Focusing on the application, *Roe* stated that "[a]n application is merely a request to purchase, and its provisions do not affect the title to the property[,]" and *Roe* concluded that whether title passed was not determined by what was stated in the application, but was determined "by the conveyances themselves, the purchase contract[,] and the patent." *Id.* Therefore, the Court required that "[f]or the State to reserve sand and gravel, a provision so specifying must be included in these conveyances." *Id.* The *Roe* Court "determine[d] that although the original applicant for the [plaintiffs'] property did not apply for title to sand and gravel, such title nevertheless passed with the surface estate since sand and gravel were not specifically reserved by the purchase contract and patent." *Id.*

{17} In *Bogle Farms*, the Court discussed *Roe* along with other pertinent New Mexico cases.[1] *Bogle Farms*, 1996-NMSC-051, ¶¶ 8-22, 33. Overruling *Roe*, *Bogle Farms* rejected *Roe*'s strict definition of minerals in the general reservation clause of the conveyance documents to exclude sand and gravel. *Bogle Farms*, 1996-NMSC-051, ¶¶ 34-35. *Bogle Farms* also rejected the purchasers' collateral estoppel, stare decisis, and rule of property arguments favoring *Roe*'s ruling. *Bogle Farms*, 1996-NMSC-051, ¶¶ 22, 27-33, 36.

{18} The Court in *Bogle Farms* read *Roe* as erroneously deciding the mineral reservation issue based on a rule that affected title to property, thereby adopting a "rule of property," instead of deciding the issue based on the intention of the parties, and the Court read *Roe* as erroneously permitting conveyance of title by implication. *Bogle Farms*, 1996-NMSC-051, ¶¶ 30, 34-35. *Bogle Farms* remanded for evidentiary proceedings given the lack of a specific mineral reservation and the need for the district court to consider evidence outside the face of the contract to determine the meaning intended for the term "mineral" when the term was shown under the circumstances to be ambiguous. *Id.* ¶ 35. *Bogle Farms* returned to *Burris*' case-by-case approach "based on the principle that in contract cases the role of the court is to give effect to the intention of the contracting parties." *Bogle Farms*, 1996-NMSC-051, ¶ 22. The Court in *Bogle Farms* noted that "prior to *Roe* this Court had held in *Burris* that a general mineral reservation included sand and gravel"; however, the Court left it open for the district court on remand to determine whether the parties intended to include sand and gravel within the term "mineral." *Bogle Farms*, 1996-NMSC-051, ¶¶ 33-35.

{19} Among *Bogle Farms*' several statements applicable to the present case are the following. In cases involving state trust land, the determination whether a material or substance is included within a general mineral reservation must be done on a case-by-case basis. *Id.* ¶ 22. The issue is whether the parties to the original sale transaction intended that the State reserve the material or substance at issue. *Id.* ¶ 35. There exists "a strong public interest in the protection of state land

[1] *Bogle Farms* discusses seven cases, the earliest dating back to 1940. *See Bd. of Cnty. Comm'rs v. Good*, 44 N.M. 495, 498, 105 P.2d 470, 472 (1940) (stating that sand, gravel, ordinary clay, and caliche fall within the term "mineral").

and its products, as reflected in the Enabling Act's requirement that no sale or other disposal [of state land or its natural productions] shall be made for a consideration less than the [appraised true] value." *Id.* ¶ 26 (alterations in original) (internal quotation marks and citation omitted). And "title to state trust lands should not be conveyed by implication." *Id.* ¶ 34.

{20} What material or substance comes within the word "minerals" in the mineral reservation is not altogether clear. The district court in the present case determined that the mineral reservation was ambiguous. Our Supreme Court has referred to this ambiguity. *See id.* ¶¶ 20, 35 (stating that "the *Roe* Court may have been attempting to resolve the ambiguity once and for all and to put to rest an issue that had given rise to a great deal of litigation" and, further, that "[i]f there is not a specific reservation, the trial court must look to evidence outside the face of the contract to determine the meaning intended for the term 'mineral' when that term has been shown under the circumstances to be ambiguous"); *Rickelton v. Universal Constructors, Inc.*, 91 N.M. 479, 480, 576 P.2d 285, 286 (1978) (stating that "[w]hat the Legislature meant to be included as a 'mineral' is not well defined in New Mexico" and that the Court had "recognized that the category of 'minerals' is a flexible one"). Courts outside New Mexico have referred to the ambiguity of the words "minerals" and "mineral reservation." *See United States ex rel. S. Ute Indian Tribe v. Hess*, 348 F.3d 1237, 1241 (10th Cir. 2003); *Kinney v. Keith*, 128 P.3d 297, 303 (Colo. App. 2005); *Resler v. Rogers*, 139 N.W.2d 379, 382 (Minn. 1965). In the present case, rock that might fit the description of the rock in question was not specifically mentioned in any of the 1930 transaction-related documents or in the 1947 patent. Further, there exists no testimony of the original contracting parties.

{21} The district court entered several findings of fact that appear to relate to the issue of intent. A number of findings relate to the character of the rock. The court noted that "[t]he rock[] or crushed stone" used for railroad ballast has certain characteristics and value, that a railroad's easy access to a rock quarry is important, and that as of 1915, railroad tracks, which still exist, run near Section 16, about two miles from the quarry site ultimately constructed by Mainline. The court further noted that "[r]ailroad ballast is the final product of certain mineral aggregates (rock) that meet railroad specifications for density, hardness[,] and durability . . .[,] is a construction use of the industrial material called 'crushed stone[,]'" and that "[a]n industrial mineral is a valuable, usually nonmetallic rock or related material that is natural or man-made, excluding fuels, metals, and gems."

{22} In further findings, the court discussed the United States Bureau of Mines' 1932-33 Minerals Yearbook that characterized crushed stone as an industrial mineral used for railroad ballast, and the court pointed to the chapter entitled "Crushed and Broken Stone" that stated, "[s]ince the advent of concrete[,] the crushed-stone industry has far surpassed the dimension-stone industry in tonnage and value." The court found that, in 1932, there was no report of railroad ballast sales in New Mexico and several other states, including Texas, and that "[t]he lack of reporting probably was the result of the lack of demand for new construction caused by the Great Depression." However, the court also found that, as reflected in the 1947 Minerals Yearbook, "[b]y 1947, the crushed[-]stone industry . . . had turned around . . ., [and s]ales of crushed stone were at an all-time high," and

"[i]n New Mexico, the sale or use by railroads of railroad ballast exceeded 300,000 short tons[.]"

{23} In regard to crushed-stone production after 1947, the court found that in 1980 railroad ballast and other construction aggregates and roadstone accounted for twenty-seven percent of the total crushed stone used in construction in the United States. The court referred to a United States Geological Survey Bulletin 1594 (1993) entitled Natural Aggregates of the Conterminous United States stating that crushed stone and sand and gravel are the two main sources of natural aggregates and amount to about one-half of the mining volume in the United States. In addition, referring to what was reported in a publication of the New Mexico Geological Society and the New Mexico Bureau of Geology and Mineral Resources, the court noted that crushed stone was included as a common industrial mineral, along with sand and gravel and caliche, and that "[i]n 2003 the top nonfuel minerals in New Mexico were, by value, potash and copper, followed by construction sand and gravel, crushed stone, and cement[.]"

{24} The court entered the following further findings that relate more particularly to intent.

> 62. The Sheltons acquired Section 16 to be used for grazing.
>
> 63. The Sheltons did not intend to exploit the rock deposit in Section 16 by mining and selling the rock or leasing Section 16 for the purpose of having the rock mined and sold.
>
> 64. Inclusion of the rock within the scope of the mineral reservation in the 1930 contract and the 1947 patent, particularly where the rock is being mined and sold commercially, serves the purposes that the parties had in agreeing that the State would sell the land and that [the] Sheltons would purchase it.
>
> 65. Mrs. Shelton's subjective intention as to the mineral reservation in Patent No. 1906 is unknown, but her objective intention as evidenced by the surrounding circumstances, including her husband's earlier contract with the Commissioner for the acquisition of Section 16 and her subsequent use of Section 16 for grazing, was in accordance with the State's intention to maximize its monetary opportunities for mineral extraction if minerals were ever to be discovered on the property.
>
> 66. The State's intention in reserving all minerals of whatsoever kind when it issued Patent No. 1906 for land that was apparently not mineral-bearing was to maximize the State's opportunities for royalties to be derived from any and all minerals that might later be discovered on Section 16.
>
> 67. The Commissioner . . . considered industrial minerals as "minerals of whatsoever kind" in Patent No. 1906 given the widespread understanding of industrial minerals as some of the most valuable minerals in the United States for highest monetary sales from earlier in the 20th century

through the year 1947.

68. In 1947, the Commissioner . . . considered crushed stone as an industrial mineral, as it was customarily considered in the mineral trade markets.

69. Based on the parties' language in their dealings with one another, their conduct, the objectives they sought to accomplish, and the surrounding circumstance, the parties intended that crushed stone, an industrial mineral, was to be considered a mineral in the 1930 Shelton contract to purchase and one of those "minerals of whatsoever kind" included in the State's mineral reservation in Patent No. 1906.

70. The fact that surface rock was visible on Section 16 was not the same as a determination that such rock was or was not a mineral under the 1930 Shelton contract to purchase or under Patent No. 1906's mineral reservation.

71. The crushed stone discovered on Section 16 in 2003 as a result of extensive on-site and laboratory testing is a mineral under the 1930 Shelton contract to purchase and one of those "minerals of whatsoever kind" reserved by the State in Patent No. 1906.

72. Even if the parties disagreed as to the meaning of the term "mineral" in the 1930 Shelton contract to purchase or the phrase "minerals of whatsoever kind" in the 1947 patent, or if the parties' intentions could not be determined, it is most reasonable that the term and phrase include the industrial mineral known as crushed stone, based on all surrounding circumstances.

After setting out the parties' proof burdens, the district court entered the following conclusions of law that appear to relate to intent.

5. Title to state trust land cannot be conveyed by implication.

. . . .

7. The parties need not be aware that the property has minerals in order to create a mineral estate.

8. Authority and responsibility for managing and conveying Section 16 was vested in the Commissioner . . . pursuant to N.M. Const., art. XIII, § 2 and N.M. Laws 1912, ch. 82, §§ 1-2 (currently codified at NMSA 1978, §§ 19-2-1 [(1913)] and 19-2-2[(1963)]).

9. Pursuant to Section 1 of the Ferguson Act and Sections 6 and 10 of the Enabling Act, the State held title to Section 16 in trust for the purpose of supporting common schools. The trust terms required that "the natural products and money proceeds" of Section 16 "shall be subject to the same trust[]" and that "[a]ll lands, leaseholds, timber[,] and other products of land before being offered [for sale or lease] shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration."

[(Alterations in original.)]

10. Because Section 16 was classified by the Commissioner as mineral land, the Commissioner was required as a matter of state law to issue a limited patent containing a reservation to the [S]tate of New Mexico of all the minerals in Section 16, together with the right to the [S]tate or its grantees, to prospect for, mine[,] and remove the same. NMSA 1978, § 19-10-27 [(1925)].

11. The question of whether a state trust land patent reservation of "all minerals of whatsoever kind, including oil and gas" may be resolved by examining the intent of the parties to the transaction. The intent of the parties may be determined by examining the parties' language and conduct, the objectives they sought to accomplish, and the surrounding circumstances.

12. A purchaser of [s]tate lands from the Commissioner owns the surface and subsurface of the purchased property, save for such minerals as are reserved, under statutory authority by the Commissioner.

13. Patent No. 1906's mineral reservation was ambiguous. Accordingly, it was incumbent upon the [c]ourt as fact-finder to resolve the ambiguity.

14. If the parties, at the time Patent No. 1906 was issued, had the same understanding of the mineral reservation, then that shared meaning controls.

15. If the parties had a different understanding of the mineral reservation in Patent No. 1906 at the time the patent was issued, then the [c]ourt as fact-finder is required to give the meaning that it finds to be most reasonable, taking into consideration all the circumstances, including the intentions of the parties, the words that the parties used, the purposes the parties sought to achieve, custom in the trade, the parties' course of dealing, the parties' course of performance, whether a party, at the time the contract was entered into, knew or should have known that the other party interpreted the term[s] differently. [(Second alteration in original.)]

16. Plaintiff has not met her burden of proving her claims that the rock at issue was not included in the reservation of "all minerals of whatsoever kind" in Patent No. 1906.

17. The Commissioner has met his burden of proving his counterclaims that the rock at issue was included in the reservation of "all minerals of whatsoever kind" in Patent No. 1906.

Plaintiff's Surface Destruction Doctrine and Other Arguments

{25} Plaintiff states that "[t]he crux of this appeal is whether New Mexico should adopt the surface destruction doctrine." That

question is one of law, which we review de novo. *Romero v. Bd. of Cnty. Comm'rs*, 2007-NMCA-004, ¶ 21, 140 N.M. 848, 149 P.3d 945; *Poncho v. Bowdoin*, 2006-NMCA-013, ¶ 32, 138 N.M. 857, 126 P.3d 1221. Plaintiff's in-a-nutshell request of this Court is

> to follow the lead of most other states in adopting the "surface destruction" doctrine, which holds that, in the absence of clear contrary intent, where materials alleged to be "minerals" are plainly visible on the surface, and where the surface would have to be destroyed in order to "mine" them, the parties could not have intended those materials to be "minerals" because, if they were, the mineral reservation would swallow up the grant and render it worthless.

Plaintiff cites to courts and commentators that recognize the "complex and hopeless search for the 'true intentions' of the original parties" and that are critical of the attempt "to [divine] the subjective intent of the parties" after decades have passed. Plaintiff contends that only the objective intent of the parties to the original transaction can be ascertained and that objective intent is to be derived from only three relevant factors, namely: (1) the surface destruction doctrine; (2) statutes in effect at the time of the original transaction; and (3) the circumstances at the time, including records, documents, and actions of the parties. *See Downstate Stone Co. v. United States*, 712 F.2d 1215, 1217-20 (7th Cir. 1983) (relying on a surface destruction rationale and statutes and on the circumstances in considering whether a mining company had title to quarry limestone under a mineral reservation contained in conveyances to the United States). Plaintiff challenges as irrelevant and insubstantial findings of fact of the district court that recite post-1947 facts, circumstances, and publications, insofar as the court intended the findings to relate to the intent of the original parties. Plaintiff also challenges those findings which indicate that the rock was a mineral.

{26} Plaintiff describes the surface destruction doctrine as a common sense concept. She asserts that it is not reasonable to assume or believe that a surface owner of land who acquired the surface for grazing or agriculture would consent to a reservation of a material or substance that obviously exists on and beneath the surface knowing that the surface could be destroyed if the mineral owner mined the material or substance. Plaintiff further asserts and points to photographs that she argues support the fact that the rock covered thirty to forty percent of the surface of Section 16. Mineable rock also existed below the surface. Thus, Plaintiff argues, if a reasonably objective rancher such as Shelton, who intended to use the land for grazing, were to understand that all of the rock, including the subsurface rock, constituted "minerals" that could be removed by the State in a manner that would destroy the entire surface, that rancher would not have purchased the land in the first place, since it "would nullify the grant by destroying the agricultural usefulness of the land."

{27} This surface destruction doctrine appears in one form or another in several cases cited by Plaintiff.[2] *See Waring v. Foden*, [1932] 1 Ch. 276, 86 A.L.R. 969, 979 (Eng.) (stating that "the word 'minerals' when found in a reservation out of a grant of land means substances exceptional in use, in value[,] and in character . . . and does not

[2] *See* cases cited *infra* note 3.

mean the ordinary soil . . . which if reserved would practically swallow up the grant"); *see also Downstate Stone*, 712 F.2d at 1218 (stating that "it [is] unreasonable to assume that a party intended to reserve the surface, and at the same time convey to the mineral owner the limestone on the surface with the right to remove it, thereby destroying all that he had reserved"); *Florman v. MEBCO Ltd. P'ship*, 207 S.W.3d 593, 600, 601 (Ky. Ct. App. 2006) (holding that limestone was not a mineral at the time of the original transaction in 1873 as well as at the time of the decision, states that "[i]n this country it is a part of the soil, and *a conveyance that reserves the limestone with the right to remove it would reserve practically everything and grant nothing*" (internal quotation marks and citation omitted)).

{28} Plaintiff does not suggest that the surface destruction doctrine be applied without regard to intent; instead, according to Plaintiff, it can be viewed as a doctrine "designed to facilitate the [intent] inquiry mandated in *Bogle Farms*" and as a "proxy for determining what the parties must have reasonably intended." Plaintiff argues based on her cited case law that application of the doctrine is triggered because (1) the entire surface area conveyed need not be covered with the material in question before the doctrine applies; (2) the doctrine may apply in circumstances where the reservation is included within a patent or other instrument of conveyance issued by a state governmental entity; and (3) widespread outcropping of the material covering thirty to forty percent of the land together with the same rock found below the surface made it apparent that mining the rock would destroy the surface and make the surface unsuitable for grazing. Plaintiff shows that the rock is part of a fifteen- to twenty-mile-wide geologic formation with rock outcrops that stretches from the Sangre de Cristo Mountains on the north into Texas and Mexico on the south and that "if the rock being removed is 'mineral,' the entire formation would have to be considered 'mineral' since the rock being removed has the same characteristics as the other rock in the formation[.]"

{29} Plaintiff also urges adoption and application of the surface destruction doctrine because, had the appraiser believed the rock was a mineral, he would have reflected that in his appraisal and would have accounted for reduced value because of the risk of surface destruction. Thus, Plaintiff argues, viewing intent objectively, based on the undisputed circumstances, a reasonable person in Shelton's position would not have intended to purchase Section 16 without ownership of the rock, adding that "a reasonable person in . . . Shelton's position would not have paid valuable consideration for Section 16 during the Great Depression had he known that [the] SLO could destroy the surface."

{30} Plaintiff points out that *Bogle Farms* never considered the application of the surface destruction doctrine and because most of the parties to the original contract were before the court and subject to cross-examination, it was not necessary for the court to consider the doctrine. Plaintiff also argues that, in *Bogle Farms*, the patentee's application specifically referred to sand and gravel as being included as a mineral, thus showing the purchaser's intent that sand and gravel could be a mineral and making the result in that case foreordained. *See Bogle Farms*, 1996-NMSC-051, ¶ 3. Plaintiff further distinguishes *Bogle Farms* because "live persons who participated in the transactions in question were available to testify concerning their intent[.]" Plaintiff complains that the district court in the present

case erroneously went beyond what *Bogle Farms* would allow by considering and relying on information developed long after the original transaction—information deemed by courts in similar cases not to be material. In addition, Plaintiff contends the Ferguson Act did not intend to convey minerals, in that the Act provided that only non-mineral lands were to be conveyed, and that the only possible conclusion that can be drawn is the lands conveyed were not deemed to contain minerals, "a critical conclusion" according to Plaintiff "since the materials now claimed to be minerals were plainly visible."

{31} Relating specifically to the transactional documents, which are (1) the application (Pl. Ex. 1), (2) the appraisal (Pl. Ex. 2), (3) the purchase contract (Pl. Ex. 3), and (4) the patent (Pl. Ex. 4), Plaintiff not only contends that these documents provide "further support for application of the surface destruction doctrine[,]" Plaintiff also argues that the documents are at variance with the district court's ruling, in that "the fact that there is no evidence the parties considered whether the rock visible on Section 16 was a mineral disclosed a binding intention not to reserve it." Plaintiff states that the appraisal is the more important of the four transactional documents, in that, although the rock was visible, "the state-approved appraiser did not classify that rock as a mineral." Because the SLO's appraisal form used by the appraiser called for the appraiser to list all minerals, Plaintiff argues, the rock would have been listed had it been regarded as a mineral. Further, Plaintiff argues that because no value was independently assigned to the rock, and because the Enabling Act requires all sales of state lands to be appraised at their "true value," if the rock had been regarded as a mineral, there would have been a deduction from the "true value" of the rock given that the removal of the rock would have rendered the land useless for the contemplated purpose of grazing. As for Shelton's application, Plaintiff points out that Shelton "recited that there was nothing he regarded as a mineral on the land." Plaintiff further shows that the patent stated that Shelton was "to have and to hold the said premises . . . forever[,]" a concept inconsistent with any notion that material was a mineral under the mineral reservation clause where the mineral could be removed only by destroying the surface.

{32} Further, Plaintiff argues that *Rickelton* governs the present case. Plaintiff contends that *Rickelton* addressed the precise question of "whether sand and gravel was a reserved 'mineral' within [the] SLO's patent reservation" and, according to Plaintiff, "reached the opposite conclusion because, unlike [in] *Burris*, there was nothing in the transactional documents in the record in that case where the patentee acknowledged that sand and gravel was a mineral." Plaintiff concludes that because the transactional documents in the present case contained no acknowledgment by Shelton that either rock, ballast, crushed stone, or industrial materials was a mineral, under *Rickelton*, rock was not a mineral within the common and ordinary meaning of that term in a mineral reservation and that "the undefined term 'minerals' does not include rock."

{33} Because Plaintiff strongly relies on *Rickelton*, we pause here to discuss *Rickelton*'s status in New Mexico law. Plaintiff footnotes that although *Bogle Farms*, 1996-NMSC-051, ¶¶ 15-16, "took the opportunity to overrule, or recognize overruling, . . . several New Mexico decisions, it left *Rickelton* [intact] despite discussing it extensively." We doubt that *Rickelton* is viable. The Court relied on and felt controlled

by *Trujillo*, a case that, *Rickelton* explained, held that sand and gravel was not intended to come within the general reservation clause because it was a material that "had no rare or exceptional character and possessed peculiar property giving it special value." *Rickelton*, 91 N.M. at 480-81, 576 P.2d at 286-87. Plaintiff fails to mention that *Trujillo* was overruled by *Champlin Petroleum*, 103 N.M. at 410, 708 P.2d at 322, a point expressly made in *Bogle Farms*. *See Bogle Farms*, 1996-NMSC-051, ¶ 12. Both *Trujillo* and *Champlin Petroleum* involved conveyances pursuant to the Federal Stock-Raising Homestead Act. *Champlin Petroleum*, 103 N.M. at 408-10, 708 P.2d at 320-22; *Trujillo*, 82 N.M. at 695-97, 487 P.2d at 123-25. *Bogle Farms* stated:

> This Court specifically addressed whether the term "mineral" as used in a reservation included sand and gravel for the first time in [*Trujillo, overruled by Champlin Petroleum*]. Basing our holding on a review of the Federal Stock-Raising Homestead Act, 43 U.S.C. §§ 291-302 (1982) (repealed in part in 1976), we concluded that the federal government did not intend to include sand and gravel within the term "mineral" as it was used in a federal patent. *Trujillo*, 82 N.M. at 696-97, 487 P.2d at 124-25. The United States Supreme Court indirectly overruled this conclusion in *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 55, 103 S. Ct. 2218, 2229, 76 L.Ed.2d 400 (1983) (determining that gravel was included within the scope of the mineral reservation contained in a federal patent issued under the Stock-Raising Homestead Act). Relying on *Watt*, this Court expressly overruled *Trujillo* in *Champlin Petroleum Co.*, wherein we determined that caliche was "a mineral similar to sand, gravel, clay, and limestone," *Champlin Petroleum Co.*, 103 N.M. at 409, 708 P.2d at 321, and was therefore included within the general mineral reservation of a federal patent, *id.* at 410, 708 P.2d at 322.

Bogle Farms, 1996-NMSC-051, ¶ 12. *Bogle Farms*' discussion of *Rickelton* and *Rickelton*'s reliance on *Trujillo* leave *Rickelton*'s value as controlling or even reliable authority in considerable doubt. Furthermore, *Rickelton* is not helpful to Plaintiff because the district court's determinations made in that case, which were affirmed, were fact-specific and not necessarily ones that would make *Rickelton* controlling precedent. *See* 91 N.M. at 481, 576 P.2d at 287.

{34} Insofar as Plaintiff attacks evidence and certain of the district court's findings as irrelevant or insubstantial, thereby casting doubt on the validity of the district court's determination relating to intent, we hold that the attacks, even assuming some are meritorious, have no effect on our decision in this case. We do not base our determinations on the findings Plaintiff challenges as irrelevant or insubstantial based on information that came into existence after the 1947 patent. We ignore Plaintiff's quarrel with findings as to which Plaintiff merely sets out evidence as to the original parties' intent arguably favorable to Plaintiff's position.

The Dispositive Issues of Intent and the Surface Destruction Doctrine

{35} *Bogle Farms* requires us to determine

the intent of the parties to the original sale transaction between the Commissioner and the purchaser of state trust land. 1996-NMSC-051, ¶ 14. The parties' intent in the present case can be determined only objectively from the original sale-related documents and surrounding circumstances. Plaintiff does not contend that findings of fact are not supported by substantial evidence. Plaintiff's primary complaint is that the district court erred in not applying the surface destruction doctrine and determining, based on the doctrine, that the parties did not intend the mineral reservation to include the rock.

{36} Plaintiff also asserts that certain of the findings of fact on which the district court relied were not sufficient to support a determination favoring the Commissioner on the question "whether the parties to the *original* contract intended that the State reserve sand and gravel[,]" quoting from *Bogle Farms*, 1996-NMSC-051, ¶ 35 (emphasis added by Plaintiff). Plaintiff's limited attack on certain conclusions of law as "based upon insubstantial evidence" is phrased as follows: "[T]he trial court relied upon information developed long after the original parties entered into the contracts at issue," and also "relied upon other information generally deemed by the courts in similar cases to be immaterial[.]" We dispose of this limited point easily. None of the findings of fact to which Plaintiff refers relating to circumstances after issuance of the patent are findings on which we rely to affirm the district court's conclusions of law and ultimate decision. The circumstances set out in the court's findings of fact that occurred after the patent was issued, although noteworthy, were not necessary for a determination as to the intent of the parties. *See Tome Land & Improvement Co. v. Silva*, 86 N.M. 87, 90, 519 P.2d 1024, 1027 (1973) (holding that a finding, even if erroneous, was clearly immaterial and irrelevant and could be ignored as surplusage with the remaining findings and conclusions supporting the judgment); *see also Quarles v. Arcega*, 114 N.M. 502, 509, 841 P.2d 550, 557 (Ct. App. 1992) ("Even if a finding of fact or conclusion is erroneous, if it is unnecessary to the court's decision, the mistake is not a basis for reversal." (internal quotation marks and citation omitted)); *United Veterans Org. v. N.M. Prop. Appraisal Dep't*, 84 N.M. 114, 118, 500 P.2d 199, 203 (Ct. App. 1972) ("The making of unnecessary and superfluous findings of fact or the presence of error in findings of fact on immaterial, irrelevant, or purely collateral issues is harmless and non-reversible error if the judgment is otherwise sufficiently supported."). The circumstances set out in the court's findings of fact relating to circumstances that pre-date the issuance of the patent are material.

{37} The court's several ultimate findings of fact that support a determination as to intent and its conclusions of law regarding intent are based on reasonable inferences from evidence, including findings regarding the sale-related documents and the surrounding circumstances, from which the court could determine, objectively, that the parties intended that the mineral reservation included the rock. The court's numerous findings of fact and conclusions of law reflect a rational and reasonable process of distilling of the court's findings of fact into the court's conclusions of law to arrive at *Bogle Farms*' required-intent element. We note, in particular, the court's conclusions of law stating:

> 14. If the parties, at the time Patent No. 1906 was issued, had the same understanding of the mineral

reservation, then that shared meaning controls.

> 15. If the parties had a different understanding of the mineral reservation in Patent No. 1906 at the time the patent was issued, then the [c]ourt as fact-finder is required to give the meaning that it finds to be most reasonable, taking into consideration all the circumstances, including the intentions of the parties, the words that the parties used, the purposes the parties sought to achieve, custom in the trade, the parties' course of dealing, the parties' course of performance, whether a party, at the time the contract was entered into, knew or should have known that the other party interpreted the term[s] differently.

These conclusions of law were derived in part from findings (1) that, based on several factors, "the parties intended that crushed stone, an industrial mineral, was to be considered a mineral in the 1930 Shelton contract to purchase and one of those 'minerals of whatsoever kind' included in the State's mineral reservation in Patent No. 1906[,]" and (2) that

> [e]ven if the parties disagreed as to the meaning of the term 'mineral' in the 1930 Shelton contract to purchase or the phrase 'minerals of whatsoever kind' in the 1947 patent, or if the parties' intentions could not be determined, it is most reasonable that the term and phrase include the industrial mineral known as crushed stone, based on all surrounding circumstances.

{38} The foregoing findings of fact and conclusions of law as to intent followed the district court's ruling that the mineral reservation was ambiguous. The parties do not disagree with that ruling, and we agree with the district court that the mineral reservation was ambiguous. Except for minerals expressly mentioned, the mineral reservation did not indicate what material or substance was intended to constitute a mineral within the meaning of the mineral reservation. Although, over the years in New Mexico, what constitutes a mineral under a mineral reservation in patents, deeds, custom, and case law has become clear as to many, if not most, materials and substances, some materials and substances appear to have escaped a settled identification. Common or metamorphic rock presently rests among the unsettled. On appeal, Plaintiff resolves the ambiguity in meaning by application of the surface destruction doctrine as the overriding evidence of intent. The Commissioner rejects any application of the surface destruction doctrine and resolves the ambiguity in meaning based on the district court's findings of fact and conclusions of law.

{39} The district court, of course, was required under *Bogle Farms* to resolve factually the ambiguity as to whether the rock came within the mineral reservation by ascertaining the intent of the parties. UJI 13-804 NMRA requires the district court to determine the intentions of parties to a contract "by examining their language and conduct, the objectives they sought to accomplish, and the surrounding circumstances." UJI 13-825 NMRA, relating to ambiguity in a contract term, tells us that "[w]here . . . the parties at the time the contract was made had different meanings in mind[,]" the fact-finder is to "give that meaning which [it] find[s] to be most

reasonable, taking into consideration all the circumstances[.]" The district court was obviously guided by UJI 13-825.

{40} As we have indicated earlier in this opinion, the district court determined that the parties intended the rock to be included in the mineral reservation, but also that if there was disagreement in the meaning, the most reasonable meaning was that the rock was intended to be included in the mineral reservation based on all surrounding circumstances. These determinations were made based, among other findings of fact, on the findings set out earlier in this opinion relating to the language in the contract and the patent; the Sheltons' intent and what they sought to achieve; what the status of commercial development of rock as crushed stone and as a mineral was in the United States; what the State intended in reserving minerals; and what the Commissioner, in regard to crushed stone, considered as an industrial mineral based on the custom in the mineral trade markets. Evidence in the record supports these findings.

{41} Also significant to the district court, as indicated in the court's findings, was the involvement of state trust lands and what follows from that. New Mexico state trust lands have purposefully been classified as mineral lands since 1919. SLO regulations in effect at the time of the original sale transaction purposefully required that minerals be reserved in the sale of state trust lands. The 1947 patent reserved to the State "all minerals of whatsoever kind[.]" At all material times, the rock had significant commercial value if it were mined, crushed, and marketed for use as railroad ballast and other uses, which could produce revenue to the State as intended by the mineral reservation. "The State's intention in reserving all minerals of whatsoever kind when it issued Patent No. 1906 for land that was apparently not mineral-bearing was to maximize the State's opportunities for royalties to be derived from any and all minerals that might later be discovered on Section 16."

{42} Discussions in two New Mexico Supreme Court decisions in print between 1930 and 1947 are pertinent in looking at surrounding circumstances. The 1925 decision in *Otto* related to the Enabling Act, to the 1919 SLO regulation, and to a sale of state trust lands. *Otto*, 31 N.M. at 122-25, 130-31, 241 P. at 1028-29, 1031-32. In *Otto*, the Court stated:

> [I]t cannot be supposed that the Legislature of New Mexico, after taking the precaution to provide in leases for reservations of minerals, oil, gas, stone, shale, salt, timber, and all other natural products of the land to be dealt with separately by the commissioner, intended that, when he went to sell grazing land or agricultural land, he would be powerless to reserve to the [S]tate and its institutions the great wealth which might flow from a future discovery of minerals in the land, merely because the circumstances had not permitted of his having made an adequate exploration in order to enable him to fully determine the exact character of the land.

Id. at 140, 241 P.2d at 1035. In relation to the disposition of lands owned by the State, the Court in *Otto* agreed with "the proposition that, until patent issues, legal title remains in the government and subject to investigation and determination." *Id.* at 136, 241 P. at 1034. Although the context in which the

foregoing statements were made is not that in the present case, the *Otto* case and the statements in it were available for the parties' consumption up to the date of the issuance of the patent. Also in existence during the critical period was the 1940 decision in *Board of County Commissioners v. Good*, 44 N.M. 495, 498, 105 P.2d 470, 472 (1940), involving a suit filed by a board of county commissioners to condemn lands to secure rock, sand, gravel, and caliche for public highway construction, addressing the actual value of the materials taken and stating that caliche rock was, "in the ordinary acceptation, a mineral simply, as is also sand [and] gravel[.]" The Court in *Good* stated: "'Mineral,' in ordinary and common meaning, is a comprehensive term, including every description of stone and rock deposit, whether containing metallic or non-metallic substances." *Id.* The Court in *Good* permitted a valuation of the rock separate from the land itself. *Id.* at 499, 105 P.2d at 472.

{43} Particular discussions in *Bogle Farms* are helpful in reaching a result in the present case. Although set in the context of our Supreme Court's discussion in *Bogle Farms* of whether the doctrine of collateral estoppel applied, we read *Bogle Farms* to establish a general principle that New Mexico's state trust lands have a status of "great public importance" and that there exists "a strong public interest in the protection of state land and its products," a status and interest that we cannot ignore. *Bogle Farms*, 1996-NMSC-051, ¶¶ 23, 26; *cf. Otto*, 31 N.M. at 126, 241 P. at 1030 (indicating that the case was "of great importance, not only to the litigant who seeks protection of the right he claims, but also it is of great public interest, because there is involved the policy and interest of the [S]tate as a trustee with respect to its school fund"). Further, also in the collateral estoppel context, *Bogle Farms* states that title to state trust lands is not to be conveyed by implication, a holding made by the Court in response to *Roe*'s rule of property that, if sand and gravel were not specifically reserved, title to those minerals passed to the purchaser. *Bogle Farms*, 1996-NMSC-051, ¶ 34; *Roe*, 103 N.M. at 521, 710 P.2d at 88. We view the foregoing statements in *Bogle Farms* as intended by our Supreme Court to apply beyond the confines of its collateral estoppel analyses.

{44} Turning to Plaintiff's main argument, which is that the surface destruction doctrine necessarily reflects the intent of the parties, in our view the doctrine essentially espouses an intent to convey minerals by presumption. In our view, the doctrine presumes that the parties cannot have intended and did not, therefore, intend a conveyance of surface rights without rights to the rock. And it mirrors the *Roe* property rule, which *Bogle Farms* rejected as essentially establishing a presumption of a conveyance of minerals where the intent of the parties was not manifest. *Bogle Farms*, 1996-NMSC-051, ¶ 34. We will not import the doctrine into the intent analysis. Moreover, we cannot accept the view, if intended by Plaintiff, that the doctrine itself is simply evidence to be weighed against all of the surrounding circumstances in the process of inferring intent. Over the years, there may in fact have been innumerable now-deceased purchasers of state trust lands who could well have subjectively intended to purchase land for grazing purposes understanding that the surface and sub-surface might be subject to mineral exploitation by the State. We are not convinced that even a preponderance of such purchasers would not have purchased their lands for grazing had they been specifically aware that some surface material was included

in a mineral reservation. Further, and significantly, none of the surface destruction doctrine cases on which Plaintiff relies involves New Mexico state trust lands or lands similar to our trust lands—instead, they involve purely private land transactions or conveyances by the United States of lands dissimilar to New Mexico's state trust lands.[3]

{45} We are aware of Plaintiff's and Amicus Curiae New Mexico Farm and Livestock Bureau's arguments that substantial farm and ranch land will be at risk if the district court is affirmed. Plaintiff states that, although this case involves only a single section of land, "its implications are far more significant" and "could have grave consequences[,]" in that "the practical effect of the decision below would be that the [Commissioner and the SLO] will have the right to destroy and render useless for agricultural and grazing purposes any portion of the millions of acres it has sold to farmers and ranchers on the mere showing that the hard rock on their lands, which is pervasive throughout the State, has some current economic value." We are not insensitive to these concerns. However, we do not feel a freedom to stray from the required *Bogle Farms'* intent-of-the-parties method of ascertaining the meaning of the mineral reservation. And we cannot ignore the over-arching principles and policies *Bogle Farms* enunciates in regard to conveyance of state trust lands. Nor do we feel free to ignore *Bogle Farms'* apparent rejection of a rule or doctrine that creates a presumption or necessary implication of intent to convey minerals that in effect overrides or diminishes the significance of surrounding circumstances that indicate an intent to include rock within the mineral reservation. We leave it up to our Supreme Court to consider whether *Bogle Farms'* clear rule requiring a determination of the intent of the parties to the original sale transaction can permit application of the surface destruction doctrine.

{46} Further, Plaintiff's and Amicus Curiae's concerns are subject to some degree of dilution in that Plaintiff has not pointed to any specific evidence showing a likely and substantial risk of future harm to purchasers of state trust lands based on surface destruction. Nor did Plaintiff show that she would be harmed based on destruction of the surface. We think it noteworthy that state law requires the Commissioner to obtain from lessees, such as Mainline, a bond to secure payment to the surface owner for damage to livestock range, water, crops, or tangible improvements that may occur as a result of the mineral lessee's activities. NMSA 1978, §§ 19-10-26 (1979), 19-10-27 (1925); *see Tidewater Associated Oil Co. v. Shipp*, 59 N.M. 37, 41, 278 P.2d 571, 574 (1954) (discussing the surface owner protection provisions of 1919 and 1925 laws and holding that a mineral lessee is similarly obligated to the surface lessee for damages to grass, livestock, or crops). It is also noteworthy that, in obtaining a zoning change

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[3] Private Grantor: *Downstate Stone*, 712 F.2d 1215; *W.S. Newell, Inc. v. Randall*, 373 So. 2d 1068 (Ala. 1979); *Harper v. Talladega Cnty.*, 185 So. 2d 388 (Ala. 1966); *Bambauer v. Menjoulet*, 29 Cal. Rptr. 874 (Ct. App. 1963); *Farrell v. Sayre*, 270 P.2d 190 (Colo. 1954) (en banc); *Kinney*, 128 P.3d 297; *Florman*, 207 S.W.3d 593; *Resler*, 139 N.W.2d 379; *Farm Credit Bank of Tex. v. Colley*, 849 S.W.2d 825 (Tex. App. 1993); *Atwood v. Rodman*, 355 S.W.2d 206 (Tex. Civ. App. 1962). United States as Grantor: *Hess*, 348 F.3d 1237; *Poverty Flats Land & Cattle Co. v. United States*, 788 F.2d 676 (10th Cir. 1986).

for construction of its quarry, Mainline provided a reclamation plan in which it represented that, "[w]hen the quarry is completed[,] the land will be suitable for grazing and will form a basin for collecting storm water for livestock watering[.]" The Rule 5 Mining Lease issued to Mainline states, "[l]essee has separately contracted with the owner of the surface estate of the lands described herein, which contractual arrangement . . . includes certain responsibilities relating to operations, reclamation, surface protection[,] and damages[.]" And the district court made an unchallenged finding that "[a]fter removal of the rock that can be removed in a commercially viable manner, the site can be reclaimed in such a manner as to allow the pre-existing grazing use without substantial impairment."

{47} We hold that the district court did not err in determining, under *Bogle Farms'* required analysis of the intent of the parties of the original sale transaction, that based on the sale transaction documentation, including the patent, and also based on all of the surrounding circumstances, the intent of the conveyance transaction was that the rock was included in the reservation of "all minerals of whatsoever kind" in the patent.

CONCLUSION

{48} We affirm the district court's determination that the rock in question was a mineral within the mineral reservation in the 1947 patent relating to Section 16.

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

JONATHAN B. SUTIN, Judge

I CONCUR:

CYNTHIA A. FRY, Judge

MICHAEL E. VIGIL, Judge (dissenting).

VIGIL, Judge (dissenting).

{50} The extent of the mineral reservation set forth in the transaction documents is ambiguous.[4] Thus, the question before the district court was whether the original parties to the sale intended the surface and subsurface metamorphic rock in Section 16 to be included in the mineral reservation. The district court ruled, and the majority agrees, that the mineral reservation includes the rock. In my view, the district court erred in two respects: (1) it failed to take into consideration the surface destruction doctrine as bearing on the parties' intent at the time the contract for the purchase of Section 16 was made; and (2) it considered irrelevant evidence and without this evidence, its conclusion that the parties intended to include the rock in the mineral reservation is not supported by substantial evidence. Since the majority disagrees, I dissent.

THE HOLDING OF *BOGLE FARMS*

{51} *Bogle Farms* overruled the holding in

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[4] The transaction documents consist of: (1) Mr. Shelton's August 5, 1930 application to purchase Section 16 from the State; (2) the August 5, 1930 appraisal of Section 16; (3) the contract dated November 21, 1930, (which was signed on January 22, 1931) between Mr. Shelton and Land Commissioner James F. Hinkle setting forth the terms of the sale of Section 16 from the State to Mr. Shelton; and (4) the August 4, 1947 patent, signed by Land Commissioner John E. Miles, conveying Section 16 to Mrs. Shelton.

Roe[5] that because a purchase contract and patent did not specifically reserve sand and gravel in a mineral reservation, title to the sand and gravel passed to the purchaser along with the surface estate. *Bogle Farms*, 1996-NMSC-051, ¶ 34. *Bogle Farms* reiterated the principle laid down in *Burris*,[6] restated in *Rickelton*,[7] that in determining whether the general term "mineral" includes a specific substance is resolved on a case-by-case basis. *Bogle Farms*, 1996-NMSC-051, ¶ 21. "The case-by-case rule adopted in *Burris* is based on the principle that in contract cases the role of the court is to give effect to the intention of the contracting parties. The role of the court is to determine whether the parties intended to include [the substance] within the term 'mineral.'" *Bogle Farms*, 1996-NMSC-051, ¶ 22. A case-by-case analysis is required "because the intent of parties to one contract may not be the same as the intent of parties to another contract." *Id.* Given that "[t]he polestar of deed construction is the parties' intent," *id.* ¶ 34, *Bogle Farms* unambiguously mandates:

> [1.] [A]nyone purchasing land under a purchase contract or a patent with a specific reservation would be bound by the terms of that reservation.
>
> [2.] If there is not a specific reservation, the trial court must look to evidence outside the face of the contract to determine the meaning intended for the term "mineral" when that term has been shown under the circumstances to be ambiguous.
>
> [3.] In those cases involving successors in interest to original purchasers, [where the purchase was not made in reliance on *Roe*], . . . the issue is whether the parties to the original contract intended that the State reserve [the substance in question].

Id. ¶ 35.

{52} In this case, none of the transaction documents contain a specific reservation of the surface and subsurface metamorphic rock in Section 16. Further, there is no dispute that the mineral reservation in the transaction documents is ambiguous. Thus, *Bogle Farms* required the district court to determine whether Mr. Shelton and Commissioner Hinkle, as the parties to the original contract, intended the State to reserve the surface and subsurface metamorphic rock in Section 16. With the foregoing principles and requirements in mind, I now turn to each specific disagreement I have with the majority.

REJECTION OF THE SURFACE DESTRUCTION DOCTRINE

{53} Mr. Shelton and Commissioner Hinkle, the parties to the original sale of Section 16, are deceased. Thus, the majority concludes, their intent "can be determined only objectively from the original sale-related documents and surrounding circumstances." Majority Opinion ¶ 35. The "surrounding circumstances" clearly include the condition of the land at the time of the sale. Since the

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[5] *Roe*, 103 N.M. at 521, 710 P.2d at 88.

[6] *Burris*, 88 N.M. at 147, 538 P.2d at 419.

[7] *Rickelton*, 91 N.M. at 481, 576 P.2d at 287.

original parties to the contract are deceased, and the transaction documents are ambiguous, the evidence most probative of their intent is the condition of the land at the time of the sale.

{54} The surface destruction doctrine requires the fact finder to engage in a critical analysis of the land at the time of the sale. I refer to the surface destruction doctrine to mean, as quoted by the majority in Paragraph 25, a doctrine "which holds that, in the absence of clear contrary intent, where materials alleged to be 'minerals' are plainly visible on the surface, and where the surface would have to be destroyed in order to 'mine' them, the parties could not have intended those materials to be 'minerals' because, if they were, the mineral reservation would swallow up the grant and render it worthless." Plaintiff asked the district court to use the doctrine in assessing the intent of the parties, but the district court refused. The majority concludes this was not error, Majority Opinion ¶ 44, and I disagree.

{55} This area of New Mexico is part of what is called the Rocky Mountains for very good obvious reason. The district court briefly noted the land's physical condition in its findings, noting that prior to 1930, Section 16 was owned in fee by the State, and that "Section 16 is located in that part of Torrance County known as 'Perdenal Hills' and is *largely composed of Pre-Cambrian metamorphic rock.*" (Emphasis added.) This finding is supported by photographs showing rocks on the surface all over Section 16. To illustrate, two photographs introduced into evidence are attached to this dissent. The majority also notes that Plaintiff showed that the rock is part of a fifteen- to twenty-mile-wide geologic formation with rock outcrops that stretches from the Sangre de Cristo Mountains on the north into Texas and Mexico on the south. Majority Opinion ¶ 28. The district court findings and Plaintiff's evidence establish that the rocks in Section 16 were ubiquitous and obvious in 1930. Nevertheless, the district court made a finding that "[t]he fact that surface rock was visible on Section 16 was not the same as a determination that such rock was or was not a mineral under the 1930 Shelton contract to purchase or under Patent No. 1906's mineral reservation."

{56} The majority has discussed the appraisal as if the appraiser was representing Mr. Shelton. Majority Opinion ¶ 6. The evidence suggests otherwise. In the application to purchase Section 16, Mr. Shelton recites the amount he offers to pay for the land and he also agrees to pay an *additional* amount of money "to defray the expense of appraisement and advertising as per the rules of the State Land Office, such amount to be returned to me in the event I am not the successful bidder." The appraisal is based on the personal knowledge of the appraiser and he does not classify the rock as a mineral, notwithstanding its obvious and abundant presence on Section 16. In the 1930 contract to buy Section 16, Mr. Shelton agreed to pay the agreed upon price for the land and he also paid an additional amount, "the same being the payments required for the advertisement and appraisement of said land[.]" Thus, these documents suggest on their face that the State hired the appraiser, and Mr. Shelton simply reimbursed the State for the expense of the appraisal. It is therefore a fair inference that the appraiser represented to his principal, the State, that notwithstanding the presence and abundance of the rocks, there were no minerals on Section 16.

{57} The majority's reasons for refusing to

adopt the surface destruction doctrine to facilitate the intent inquiry mandated by *Bogle Farms* are unconvincing. Majority Opinion ¶¶ 44-46. The majority states that Plaintiff urges its adoption as a means of conveying minerals by implication or by presumption in violation of *Bogle Farms*. Majority Opinion ¶¶ 19, 44. I disagree. *Bogle Farms* did not consider the surface destruction doctrine, and the statement in *Bogle Farms*, 1996-NMSC-051, ¶ 34, that state trust lands should not be conveyed by implication is not a rejection of the surface destruction doctrine. Rather, the statement sets forth an additional reason for overruling *Roe*'s conclusion that if a substance is not specifically *included* in a mineral reservation, it is *excluded* from the mineral reservation. Instead, the actual intent of the parties governs, and the *Bogle Farms* statement does not preclude utilizing an evidentiary aid such as the surface destruction doctrine to construe the intent of the original parties to the transaction. In addition, the majority in wholesale fashion rejects the significant and substantial body of cases which recognize and apply the surface destruction doctrine on the basis that "they involve purely private land transactions or conveyances by the United States of lands dissimilar to New Mexico's trust lands." Majority Opinion ¶ 44. Noticeably absent in the wholesale rejection of these cases is any indication that the doctrine is not a valuable and valid aid in construing intent.

{58} I would adopt the surface destruction doctrine as an evidentiary tool to facilitate the intent inquiry required by *Bogle Farms*. The intent of the original parties is to be construed from the perspective of the interest the buyer desires to purchase, and the interest the seller desires to sell. Mr. Shelton's application to purchase Section 16 states he intends to use Section 16 to "graze sheep or raise cattle"; the appraisal states that Section 16 is best adapted for "grazing"; and the contract, which is the only document signed by both Mr. Shelton and Commissioner Hinkle, states that Section 16 "is being purchased for the purpose of grazing and agriculture only[.]" Thus, I would remand this case to the district court to utilize the surface destruction doctrine to determine whether removal of the surface and subsurface metamorphic rock unreasonably interferes with what use the original parties intended for Section 16, namely for grazing and agricultural purposes. If such a burden results, this is persuasive evidence that Mr. Shelton and Commissioner Hinkle did not intend the State to reserve the rock in the general mineral reservation.

CONSIDERATION OF IRRELEVANT EVIDENCE

{59} The district court findings of fact relating to whether Mr. Shelton and Commissioner Hinkle intended to include the rock in the general mineral reservation are, for the most part, all facts which occurred after 1930. Many of them are set forth verbatim in the majority opinion in Paragraphs 22-24. Without these facts, there is no basis for concluding that Mr. Shelton and Commissioner Hinkle intended to include the rock in the general mineral reservation. For the following reasons, I submit that the district court erred in considering these facts. Furthermore, they do not support the district court's findings of intent, because they are irrelevant.

{60} Commissioner Hinkle agreed to sell Section 16 to Mr. Shelton, and they entered into a contract, dated November 21, 1930. Under the contract, Commissioner Hinkle agreed to convey a fee simple interest in Section 16 to Mr. Shelton upon payment of

the purchase price in full subject to the following reservations and conditions:

> [T]hat this land is being purchased for the purpose of grazing and agriculture only; that while the land herein contracted for is believed to be essentially non-mineral land, should mineral be discovered therein it is expressly understood and agreed that this contract is based upon the express condition that the minerals therein shall be and are reserved to the fund or institution to which the land belongs, together with right of way to the Commissioner, or any one acting under his authority, at any and all times to enter upon said land and mine and remove the minerals therefrom without let or hindrance.

The land was paid for, and on behalf of the State, Commissioner Miles issued a patent to Mr. Shelton's widow on August 19, 1947. The patent conveys a fee simple estate to Section 16, but reserves to the State:

> all minerals of whatsoever kind, including oil and gas, in the lands so granted, and to it, or persons authorized by it, the right to prospect for, mine, produce and remove the same, and perform any and all acts necessary in connection therewith, upon compliance with the conditions and subject to the limitations of the laws of the State of New Mexico[.]

{61} As set forth in this dissent, there are two general mineral reservations in this case: the mineral reservation in the 1930 contract between Commissioner Hinkle and Mr. Shelton, and the mineral reservation in the 1947 patent issued to Mr. Shelton's widow by Commissioner Miles. As quoted above, the 1930 contract first states that the land contracted for "is believed to be essentially non-mineral." With this preface, the contract then provides, "should mineral be discovered" on Section 16, such minerals "are reserved." On the other hand, the 1947 patent in the broadest language states that "all minerals of whatsoever kind" are reserved. The documents are not only separated by almost seventeen years, they are signed by different commissioners. The differences between the two reservation clauses are material, and the majority does not determine which mineral reservation applies. I conclude, however, that the 1930 general mineral reservation is the one which is applicable.

{62} The contract between the parties defines what the purchaser (Mr. Shelton) agreed to buy and what the seller (the State) agreed to sell. The function of the patent is to convey the legal title which the parties agreed upon, not to change the contract made by the parties. *See Bogle Farms*, 1996-NMSC-051, ¶ 4 (noting that purchasers buying land from the Commissioner of Public Lands under installment contracts received patents from the Commissioner transferring legal title after fulfilling their contractual payment obligations); *Jensen v. State Highway Comm'n*, 97 N.M. 630, 631, 642 P.2d 1089, 1090 (1982) (stating that the provisions of the purchase contract determine whether a substance is reserved to the State, and if the State desires to reserve a substance, "it may do so by specific reservations in the purchase contract"); *cf. Deaton v. Gutierrez*, 2004-NMCA-043, ¶ 14, 135 N.M. 423, 89 P.3d 672 (stating that until the Bureau of Land Management issued a patent to the land, title remained in the United States). *Bogle Farms* itself was a declaratory judgment brought by original purchasers and successors in interest

to land sold by the Commissioner of Public Lands under installment contracts. 1996-NMSC-051, ¶ 3. The plaintiffs alleged that the general mineral reservation of their purchase contracts did not include sand and gravel, and they sought a declaratory judgment that their patents could not include a specific reservation of sand and gravel. *Id.* ¶ 5.

{63} I therefore conclude that the applicable mineral reservation at issue in this case is the one contained in the 1930 contract between Commissioner Hinkle and Mr. Shelton. The district court failed to relate the post-1930 findings of fact back to the intent Mr. Shelton and Commissioner Hinkle had when they signed the 1930 contract. Thus, Finding of Fact No. 69 is not supported by substantial evidence. This finding, which the majority refers to in Paragraph 37, and relies on in Paragraphs 38-39 in affirming the judgment states:

> Based on the parties' language in their dealings with one another, their conduct, the objectives they sought to accomplish, and the surrounding circumstance the parties intended that the crushed stone, an industrial mineral, was to be considered a mineral in the 1930 Shelton contract to purchase and one of those "minerals of whatsoever kind" included in the State's mineral reservation in Patent No. 1906.

Further, assuming the district court could, consistent with *Bogle Farms*, determine the most reasonable meaning of the general mineral reservation if Mr. Shelton and Commissioner Hinkle had different meanings in mind, Finding of Fact No. 72 fails for the same reason. Finding of Fact No. 72 states:

> Even if the parties disagreed as to the meaning of the term "mineral" in the 1930 Shelton contract to purchase or the phrase "minerals of whatsoever kind' in the 1947 patent, or if the parties" intentions could not be determined, it is most reasonable that the term and phrase include the industrial mineral known as crushed stone, based on all surrounding circumstances.

{64} The majority asserts that it does not rely on any findings made by the district court after the patent was issued in 1947, and then it fails to specifically identify what those findings are. Majority Opinion ¶¶ 36-37. I submit that the applicable date for determining intent is as of the 1930 contract and not the 1947 patent.

{65} When one considers only those findings which are contemporary with, or precede 1930, they do not support a finding that Mr. Shelton and Commissioner Hinkle intended to include the rock in the general mineral reservation. For this additional reason, I dissent.

CONCLUSION

{66} I would reverse and remand to the district court to consider the surface destruction doctrine as evidence of the parties' intent, and not to consider the post-1930 evidence unless it is shown to be indicative of the parties' intent in signing the purchase contract in 1930. Since the majority disagrees, I dissent.

MICHAEL E. VIGIL, Judge

MAINLINE ROCK AND BALLAST, INC.

TORRANCE QUARRY SITE

SW ¼ SEC. 16, Twp. 12 N, Rng. 12 E, NMPM

PLAINTIFF'S EXHIBIT 16 B

SLO 0390

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2011-NMCA-111

Filing Date: September 21, 2011

Docket No. 29,807

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ESAU BARRAZA,

Defendant-Appellant.

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OPINION

GARCIA, Judge.

{1} Defendant, convicted of a felony that may likely result in his deportation, sought to withdraw his plea based on ineffective assistance of counsel. He sought relief under the historic writ of coram nobis that has now been incorporated into Rule 1-060(B) NMRA. Defendant's petition under Rule 1-060(B) depends on the existence of no other remedy. Since Defendant has not shown that the remedy of habeas corpus was unavailable to him, a petition under Rule 1-060(B) is precluded, and we affirm.

BACKGROUND

{2} On November 8, 2007, Defendant entered a plea of no contest to the charge of

aggravated assault with a deadly weapon, a fourth degree felony contrary to NMSA 1978, Section 30-3-2(A) (1963). As part of Defendant's plea agreement, he recognized that the "conviction *may have an effect upon* [D]efendant's immigration or naturalization status." (Emphasis added.) On January 31, 2008, the district court accepted Defendant's no contest plea and sentenced Defendant to eighteen months imprisonment. This sentence was then suspended, and Defendant was placed on supervised probation for eighteen months and given pre-sentence confinement credit of two days. Defendant received an early discharge from probation on May 8, 2009.

{3} On or about July 8, 2008, while Defendant was still on probation, Defendant filed a petition pursuant to Rule 1-060 and Rule 5-304 NMRA to vacate and set aside the plea or, in the alternative, for a writ of error coram nobis (the Petition). Defendant alleged that his plea should be set aside or withdrawn due to ineffective assistance of counsel as he was not advised of the specific immigration consequences of this conviction and the almost certain deportation that would result from this aggravated felony. *See State v. Carlos*, 2006-NMCA-141, ¶ 14, 140 N.M. 688, 147 P.3d 897 (concluding that defense counsel must "read and interpret federal immigration law and specifically advise the defendant whether a guilty plea will result in almost certain deportation"). On February 10, 2009, the district court held an evidentiary hearing on the Petition. The district court initially entered a letter ruling denying the Petition and subsequently filed an order denying the Petition on July 9, 2009. Defendant timely appealed the order denying the Petition.

DISCUSSION

{4} Defendant does not contest the district court's ruling that the Petition could not be heard under Rule 5-304. As a result, Defendant has now abandoned this issue on appeal. *See State v. Correa*, 2009-NMSC-051, ¶ 31, 147 N.M. 291, 222 P.3d 1 (explaining that issues that are not briefed on appeal are considered abandoned). The parties also recognize that the writ of coram nobis was abolished in New Mexico when our Supreme Court adopted Rule 1-060. *State v. Tran*, 2009-NMCA-010, ¶ 16, 145 N.M. 487, 200 P.3d 537. The California Supreme Court's description of the development of the writ of coram nobis is beneficial to our analysis and is as follows:

> The writ of error coram nobis is a nonstatutory, common law remedy whose origins trace back to an era in England in which appeals and new trial motions were unknown. Far from being of constitutional origin, the proceeding designated coram nobis . . . was contrived by the courts at an early epoch in the growth of common law procedure to provide a corrective remedy because of the absence at that time of the right to move for a new trial and the right of appeal from the judgment. The grounds on which a litigant may obtain relief via a writ of error coram nobis are narrower than on habeas corpus; the writ's purpose is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the [district] court had known it and which, through no negligence or fault of the defendant, was not then known

to the court.

People v. Hyung Joon Kim, 202 P.3d 436, 445 (Cal. 2009) (emphasis omitted) (footnote omitted) (internal quotation marks and citations omitted). Because the common law writ of coram nobis was abolished and subsumed into Rule 1-060, we will now address the district court's ability to procedurally address the Petition on its merits pursuant to Rule 1-060(B). *Tran*, 2009-NMCA-010, ¶ 16.

{5} The State properly raised the issue of whether the district court could exercise jurisdiction to hear the Petition pursuant to Rule 1-060(B), rather than habeas corpus relief under Rule 5-802. The question of jurisdiction is a controlling consideration that must be resolved before going further in a proceeding and may even be raised by the appellate court on its own motion. *Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 10, 142 N.M. 786, 171 P.3d 300. In the present case, the district court ruled that it had jurisdiction to hear the Petition pursuant to Rule 1-060(B) and addressed the Petition on its merits. Although Rule 1-060(B) is a rule of civil procedure, it has been extended to govern proceedings for obtaining relief from criminal judgments under certain circumstances, including the now abolished writ of coram nobis. *Tran*, 2009-NMCA-010, ¶ 16. We therefore consider whether the district court properly exercised its jurisdiction to hear the Petition on its merits pursuant to Rule 1-060 while Defendant was still serving his sentence and probationary term on July 8, 2008. Determining whether the district court properly exercised its jurisdiction is a question of law that we review de novo. *Smith*, 2007-NMSC-055, ¶ 10.

{6} In pertinent part, Rule 1-060(B) provides the following: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order[,] or proceeding [if] . . . the judgment is void[.]" In *Tran*, this Court held that the defendant was entitled to collaterally attack previous guilty pleas and no contest pleas under Rule 1-060(B)(4) "on [the] grounds that his attorneys failed to advise him of the specific immigration consequences of his pleas as required by *State v. Paredez*, 2004-NMSC-036, 136 N.M. 533, 101 P.3d 799[.]" *Tran*, 2009-NMCA-010, ¶¶ 1, 14-17. In *Paredez*, our Supreme Court recognized an affirmative duty on defense counsel such that "[a]n attorney's failure to provide the required advice regarding immigration consequences will be ineffective assistance of counsel if the defendant suffers prejudice by the attorney's omission." 2004-NMSC-036, ¶ 19. Consequently, defense counsel must "read and interpret federal immigration law and specifically advise the defendant whether a guilty plea will result in almost certain deportation." *Carlos*, 2006-NMCA-141, ¶ 14.

{7} In *Tran*, this Court addressed the use of the common law writ of coram nobis or its statutory counterpart in criminal cases. 2009-NMCA-010, ¶ 14. *Tran* recognized that the remedy of coram nobis "is used in criminal cases where there is no other remedy available to obtain a review[.]" *Id.* (internal quotation marks and citation omitted). Procedurally, however, *Tran* involved factual circumstances where it was undisputed that the defendant had completed serving his sentences and was no longer subject to any custody or restraint imposed by his previous convictions at the time he filed his petition to set aside those convictions pursuant to a writ of coram nobis. *Id.* ¶¶ 8, 10-11. Because the defendant was no longer in custody or otherwise subject to the restraint imposed by his prior sentences,

this Court concluded that the only procedural remedy available would be through a writ of coram nobis, now subsumed within Rule 1-060. *Tran*, 2009-NMCA-010, ¶¶ 14-17. However, *Tran* did not address the issue of whether a defendant may seek coram nobis type relief under Rule 1-060(B) to attack and vacate a conviction while the defendant is still in custody or under restraint as a result of that conviction at the time the petition is filed. The State asserts that a petition for a writ of habeas corpus under Rule 5-802 was the proper procedure to attack the validity of Defendant's conviction because Defendant was still under the restraint of his conviction on July 8, 2008. We now address whether Defendant properly attacked the conviction and sentence he was serving on July 8, 2008, through his Petition under Rule 1-060(B), rather than a petition for habeas corpus relief under Rule 5-802.

{8} Because Rule 1-060 closely follows the federal rule, authority interpreting Federal Rule of Civil Procedure 60 and the availability of coram nobis type relief is persuasive in the absence of contrary New Mexico authority. *Century Bank v. Hymans*, 120 N.M. 684, 690, 905 P.2d 722, 728 (Ct. App. 1995). Federal courts have repeatedly held that where a defendant has not shown that habeas corpus relief is unavailable or otherwise inadequate, then the common law remedy of coram nobis or its statutory counterpart is not available. *See, e.g.*, *United States v. Payne*, 644 F.3d 1111, 1112-13 (10th Cir. 2011) (affirming the denial of the petitioner's motion for coram nobis relief because the petitioner failed to show that habeas corpus relief was unavailable or would have been inadequate); *United States v. Sandles*, 469 F.3d 508, 517 (6th Cir. 2006) (concluding that "[a] defendant completing his supervised release is in 'custody,' and the writ of coram nobis is not available to him"); *Obado v. New Jersey*, 328 F.3d 716, 718 (3d Cir. 2003) (recognizing that "coram nobis is not available when a petitioner is in custody" (emphasis omitted)); *Matus-Leva v. United States*, 287 F.3d 758, 760-61 (9th Cir. 2002) (holding that coram nobis relief was not available to the defendant where he was still subject to supervised release and, thus, still in custody for purposes of pursuing habeas corpus relief); *United States v. Peter*, 310 F.3d 709, 712 (11th Cir. 2002) (stating that "[a] writ of error coram nobis is a remedy available to vacate a conviction when the petitioner has served his sentence and is no longer in custody," as required for habeas corpus relief); *United States v. Dyer*, 136 F.3d 417, 422, 424 (5th Cir. 1998) (recognizing that coram nobis relief is available only where no other remedy exists and that coram nobis relief was appropriate where a petitioner had completed his sentence and no other remedy existed); *United States v. Bush*, 888 F.2d 1145, 1147 (7th Cir.1989) (reasoning that coram nobis relief is available only after a defendant is no longer in custody for purposes of seeking habeas corpus relief and that coram nobis relief requires a substitute for the custody requirement); *United States v. Mandel*, 862 F.2d 1067, 1075 (4th Cir. 1988) (concluding that coram nobis may be used "to vacate a conviction after the sentence has been served[,]" but "only under circumstances compelling such action to achieve justice" and where no other remedy is available (internal quotation marks and citation omitted)).

{9} Furthermore, other state courts have similarly held that coram nobis type relief is not available where the petitioner has not shown that habeas corpus relief would have been unavailable or inadequate. *See, e.g.*, *Kim*, 202 P.3d at 447 (recognizing that coram nobis relief is not available where other adequate relief is available, such as relief

through a habeas corpus petition); *State v. Das*, 968 A.2d 367, 377 (Conn. 2009) (stating that coram nobis relief is not available "when habeas corpus affords a proper and complete remedy" (internal quotation marks and citation omitted)); *State v. Becker*, 115 N.W.2d 920, 921 (Minn. 1962) (rejecting a writ of coram nobis where a claim could have been asserted by a writ of habeas corpus); *Jessen v. State*, 290 N.W.2d 685, 688 (Wis. 1980) (stating that "where the writ of habeas corpus affords a proper and complete remedy[,] the writ of error coram nobis will not be granted").

{10} In line with this authority from federal and state courts, we hold that coram nobis type relief under Rule 1-060(B) is not available unless the petitioner demonstrates that relief through habeas corpus proceedings under Rule 5-802 is unavailable or otherwise inadequate. In New Mexico, a defendant may seek habeas corpus relief under Rule 5-802 for a claim of ineffective assistance of trial counsel. *Duncan v. Kerby*, 115 N.M. 344, 346, 851 P.2d 466, 468 (1993). Relief under Rule 5-802 only applies when a person is still under the custody or restraint of the State. *See Cummings v. State*, 2007-NMSC-048, ¶ 25, 142 N.M. 656, 168 P.3d 1080; *see also State v. Baca*, 1997-NMSC-059, ¶ 25, 124 N.M. 333, 950 P.2d 776. Furthermore, a term of probation is recognized as a restraint upon personal freedom that triggers a deprivation of liberty for purposes of obtaining habeas corpus relief. *See State v. Ponce*, 2004-NMCA-137, ¶ 38, 136 N.M. 614, 103 P.3d 54 (recognizing that probation fulfills the "in custody" requirement for purposes of habeas corpus relief (internal quotation marks and citation omitted)); *see also A.M. v. Butler*, 360 F.3d 787, 790 n.3 (7th Cir. 2004) (noting that probation constitutes "in custody" for purposes of fulfilling the jurisdictional requirements for habeas corpus relief (internal quotation marks and citation omitted)).

{11} It is undisputed that Defendant was still serving his sentence of probation as a result of his conviction when he filed the Petition on July 8, 2008. Defendant does not assert that he was precluded from filing a petition for habeas corpus on July 8, 2008, but only asserts that any error in hearing the Petition was harmless error. Likewise, Defendant does not assert that he was not a person subject to the custody or restraint of the State on July 8, 2008, when he was serving his probationary sentence. As such, we conclude that Defendant has failed to demonstrate that habeas corpus relief was unavailable or otherwise inadequate when he filed the Petition for relief under Rule 1-060(B) in the district court on July 8, 2008. Furthermore, Defendant provides no argument or authority that Rule 1-060 expanded the scope of relief under a writ of coram nobis when this common law principle was subsumed and abolished by Rule 1-060. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (concluding that this Court has no duty to review arguments that are not developed through citation to authority and the record).

{12} Finally, we are left with Defendant's argument that the district court's use of Rule 1-060 to address his ineffective assistance of counsel argument was harmless error and that any review by this Court would be identical to a habeas corpus petition under Rule 5-802. Although our Supreme Court has the flexibility to construe a motion as a petition for habeas corpus even where it was not denominated as such, *Case v. Hatch*, 2008-NMSC-024, ¶ 12, 144 N.M. 20, 183 P.3d 905, this Court has no such jurisdiction or flexibility to do so. *See* Rule 5-802(H)(2) (requiring a defendant to petition for certiorari

to our Supreme Court in order to obtain review of a district court's denial of a writ of habeas corpus); Rule 12-501 NMRA (specifying the procedures for review of denials of habeas corpus petitions by our Supreme Court). Because Defendant cannot appeal the denial of a writ of habeas corpus to this Court, we lack jurisdiction to review or otherwise construe whether it would be harmless error to treat the current Petition filed under Rule 1-060(B) as a petition for habeas corpus. *See State v. Peppers*, 110 N.M. 393, 397-98, 796 P.2d 614, 618-19 (Ct. App. 1990) (declining to consider whether the defendant's motion to withdraw his plea might be construed as a petition for a writ of habeas corpus under Rule 5-802 because this Court lacks jurisdiction to review a district court's rulings on Rule 5-802 petitions). Such a decision is left to the exclusive discretion of our Supreme Court pursuant to Rule 5-802(H)(2) and Rule 12-501. *See Peppers*, 110 N.M. at 397-98, 796 P.2d at 618-19. As a result, we cannot address Defendant's argument that any error was harmless and that this Court should construe the Petition as a petition for a writ of habeas corpus.

CONCLUSION

{13} We determine that the district court could not exercise its jurisdiction to review the petition of July 8, 2008, for coram nobis relief pursuant to Rule 1-060(B) because such relief could only be granted pursuant to habeas corpus proceedings under Rule 5-802 while Defendant was within the custody or restrictions imposed by his sentence. We reverse and remand to the district court with instructions to dismiss the Rule 1-060(B) petition without prejudice.

{14} IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

CELIA FOY CASTILLO, Chief Judge

RODERICK T. KENNEDY, Judge

Certiorari Granted, October 12, 2011, No. 33,166

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2011-NMCA-112

Filing Date: May 9, 2011

Docket No. 30,343

CHRISTUS ST. VINCENT REGIONAL MEDICAL CENTER,

Third-Party Plaintiff-Appellee,

v.

RAMON DUARTE-AFARA, M.D., and MARK WADE DICKINSON, M.D.,

Third-Party Defendants-Appellants.

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for Appellant Dickinson, M.D.

OPINION

CASTILLO, Chief Judge.

{1} The primary issue before us is whether the claim of Christus St. Vincent Regional Medical Center (Medical Center) for equitable indemnification is a malpractice claim governed by the Medical Malpractice Act (MMA), NMSA 1978, §§ 41-5-1 to -29 (1976, as amended through 2008), and subject to the three-year statute of repose provided by Section 41-5-13 of the MMA. We hold that Medical Center's claim is governed by the MMA and subject to Section 41-5-13. We also consider whether due process and equal protection concerns preclude application of Section 41-5-13 and conclude that they do not. Accordingly, we reverse.

BACKGROUND

{2} On December 6, 2004, Lillian Martinez (Martinez) received a hysterectomy at Medical Center. Several days later, on December 9 and 10, she developed respiratory problems and ultimately suffered brain damage. On December 4, 2007, almost three years later, Martinez filed a complaint against Medical Center under the MMA alleging medical malpractice. Specifically, Martinez alleged that Medical Center failed to adequately monitor her after surgery, administered inappropriate and/or excessive medications, failed to timely and properly diagnose and treat her respiratory problems, and failed to timely diagnose and treat her while she was experiencing a significant life-threatening medical emergency.

{3} Martinez filed an application for panel review with the New Mexico Medical Review Commission on March 6, 2008, asking the commission to, in part, review the

conduct of Dr. Duarte-Afara and Dr. Dickinson (Doctors), the physicians who treated her at Medical Center and Appellants in this case. On March 12, 2008, Martinez amended her December 4, 2004 complaint against Medical Center to include Doctors.

{4} In response to Martinez's amended complaint, Doctors filed motions for summary judgment in June 2008 asserting that Martinez's claims against them were barred by the three-year time period set forth in Section 41-5-13 of the MMA. *Id.* (stating that "[n]o claim for malpractice arising out of an act of malpractice . . . may be brought against a health care provider unless filed within three years after the date that the act of malpractice occurred"). The district court agreed with Doctors and dismissed Martinez's claims against Doctors with prejudice.

{5} On December 22, 2008, Medical Center filed a third-party complaint for indemnification against Dr. Duarte-Afara in which Medical Center sought indemnification in the amount, if any, for which it may be found vicariously liable for Dr. Duarte-Afara's malpractice. On March 19, 2009, Medical Center amended its third-party complaint to include an indemnification claim against Dr. Dickinson.

{6} In response to Medical Center's amended third-party complaint, Doctors filed a motion to dismiss, arguing that Medical Center's indemnification claim was also barred by Section 41-5-13. Medical Center countered that Section 41-5-13 is not controlling, claimed that the four-year statute of limitations provided in NMSA 1978, Section 37-1-4 (1929) governed their amended third-party complaint, and asserted that its indemnification claim could proceed. The district court agreed with Doctors and granted their motion to dismiss.

{7} In March 2010, the district court granted Medical Center's motion to reconsider the court's dismissal of its claims against the Doctors. The court determined that "[b]ecause this matter is a claim for indemnification rather than malpractice . . . Section 41-5-13 . . . is inapplicable[,]" and further determined that "[t]he statutory time limit for the third-party claims for indemnification in this matter does not begin to run until the claim of indemnity accrues, which is at the time of payment of the underlying claim, judgment, or settlement, and not from the time that the underlying damage occurred to [Martinez]." We accepted Doctors' request for interlocutory review on the issue of the applicability of the MMA and Section 41-5-13 to Medical Center's indemnification claim against Doctors.

DISCUSSION

{8} On appeal, Doctors argue, as they did below, that Medical Center's indemnification claim is governed by the MMA and subject to Section 41-5-13. Because, as explained below, we agree with this argument, we also address Medical Center's contention that application of Section 41-5-13 would deprive them of their due process and equal protections rights.

Applicability of the MMA and Section 41-5-13

{9} To address Medical Center's indemnification claim, we must construe Section 41-5-13 as it applies to the facts of this case. We review such matters de novo. *Bd. of Comm'rs of Rio Arriba Cnty. v. Greacen*, 2000-NMSC-016, ¶ 4, 129 N.M. 177, 3 P.3d 672 ("This is primarily a matter of

statutory construction and thereby concerns a pure question of law, subject to de novo review."); *Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000-NMSC-033, ¶ 7, 129 N.M. 698, 12 P.3d 960 ("We review de novo the [district] court's application of the law to the facts in arriving at its legal conclusions."). "This Court's primary goal when interpreting statutes is to further legislative intent." *Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, ¶ 15, 149 N.M. 162, 245 P.3d 1214. To determine legislative intent, "we look to the language used and consider the statute's history and background." *Key v. Chrysler Motors Corp.*, 121 N.M. 764, 768-69, 918 P.2d 350, 354-55 (1996). We begin by examining the history and purpose behind the MMA and Section 41-5-13.

{10} The MMA was enacted in response to a perceived malpractice insurance crisis in New Mexico. *Roberts v. Sw. Cmty. Health Servs.*, 114 N.M. 248, 251-52, 837 P.2d 442, 445-46 (1992). Through the MMA, the Legislature made professional liability insurance available to health care providers but conditioned availability to that insurance on a quid pro quo: health care providers could receive the benefits of the MMA only if they became qualified health care providers under the MMA and accepted the burdens of doing so. *Id.*; *see also Cummings v. X-Ray Assocs. of N.M., P.C.*, 1996-NMSC-035, ¶¶ 27-29, 121 N.M. 821, 918 P.2d 1321 (discussing the benefits and burdens of participation in the MMA).

{11} Section 41-5-13 is one benefit health care providers receive in accepting the burdens of the MMA. *See Cummings*, 1996-NMSC-035, ¶ 29 (describing the Legislature's decision to enact Section 41-5-13 as one of the "[t]he most notable" benefits under the MMA); *Roberts*, 114 N.M. at 252-53, 837 P.2d at 446-47 (identifying Section 41-5-13 as one of the benefits inuring to qualified health care providers under the MMA). This provision provides the following:

> No claim for malpractice arising out of an act of malpractice which occurred subsequent to the effective date of the [MMA] may be brought against a health care provider unless filed within three years after the date that the act of malpractice occurred except that a minor under the full age of six years shall have until his ninth birthday in which to file. This section applies to all persons regardless of minority or other legal disability.

Section 41-5-13 (alteration omitted).

{12} Section 41-5-13 addressed one of the reasons insurance carriers were withdrawing from medical malpractice: the potential for malpractice liability coverage suits being filed long after the act of malpractice. *Cummings*, 1996-NMSC-035, ¶ 40. Our Supreme Court has previously concluded that the plain language of Section 41-5-13 demonstrates that the Legislature intended the "occurrence rule" to govern claims controlled by the MMA. *Cummings*, 1996-NMSC-035, ¶¶ 47-48. The occurrence rule fixes the accrual date in which a patient must file a claim for medical malpractice at the time of the act or occurrence of medical malpractice even if the patient is oblivious of any harm. *See id.* ¶ 47. As such, Section 41-5-13 will function, under certain circumstances, as a statute of repose. See *Cummings*, 1996-NMSC-035, ¶¶ 48-50 (describing the circumstances under which Section 41-5-13 may function either as a statute of limitations or as a statute of repose and explaining that "a statute of repose

terminates the right to any action after a specific time has elapsed, even though no injury has yet manifested itself"). Having established the general principles that guide our analysis, we turn now to the more specific question of whether Medical Center's indemnification claim is governed by the MMA and thus subject to Section 41-5-13.

{13} The MMA comprehensively defines what constitutes a "malpractice claim." *See* § 41-5-3(C).

> "[M]alpractice claim" includes any cause of action arising in this state against a health care provider for medical treatment, lack of medical treatment or other claimed departure from accepted standards of health care which proximately results in injury to the patient, whether the patient's claim or cause of action sounds in tort or contract, and includes but is not limited to actions based on battery or wrongful death; "malpractice claim" does not include a cause of action arising out of the driving, flying or nonmedical acts involved in the operation, use or maintenance of a vehicular or aircraft ambulance[.]

Id. Our Supreme Court has observed that the breadth of this language indicates that "[t]he [L]egislature foresaw and intended broad application of the concept of a 'malpractice claim.'" *Wilschinsky v. Medina*, 108 N.M. 511, 517, 775 P.2d 713, 719 (1989). The question we must answer is whether an equitable indemnification claim falls within the ambit of this broadly defined concept. To answer that question we must examine the nature of a claim for indemnification.

{14} New Mexico recognizes "both traditional and proportional equitable indemnification." *N.M. Pub. Schs. Ins. Auth. v. Arthur J. Gallagher & Co.*, 2008-NMSC-067, ¶ 23, 145 N.M. 316, 198 P.3d 342. "Traditional indemnification grants the person who has been held liable for another's wrongdoing an all-or-nothing right of recovery from a third party, such as the primary wrongdoer." *Id.* "[P]roportional indemnification allows a defendant to seek partial recovery from another for his or her fault." *Id.* Medical Center has not specified which of these two theories of indemnification it has invoked. Nevertheless, our Supreme Court has explained that, under either theory, "to state a claim for equitable indemnification, the indemnitor must be at least partly liable to the original plaintiff for his or her injuries." *Id.* ¶ 28 (emphasis omitted). In other words, "[a] properly pled indemnity claim must allege that the defendant [or indemnitor] caused some *direct harm* to a third party and that the plaintiff or [indemnitee] discharged the resulting liability from this harm." *Id.* ¶ 30. This doctrinal point is, in our view, determinative.

{15} As discussed above, the Legislature intended that the term "malpractice claim" be construed broadly. *Wilschinsky*, 108 N.M. at 517, 775 P.2d at 719. Indeed, a claim may be construed as a malpractice claim within the meaning of the MMA if "the gravamen of the third-party action is predicated upon the allegation of professional negligence by a practicing physician." *Id.* at 517-18, 775 P.2d at 719-20 (internal quotation marks and citation omitted). We discern from *Gallagher* that the gravamen of Medical Center's equitable indemnification claim is predicated upon the allegation that Doctors negligently caused, and were partly liable for, Martinez's injuries. As such, we hold that Medical

Center's equitable indemnification claim is a malpractice claim as that term is used in the MMA and is, therefore, subject to Section 41-5-13.

{16} We reach this conclusion, in part, so as to carry out the policy goals the Legislature intended by enacting the MMA and Section 41-5-13. *See C. de Baca v. Baca*, 73 N.M. 387, 392, 388 P.2d 392, 396 (1964) ("It accordingly devolves upon us to interpret the statute so as to accomplish the ends sought by the [L]egislature."). In effect, Medical Center's equitable indemnification claim exposes Doctors to the identical liability to which they were subject under Martinez's claims. Martinez's claims were properly dismissed as untimely. To permit Medical Center's claim to proceed where Martinez's claim could not, would, in our view, elevate form over substance and frustrate the underlying concerns which motivated our Legislature to enact the MMA and Section 41-5-13—that is, relieving insurers and health care providers from the uncertainty posed by stale malpractice claims. *Cummings*, 1996-NMSC-035, ¶ 40.

{17} We are unpersuaded by Medical Center's varying arguments that its indemnification claim is not governed by the MMA. Citing *Budget Rent-A-Car Systems, Inc. v. Bridgestone Firestone N. Am. Tire, LLC*, 2009-NMCA-013, ¶ 21, 145 N.M. 623, 203 P.3d 154, Medical Center first argues that the limitation period for an indemnification claim begins to run "at the time of payment of the underlying claim, payment of a judgment, or payment of a settlement." Medical Center further contends that "a third-party plaintiff's cause of action for indemnification or contribution is distinct from the tort claim asserted by the plaintiff against the defendant in the underlying suit." Medical Center cites a variety of out-of- state authority for this proposition, *see State ex rel. General Electric Co. v. Gaertner*, 666 S.W.2d 764, 766 (Mo. 1984) (en banc); *State Farm Mut. Auto. Ins. Co. v. Schara*, 201 N.W.2d 758, 759 (Wis. 1972); *Duncan v. Beres*, 166 N.W.2d 678, 687 (Mich. Ct. App. 1968), which we have duly considered.

{18} These cases all point to the well-settled proposition that a cause of action for indemnification is separate and distinct from the underlying tort. *See* Maurice T. Brunner, *When Statute of Limitations Commences to Run Against Claim for Contribution or Indemnity Based on Tort*, 57 A.L.R.3d 867, § 4[a] (1974) ("The cause of action for indemnity of one whose liability for a tort is secondary or constructive, against one whose liability for the tort is primary, is separate and distinct from the injured person's cause of action for the tort, and is generally recognized not to be a mere species of subrogation to the tort cause of action. It is inchoate until judgment is rendered or the claim is settled." (footnotes omitted)). We do not dispute this point of law. However, this point does not undermine our confidence in the conclusion that Medical Center's indemnification claim does fall within the ambit of the term "malpractice claim" as that term is used in the MMA. As discussed above, the controlling inquiry in determining whether a claim constitutes a "malpractice claim" under the MMA is merely whether the gravamen of the claim is predicated upon the allegation of professional negligence. We have concluded that this is the case. As such, Medical Center's claim is governed by the MMA and is subject to Section 41-5-13.

{19} Medical Center devotes considerable attention to two Missouri cases, *Rowland v. Skaggs Companies, Inc.*, 666 S.W.2d 770

(Mo. 1984) (en banc), and *Aherron v. St. John's Mercy Medical Center*, 713 S.W.2d 498 (Mo. 1986) (en banc), and argues that the reasoning and conclusions in these cases should apply here. In these cases, the Missouri Supreme Court addressed whether the two-year statute of limitations governing medical malpractice claims in Missouri applied to claims for contribution or indemnification. *Rowland*, 666 S.W.2d at 772; *Aherron*, 713 S.W.2d at 499-500. In *Rowland*, the court observed that the language of the statute of limitations at issue revealed "an unequivocal legislative intent to make only a specified class of suits brought against health care providers subject to" the two-year statute of limitations, and concluded that their legislature did not include suits for contribution in that limited class. 666 S.W.2d at 772. *Aherron* relied almost exclusively on *Rowland* to reach the same conclusion as to claims for indemnification. *Aherron*, 713 S.W.2d at 499-500. We distinguish these cases from New Mexico law based on policy considerations. Our Legislature intended to define the term "malpractice claim" in the MMA broadly. *Wilschinsky*, 108 N.M. at 517, 775 P.2d at 719. Thus, New Mexico law is based on the converse of the policy concerns articulated and acted upon in *Rowland* and *Aherron*.

{20} In conclusion, we hold that Medical Center's claim for equitable indemnification is governed by the MMA and subject to Section 41-5-13. Because Medical Center's claim was filed outside the three-year limitations period, Section 41-5-13, if applied, would bar Medical Center's amended third-party complaint. We proceed to address Medical Center's argument that application of Section 41-5-13 is impermissible as its application would violate Medical Center's due process and equal protection rights.

Due Process and Equal Protection

{21} Medical Center asserts that, given the timing of Martinez's claim, it had only six days to file its equitable indemnification claim in order to comply with Section 41-5-13 and that this is an unreasonably short period of time. Citing due process and equal protection concerns, Medical Center argues that application of Section 41-5-13 is impermissible. We review constitutional arguments de novo. *Gomez v. Chavarria*, 2009-NMCA-035, ¶ 6, 146 N.M. 46, 206 P.3d 157, *cert. quashed*, 2009-NMCERT-012, 147 N.M. 601, 227 P.3d 91. We begin with due process.

{22} "[T]he [L]egislature may, consistent with due process, impose a statutory time deadline for commencing an accrued action where no limit existed before, and may, consistent with due process, shorten the time period within which existing claims may be brought as long as a reasonable time is provided for commencing suit." *Garcia ex rel. Garcia v. La Farge*, 119 N.M. 532, 541, 893 P.2d 428, 437 (1995) (citations omitted). Thus, "considerations of fairness implicit in the Due Process Clauses of the United States and New Mexico Constitutions dictate that when the [L]egislature enacts a limitations period it must allow a reasonable time within which existing or accruing causes of action may be brought." *Id.* Our Supreme Court has applied these principles in the context of the MMA and has, on three separate occasions, specifically inquired whether application of Section 41-5-13 would violate due process. We review those cases below.

{23} In *La Farge*, a young boy suffered a fainting spell and was treated by a heart specialist. 119 N.M. at 534-35, 893 P.2d at 430-31. The specialist misdiagnosed the

boy's symptoms, but this was not discovered until a subsequent fainting episode. *Id.* at 535, 893 P.2d at 431. The subsequent episode occurred only eighty-five days before the expiration of the limitations period in Section 41-5-13. *La Farge*, 119 N.M. at 542, 893 P.2d at 438. The boy filed a malpractice claim approximately seven months after the Section 41-5-13 date had run. *La Farge*, 119 N.M. at 535, 893 P.2d at 431. Although filed outside the allowable window, our Supreme Court concluded that the boy's due process rights would be violated if Section 41-5-13 was applied to preclude his claim. *La Farge*, 119 N.M. at 542, 893 P.2d at 438. The Court focused on the fact that the boy learned of the malpractice only eighty-five days before the Section 41-5-13 expiration date. *La Farge*, 119 N.M. at 542, 893 P.2d at 438. Eighty-five days, the Court determined, was an unreasonably short period of time within which the boy could exercise his rights. *Id.* Accordingly, the Court concluded that Section 41-5-13 was inapplicable and instead applied the accrual based statute of limitations in NMSA 1978, Section 37-1-8 (1976). *La Farge*, 119 N.M. at 542, 893 P.2d at 438. As the boy had filed suit within three years of the date of accrual—the date the boy discovered the malpractice—his claim could proceed. *Id.*

{24} In *Cummings*, 1996-NMSC-035, ¶¶ 2, 6, a patient received x-rays, and the medical provider identified certain abnormalities, but then failed to properly diagnose those abnormalities. The patient later discovered that the abnormalities were cancerous masses. *Id.* The date of malpractice was identified as August 1988 and the date the patient discovered the malpractice as February 1990, roughly one and one-half years before the Section 41-5-13 limitation period expired in August 1991. *Cummings*, 1996-NMSC-035, ¶ 57. The patient filed her malpractice claim in July 1992, approximately eleven months after the Section 41-5-13 expiration date. *Cummings*, 1996-NMSC-035, ¶ 57. Our Supreme Court declined to extend the conclusion in *La Farge* to the patient's case and determined that her claim was barred by Section 41-5-13. *Cummings*, 1996-NMSC-035, ¶¶ 57-58. The Court reasoned that the patient knew of the malpractice a year and a half before the Section 41-5-13 expiration date, but failed to file her claim. *Cummings*, 1996-NMSC-035, ¶¶ 57-58. Accordingly, the patient could not complain that her due process rights were violated by the preclusive effect of Section 41-5-13. *Cummings*, 1996-NMSC-035, ¶¶ 57-58. She had more than adequate time to take action, but failed to do so. *Id.*

{25} Finally, in *Tomlinson v. George*, 2005-NMSC-020, ¶ 4, 138 N.M. 34, 116 P.3d 105, a patient had wrist surgery in August 1996 that was ineffective and, when the patient saw another specialist only a few months later, was informed that the initial surgeon had been negligent. The patient filed a claim for malpractice in March 2000, roughly seven months after the Section 41-5-13 limitations period expired. *Tomlinson*, 2005-NMSC-020, ¶¶ 5, 10. Again, our Supreme Court declined to apply the result reached in *La Farge*. *Tomlinson*, 2005-NMSC-020, ¶¶ 23-24. The Court observed that the patient learned of the malpractice only a few months after it occurred, but failed to act on this information for most of the Section 41-5-13 period. *Tomlinson*, 2005-NMSC-020, ¶¶ 23-24. As in *Cummings*, the Court concluded that the patient's due process rights were not violated by the preclusive effect of Section 41-5-13. *Tomlinson*, 2005-NMSC-020, ¶¶ 23-24.

{26} Because we have concluded that

Medical Center's equitable indemnification claim is a "malpractice claim" under the MMA and subject to Section 41-5-13, we apply the due process analysis developed in the cases above. We do so despite the fact that the issue in those cases was the due process rights of patients/plaintiffs whereas here we are concerned with the rights of a third-party. Conceptually, these seem like different matters and would, perhaps, implicate a different analysis. The parties do not address that issue.

{27} *La Farge*, *Cummings*, and *Tomlinson* make clear that the due process analysis in the Section 41-5-13 context requires us to identify three dates: (1) the occurrence date, i.e., the date the malpractice occurred; (2) the discovery date, i.e., the date the existence of the malpractice is discovered; and (3) the Section 41-5-13 expiration date. Here, the occurrence date and the Section 41-5-13 expiration date are clear and there is no dispute between the parties as to these dates. The malpractice at issue in this case—Martinez's injuries—occurred on December 9-10, 2004, and thus the three-year limitations period expired on December 10, 2007.

{28} The parties disagree about the date of discovery. Medical Center claims that the discovery date is December 4, 2007, the date Martinez filed her complaint against Doctors, which was six days before the Section 41-5-13 expiration date. Doctors counter that the discovery date is either December 9 or 10, 2004, the date the malpractice committed against Martinez occurred, or December 11, 2007, the date Martinez's complaint was served on counsel for Medical Center. As explained below, we agree with Doctors that the date of discovery is December 11, 2007, the date Medical Center received service or, alternatively, at some point thereafter.

{29} "The key consideration under the discovery rule is the factual, not the legal, basis for the cause of action. The action accrues when the plaintiff knows or should know the relevant facts, whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action." *Coslett v. Third St. Grocery*, 117 N.M. 727, 735, 876 P.2d 656, 664 (Ct. App. 1994) (internal quotation marks and citation omitted). Medical Center concedes that it did not have knowledge that Martinez had suffered an injury until the date her complaint was filed—December 4, 2007. We accept this statement as an admission on Medical Center's part that it did not have knowledge that Martinez suffered injuries prior to Martinez's decision to file suit. We do not, however, accept the legal conclusion implicit in Medical Center's concession, i.e., that Medical Center knew Martinez filed suit merely because Martinez filed a complaint in district court. Medical Center could only discover that Martinez had filed a claim upon receiving service of process. Medical Center received service on December 11, 2007, one day after the three-year limitation period provided by Section 41-5-13 expired. Accordingly, we conclude that the earliest possible discovery date is December 11, 2007. We observe that Medical Center did not file its indemnification claim against Doctors until December 2008. This suggests that the discovery date could be well after December 11, 2007. We need not, however, conclusively decide the issue.

{30} As described above, Section 41-5-13 is a statute of repose and terminates the right to any action after a specific time has elapsed. *Cummings*, 1996-NMSC-035, ¶ 50. Our

Supreme Court has clearly stated that the due process analysis first established in *La Farge*, and further developed in *Cummings* and *Tomlinson*, applies "only to claims discovered within the statutory period; if a claim is discovered after the statute has run, Section 41-5-13 is an explicit bar." *Tomlinson*, 2005-NMSC-020, ¶ 23. The discovery date in the present matter was one day beyond the end of the three-year limitations period provided by Section 41-5-13. As such, we hold that Section 41-5-13 bars Medical Center's claim and further conclude that the preclusive effect of Section 41-5-13 does no harm to Medical Center's due process rights. We conclude this opinion by briefly addressing Medical Center's equal protection arguments.

{31} At the end of Medical Center's discussion of the due process issue, Medical Center contends that its equal protection rights would also be violated if we conclude that Section 41-5-13 applies. This claim appears to be premised on two points. First, Medical Center contends that, if its claim for indemnification is dismissed as untimely, it will be solely responsible for the Martinez liabilities. Medical Center then argues that "the New Mexico [L]egislature did not include third[-]party claims, including indemnity claims, in the [MMA's] definition of 'malpractice claim.'" It is not clear to us how this implicates equal protection and it is well settled that we do not review unclear arguments. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076. Moreover, this claim seems merely a variation of Medical Center's contention that indemnification claims are not governed by the MMA or subject to Section 41-5-13. We rejected this claim above.

CONCLUSION

{32} The district court's determination that Medical Center's amended third-party complaint and the claim for indemnification therein was not governed by the MMA and not subject to Section 41-5-13 is reversed. We reach the opposite conclusion and reject Medical Center's contention that doing so violates its due process and equal protection rights. We remand this matter to the district court with instructions to dismiss Medical Center's amended third-party complaint and for proceedings not inconsistent with this opinion.

{33} IT IS SO ORDERED.

CELIA FOY CASTILLO, Chief Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

MICHAEL E. VIGIL, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2011-NMCA-117

Filing Date: October 19, 2011

Docket No. 30,059

SAN JUAN COLLEGE,

Plaintiff-Appellant,

v.

SAN JUAN COLLEGE LABOR MANAGEMENT RELATIONS BOARD,

Defendant-Appellee.

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for Appellee

OPINION

KENNEDY, Judge.

{1} San Juan College (the College) appeals its Labor Relations Management Board's (the Board) decision regarding the appropriate composition of a faculty member's collective bargaining unit. The College maintains that the faculty member group was unduly restricted. The undisputed applicable factors for consideration in defining the bargaining unit are a proper "community of interest" and "occupational group." We hold that the Board's decision as affirmed by the district court was supported by substantial evidence and affirm.

I. BACKGROUND

{2} In March 2008, a union filed a petition with the State Public Employer Labor Relations Board to represent full-time faculty on nine-month contracts at the College. The petition was dismissed by the state board and remanded to the Board on the College's motion. At the local Board, the College challenged the appropriateness of the proposed bargaining unit as too narrow and sought to include all full-time faculty on nine- and ten-month contracts, as well as full-time instructional professionals with 100%, 80%, 60%, and 50% instructional duties. These percentages reflect a division in the workload for those persons between instructional and administrative duties. For instance, the 60% instructional professional would also be employed to perform 40% of their work as an administrator. The Board held a hearing and took testimony and other evidence. At the hearing, Michael Tacha, Vice President for Learning, testified to the faculty structure at the College and gave his opinion that, as to the fractional duties of employees, management and administrative duties were comparable. The Board issued its decision that the appropriate bargaining unit would include

full-time faculty on both nine- and ten-month contracts, and full-time instructional professionals with 100% instructional duties. The bargaining unit would exclude full-time instructional professionals with less than 100% instructional duties, administrative and managerial staff, and all others.[1] From this ruling, the College appealed to the district court, which affirmed the Board. The College now appeals.

II. STANDARD OF REVIEW

{3} The Public Employee Bargaining Act, NMSA 1978, § 10-7E-23(B) (2003), instructs reviewing courts that "[a]ctions taken by the board or local board shall be affirmed unless the court concludes that the action is (1) arbitrary, capricious[,] or an abuse of discretion; (2) not supported by substantial evidence on the record considered as a whole; or (3) otherwise not in accordance with law." The court views the evidence in a light most favorable to the Board's decision and employs a deferential standard to the decision concerning areas within the agency's expertise. While we do not substitute our judgment for that of the Board, we examine the record to determine whether it supports the result. *N.M. State Bd. of Psychologist Exam'rs v. Land*, 2003-NMCA-034, ¶ 5, 133 N.M. 362, 62 P.3d 1244. If the findings do not support the result, we may adopt facts from the record before us in reaching our decision. *Sanchez v. N.M. Dep't of Labor*, 109 N.M. 447, 449, 786 P.2d 674, 676 (1990). We review whether the Board's decision was in accordance with law employing a de novo standard of review. *Selmeczki v. N.M. Dep't of Corr.*, 2006-NMCA-024, ¶ 13, 139 N.M. 122, 129 P.3d 158. In this case, the parties agree on the nature of the case, the scope of the relevant facts, the standard of review, and the applicable law. The parties dispute the law's application to the facts.

III. DISCUSSION

{4} The question in this case is: What is an appropriate bargaining unit? Under both state law and the Board's resolution, the criteria are virtually identical. The Board is established pursuant to the San Juan College Labor Management Relations Resolution (Resolution) and oversees the collective bargaining process for the College pursuant to the Resolution and Public Employee Bargaining Act (PEBA). NMSA 1978, §§ 10-7E-1 to -26 (2003). Both the Resolution and the PEBA presume appropriate bargaining groups to "be established on the basis of occupational groups or clear and identifiable community of interest in employment terms, employment conditions, and related personnel matters among the employees involved." College LRB Resolution, § 10(A). The Resolution and PEBA define an appropriate bargaining unit in substantially similar terms.

{5} The Board is entitled to determine an appropriate bargaining unit without being hamstrung by having to declare "the most appropriate [bargaining] unit." *Cmty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1084 (D.C. Cir. 2003) (emphasis omitted) (internal quotation marks and citation omitted); *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008). The difference between "a" most appropriate unit and "the" most appropriate unit rests in the fact that sharing a

[1] Should other facts become necessary to our discussion, we will include them.

community of interest does no more than establish a unit that is prima facie appropriate, and "more than one appropriate collective bargaining unit logically can be defined in any particular factual setting." *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000). That a unit with "different contours" might exist is immaterial. *Id.* Specific to this case, the College must show that the employees excluded from the bargaining unit share an "overwhelming community of interest with the included employees[.]" *Blue Man Vegas*, 529 F.3d at 421. There is no absolute rule of law as to what constitutes an appropriate bargaining unit. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947). Because it is the Board's task to choose among bargaining units that are perhaps equally appropriate and because we do not substitute our judgment for the reasonable determination of the Board, we are limited to striking down only those determinations that are "truly inappropriate." *Country Ford Trucks*, 229 F.3d at 1189.

{6} Both parties agree that it is the employer's burden, if it seeks to overturn the Board's decision, to demonstrate that the Board's decision resulted in a "truly inappropriate" unit. *Blue Man Vegas*, 529 F.3d at 421 (internal quotation marks and citation omitted). This results in a high standard of proof set against a firmly set tradition of deference to the Board's decisions.

{7} Here, the College maintains that professional instructors with less than 100% instructional duties—and, by definition, partial administrative and managerial duties—should not have been excluded. The College relies heavily on the testimony given by Tacha to establish the "overwhelming" shared community of interest between the full-time faculty with fractional instructional/ administrative duties from those who are employed full time to teach as 100% of their duties. The College asserts with some hyperbole that there was "no legitimate basis" to exclude the other instructional staff which the College sought to include in the unit. From the College's summary of Tacha's testimony, we gather that all faculty are a community of interest whose purpose at the College is instructional. All who teach students are faculty and receive the same benefits. The College's statement that "[t]he [u]nion presented no testimony substantial enough to contradict the above testimony" reminds us that the College sought the inclusion of the instructional professionals in addition to the nine- and ten-month contract faculty members that were not part of the union's petition. Tacha's testimony indicated that carving away the instructional professionals from other faculty members would create division in the faculty community as the College was trying to erase such differences. We surmise this is a statement of the College's purpose in seeking full inclusion of all faculty members. We determine whether the composition approved by the Board was supported by substantial evidence and in accordance with law. However, we also take into account the union's presentation of a large amount of testimony in reviewing the Board's decision.

{8} We do not take a position in this case as to whether the College's view of the appropriate bargaining unit might be correct. We are not obligated to do so, owing to the deference we pay to the Board's decision and our substantial evidence review. The Board's conclusion as to an appropriate bargaining unit must only be an appropriate unit among what may properly be more than one. We therefore concern ourselves with the

difference between full-time faculty and instructional professionals with 100% teaching duties, and those instructional professionals "who spend 80%, 60%[,] and 50% of their time teaching [and] spend the remaining percentage of their time performing various administrative duties in connection with College programs in which they are involved." (Emphasis omitted.)

{9} The College only argues to us that, although correct as far as it went, the Board's decision established an inappropriate unit that should not have failed to include all of the faculty. We disagree. The College points out that the administrative duties occasioned by the fractional contracts consist of ordering materials, project preparation, and budgeting. Testimony before the Board from Mr. Williams, the union's primary witness, indicated that those Instruction Professionals whose contracts included administrative duties were workers of a different sort—working under annual contracts in contrast to continuing faculty contracts and receiving a pay component for administrative work that occasionally enhanced the salary beyond faculty levels. Instruction Professionals have a different way of bringing grievances about their contracts to the College than do instructors who work under faculty contracts. Faculty members who work pursuant to faculty contracts operate under a different employee handbook than do instructional professionals whose job terms more resemble a contract employee who teaches than a true faculty member. Faculty contracts are made for the academic year while Instruction Professionals' contracts are for the fiscal year. Faculty contracts impose requirements having to do with academic expectations that the Instruction Professionals' contracts do not have. Faculty contracts also limit outside employment where the Instruction Professionals' contracts do not and are terminated pursuant to the "Faculty Handbook" where the Instruction Professionals' contracts may not be changed or amended, save by the President of the College, and their working parameters are governed by the "Employee Handbook for Professional & Support Staff." When renewed, faculty contracts remain in continuing status for the next contract year where Instruction Professionals' renewals "place [the instructor] on 'continuing contract' status . . . effective with the start date of your next year contract." Sick leave and annual leave accrual are handled differently between faculty and instructional professionals. The Board points out that the instructional professionals with less than 100% teaching duties are employed under a different contract that divides their work between instruction and administrative/managerial duties. They are subject to dual lines of supervision, one for each side of their role at the College, which may subject them to conflicting loyalties. This said, instructional professionals employed to provide 100% instruction without other duties or contractual obligations, perform substantially identical jobs as full-time faculty who also are contracted as full-time instructors. The logic of combining these groups is apparent and substantially supported by the evidence.

{10} Having reviewed the record upon which the Board based its decision, we see that full-time faculty, whether pursuant to nine- or ten-month contracts, engage in full-time academic instruction during applicable periods of the school year. Instructional professionals with 100% teaching duties do as well, even though their contract periods are different. Instructional professionals with fractional duties have other responsibilities than teaching and receive additional

compensation for performing these other duties. In our view, it is reasonable to accord full-time teaching personnel whose exclusive job is teaching, the community of interest required to establish a proper bargaining unit.

{11} In accordance with our standard of review, as we resolve all factual disputes in favor of the Board's decision, including indulging all reasonable references, we determine that substantial evidence supports the result that was reached. *Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P.2d 177. We need only find that there is credible evidence for a reasonable mind to accept as adequate the Board's result. *Id.* Having done so, we affirm the Board's decision creating a bargaining unit of faculty members with nine- and ten- month contracts and full-time instructional professionals employed at 100% instruction.

IV. CONCLUSION

{12} Based upon the foregoing analysis, we affirm the district court.

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

RODERICK T. KENNEDY, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

MICHAEL E. VIGIL, Judge

Certiorari Denied, November 3, 2011, No. 33,259

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2011-NMCA-118

Filing Date: September 26, 2011

Docket No. 30,386

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

SHIRLEY REDHOUSE,

Defendant-Appellant.

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OPINION

GARCIA, Judge.

{1} The underlying issue in this case is whether Defendant Shirley Redhouse's uncounseled 1972 misdemeanor conviction for driving while intoxicated (DWI) could be used to enhance Defendant's current DWI conviction when she was not sentenced to any incarceration for the 1972 offense. The State asked the district court to reconsider its ruling on this issue as a legal error six days after Defendant's judgment and sentence was filed. We recognize that "[s]entencing may violate concepts of double jeopardy if not within objectively reasonable expectations of finality." *March v. State*, 109 N.M. 110, 111, 782 P.2d 82, 83 (1989). This case requires us to address and distinguish our decision in *State v. Diaz*, 2007-NMCA-026, 141 N.M. 223, 153 P.3d 57. Upon reconsideration, the district court amended Defendant's sentence based upon legal error regarding the 1972 conviction. Under the facts in this case, Defendant did not have a reasonable expectation of finality in her sentence because the State moved for reconsideration of the district court's ruling on the validity of the prior 1972 DWI conviction within thirty days of the district court's entry of a judgment and sentence. We hold that the district court did not violate Defendant's right to be free from double jeopardy when it re-examined the validity of Defendant's 1972 DWI conviction and amended Defendant's sentence which had been based upon a legal error regarding the prior 1972 conviction. We also hold that the district court did not err in determining that the 1972 conviction was valid for purposes of sentence enhancement. We affirm.

BACKGROUND

{2} On November 30, 2009, Defendant pleaded guilty to aggravated DWI, contrary to NMSA 1978, Section 66-8-102(D)(1) (2008) (amended 2010). Sentencing occurred the same day. The State submitted four prior DWI convictions in order to enhance Defendant's current DWI conviction to a fifth and make the current offense a felony conviction. Defendant contested two of the prior DWI convictions, one from 1972 and one from 1973. The district court initially determined that neither of these two prior convictions could be used for enhancement purposes because neither showed that Defendant had been represented by counsel, yet the court determined that Defendant had been punished by imprisonment for both prior convictions. At the sentencing hearing, the district court asked the State if it wanted further time to contest its ruling regarding prior convictions, and the State declined. Based upon the district court's determination that Defendant had two prior DWI convictions, Defendant was sentenced to 364 days of incarceration. The district court gave Defendant credit for the 109 days served prior to sentencing, suspended the remaining 255 days of the sentence, and placed Defendant on unsupervised probation for 255 days. The judgment and sentence order was filed on December 3, 2009.

{3} On December 9, 2009, the State filed a motion for reconsideration arguing that the district court made a mistake of law when it concluded that the DWI convictions from 1972 and 1973 could not be used for enhancement purposes. Four hearings scheduled followed: January 20, 2010; February 22, 2010; March 10, 2010; and April 19, 2010. The State consequently argued that the district court had erred as a matter of law regarding the use of Defendant's 1972 and 1973 convictions as prior DWI convictions for sentencing purposes. The State did not present any new evidence or attempt to supplement the prior evidence regarding Defendant's 1972 and 1973 convictions. After the first hearing on January 20, 2010, the district court ruled that it had erred as a matter of law concerning the 1972 conviction. Under this ruling, the 1972 conviction counted as a prior DWI conviction even though there was no waiver of counsel because Defendant had not been sentenced to jail for the conviction. Upon Defendant's oral motion for reconsideration on February 22, 2010, the district court held two subsequent hearings and confirmed its ruling that the 1972 conviction could be used for enhancement purposes. However, the district court remained firm that the 1973 conviction could not be used as a prior DWI conviction.

{4} Defendant's judgment and sentence was amended to reflect that Defendant was convicted of a fourth DWI, which statutorily required her to serve at least six months in jail. § 66-8-102(G). Thus, Defendant was required to serve an additional seventy-one days in jail. Defendant appeals the amendment to her judgment and sentence. Defendant argues that she had an expectation of finality in the sentence imposed on December 3, 2009, prior to any reconsideration and subsequent amendment by the district court resulting in a double jeopardy violation. She further argues that a penalty of imprisonment was imposed under her 1972 DWI conviction and thus the district court erred in determining that the 1972 conviction was valid for the purposes of enhancement.

DISCUSSION

Standard of Review

{5} We review Defendant's contention that modification of her sentence violated her constitutional guarantee against double jeopardy under a de novo standard of review. *State v. Lopez*, 2008-NMCA-002, ¶ 12, 143 N.M. 274, 175 P.3d 942. Similarly, we review issues of statutory and constitutional interpretation regarding the validity of Defendant's prior conviction de novo. *See State v. Lucero*, 2007-NMSC-041, ¶ 8, 142 N.M. 102, 163 P.3d 489 (stating that appellate courts "review issues of statutory and constitutional interpretation de novo"). However, to the extent that factual issues are intertwined with issues of constitutional and statutory interpretation, we defer to the district court's factual findings as long as they are supported by substantial evidence. *See State v. Rodriguez*, 2006-NMSC-018, ¶ 3, 139 N.M. 450, 134 P.3d 737.

Defendant's Right to Finality in Sentencing Was Not Violated When the District Court Resentenced Her

{6} Defendant argues that the district court erred by reconsidering and resentencing her to an increased sentence because she had already substantially completed her sentence. Specifically, Defendant contends that the district court's modification of her sentence violated her right to finality in her sentence, implicating her constitutional guarantee

against double jeopardy.

{7} It is well established that "a [district] court generally cannot increase a valid sentence once a defendant begins serving that sentence." *State v. Porras*, 1999-NMCA-016, ¶ 7, 126 N.M. 628, 973 P.2d 880. However, there is an exception to this rule of finality when the original sentence is illegal or improper. *Id.* Our appellate courts have determined that an original sentence is illegal if habitual offender enhancements based on prior convictions have not been included. *See, e.g.*, *State v. Freed*, 1996-NMCA-044, ¶ 9, 121 N.M. 569, 915 P.2d 325. Thus, a habitual offender's sentence may be enhanced at any time prior to the expiration of the underlying sentence. *Porras*, 1999-NMCA-016, ¶ 8. In *Diaz*, this Court determined that enhancement pursuant to the DWI sentencing statute is different from habitual offender enhancement pursuant to NMSA 1978, Section 31-18-19 (1977). *Diaz*, 2007-NMCA-026, ¶ 12-13. In *Diaz* this Court concluded that the prosecution had the burden of presenting proof of prior DWI convictions for sentencing purposes at the original sentencing hearing. *See id.* ¶¶ 3-5, 18, 21 (rejecting consideration of an additional prior DWI that was subsequently discovered after sentencing and presented as a motion to correct an illegal sentence at the time the defendant only had two months remaining on his original prison term). Once a DWI offender was sentenced after considering the evidence of any prior DWI convictions, the prosecution could not introduce new evidence of another "recently" discovered prior DWI conviction and seek a post-judgment enhancement to a third degree felony with an additional six-month term of imprisonment. *Id.* ¶¶ 5, 21.

{8} Defendant relies on *Diaz* in support of her argument that once she was sentenced and began to serve her sentence, the district court could not amend and increase her sentence with another prior conviction that it had previously determined was invalid for purposes of enhancement. The factual circumstances in *Diaz* are, however, significantly different than in this case. In *Diaz*, the state moved to modify the defendant's sentence when the defendant had only two months left to serve of his one-year prison term. *Id.* ¶¶ 4-5. The motion was based on the state having "'recently' learned of another DWI conviction" that, if factored into the defendant's sentence, would have resulted in an additional mandatory six months of imprisonment. *Id.* ¶ 5.

{9} It is apparent that this case is both factually and legally distinct from *Diaz* in four important ways. First, the timing of the state's motion in *Diaz* was considerably late, having been made at the end of the defendant's prison term; whereas here, the State acted expeditiously. Second, in *Diaz* this Court held that the sentence was legal when it was imposed; whereas here, we have an illegal sentence. Third, *Diaz* implicated fairness and due process concerns, *see id.* ¶¶ 19-21, to an extent that are not present in this case. The defendant in *Diaz* had completed a year-long prison term and had already started to serve probation when he was faced with the prospect of returning to prison for six additional months. And fourth, unlike *Diaz* where the prosecution introduced proof of a "recently" discovered prior conviction, in the present case, the State moved for reconsideration of whether the prior convictions introduced at the original sentencing hearing could be used to enhance Defendant's sentence as a matter of law and did not introduce any new evidence. *See id.* ¶¶ 5, 21. As a result, we are not persuaded that *Diaz* controls the outcome in this case.

{10} Increasing a defendant's sentence after a defendant begins serving the sentence implicates double jeopardy concerns if a defendant's objectively reasonable expectations of finality in the original sentencing proceedings are violated. *See March*, 109 N.M. at 111, 782 P.2d at 83 (reasoning that sentencing implicates double jeopardy concerns if a defendant's objectively reasonable expectations of finality are violated); *see also State v. Gaddy*, 110 N.M. 120, 122-23, 792 P.2d 1163, 1165-66 (Ct. App. 1990) (concluding that the defendant's objectively reasonable expectations of finality were violated by the initiation of habitual offender proceedings after the defendant had completely served the underlying sentence). The question here is whether Defendant had an objectively reasonable expectation of finality that would prevent further legal consideration of the evidence presented at her original sentencing hearing on November 30, 2009. We conclude that Defendant had no reasonable expectation of finality under these circumstances and that double jeopardy did not preclude the modification of Defendant's sentence based upon a legal error.

{11} The State has a constitutional right to appeal from a disposition that is contrary to law. *State v. Horton*, 2008-NMCA-061, ¶ 1, 144 N.M. 71, 183 P.3d 956. This right includes appeal of the district court's legal determinations regarding whether a prior conviction can be used for enhancement purposes. *See State v. Tave*, 2007-NMCA-059, ¶¶ 1, 8-10, 141 N.M. 571, 158 P.3d 1014 (concluding that the state was entitled to raise the issue of whether the district court erred in refusing to enhance the defendant's sentence as a matter of law for the first time on appeal). Where the state's time to exercise its constitutional right to appeal has not expired, a defendant has no reasonable expectation of finality in his or her sentence. *See State v. Abril*, 2003-NMCA-111, ¶¶ 21-23, 134 N.M. 326, 76 P.3d 644 (reasoning that a defendant has no reasonable expectation of finality where the prosecution's time to exercise its constitutional right of appeal has not expired).

{12} Here, the State had a right to appeal the decision of the district court that the 1972 DWI conviction could not be used to enhance the sentence for the current conviction as a matter of law. Concomitant with that right is the right to ask the district court to reconsider its decision. *See* NMSA 1978, § 39-1-1 (1917) (stating that final judgments and decrees remain under the control of the district court for thirty days and for additional time as necessary to allow the court to rule upon any motion directed against the judgment that is filed in that period). Because the State expeditiously sought to have the district court correct its legal determination that the 1972 DWI conviction could not be used to enhance the current DWI, Defendant had no reasonable expectation of finality in the sentence entered on December 3, 2009. Thus, Defendant's constitutional guarantee against double jeopardy was not violated when the State expeditiously filed a motion for reconsideration of Defendant's sentence on December 9, 2009.

The District Court Did Not Err in Determining That the 1972 Conviction Was Valid for Purposes of Enhancement

{13} The law is clear in New Mexico "that the use of a prior uncounseled misdemeanor DWI conviction not resulting in a sentence of imprisonment to enhance a subsequent misdemeanor DWI conviction does not violate the New Mexico Constitution." *State v. Woodruff*, 1997-NMSC-061, ¶ 37, 124 N.M. 388, 951 P.2d 605. It is undisputed that

Defendant's 1972 DWI conviction was uncounseled. The issue is whether Defendant served a sentence of imprisonment on that conviction.

{14} The district court conducted four hearings on the matter, taking testimony from Defendant's witnesses, examining documents related to the convictions, and hearing argument of counsel. The evidence established that when Defendant was arrested in 1972 for DWI, she spent some time in jail after her arrest but prior to her conviction on the charge. It is not clear how much time she spent in jail after her arrest, before she was convicted and sentenced. The documentation related to the charge was reviewed by the district court but the actual documents were not made a part of the record. However, the district court's review indicated that based on the 1972 DWI conviction Defendant was sentenced to pay a fine and attend DWI classes. The record showed that she paid some of the fine, but not all of it. When she failed to pay the fine, a warrant was issued. She was then arrested on a second DWI. She was ordered to pay a fine on the second DWI, plus the remaining fine owing from the 1972 conviction. She was also jailed for thirty days for the second DWI.

{15} Defendant makes two arguments on her claim that she was imprisoned on the 1972 DWI conviction. First, she contends that the jail sentence after the second DWI conviction was imposed because she failed to pay the fine on the 1972 DWI conviction. It is not clear from the record that the incarceration ordered at the time of the second conviction was related to the 1972 DWI conviction. There was a great deal of discussion about what the judge *might* have been thinking at the time of sentencing on Defendant's second DWI. However, there is nothing in the record indicating that the jail sentence for the second DWI was because Defendant failed to pay the fine on the 1972 DWI conviction. The record simply shows that Defendant was fined for the 1972 DWI conviction, and she was incarcerated for the second DWI. As a result, substantial evidence supports the district court's determination that Defendant was not sentenced to a term of incarceration as a result of her 1972 DWI conviction.

{16} Second, Defendant argues that she was in jail before her conviction on the 1972 DWI conviction and that she is entitled to receive pre-sentence confinement credit against any sentence that is imposed. Therefore, she argues that any sentence imposed as a result of the 1972 DWI conviction would take into consideration that pre-sentence jail time. As a result of this pre-sentence jail time and any credit allowed thereunder, Defendant argues that she was required to receive the advice of counsel prior to being sentenced for the 1972 DWI conviction. We disagree. Defendant appears to assume that the sentence she actually received for the 1972 DWI conviction did not contain any jail time because she had already served some pre-sentence jail time and was thereby given credit for time served. There is nothing in the written record of the 1972 DWI conviction suggesting that Defendant was given any credit for time served in jail. The only record available reflects that Defendant was not incarcerated under the 1972 DWI conviction and was only fined. Thus, the premise of this argument is based on speculation and must fail because it is not supported by the record herein.

{17} Defendant also appears to be arguing that using a misdemeanor DWI to enhance a crime to a felony DWI does not satisfy the constitution. Defendant does not cite any

authority in support of this argument or explain why using a misdemeanor DWI to enhance to a felony DWI should be treated differently from using a misdemeanor DWI to enhance another misdemeanor DWI. Therefore, we do not address the issue. *See In re Adoption of Doe*, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984). We conclude that the district court did not err in determining that the 1972 DWI conviction could properly be used to enhance Defendant's current DWI conviction because the 1972 DWI conviction resulted in the imposition of a fine and Defendant was not subjected to jail time for this prior conviction.

CONCLUSION

{18} We conclude that Defendant did not have a reasonable expectation that the sentence she received on December 3, 2009, was final. Therefore, the district court could have properly reconsidered her sentence and increase this sentence due to a legal error made by the district court at the original sentencing hearing. Further, the district court did not err in determining that Defendant's 1972 DWI conviction could be used to enhance her current DWI to a fourth DWI conviction. We affirm the amended judgment and sentence imposed by the district court.

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

TIMOTHY L. GARCIA, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

MICHAEL E. VIGIL, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2011-NMCA-119

Filing Date: October 24, 2011

Docket No. 30,020

GUILLERMO RIVERA,

Worker-Appellant,

v.

FLINT ENERGY AND LIBERTY MUTUAL INSURANCE COMPANY,

Employer/Insurer-Appellee.

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OPINION

BUSTAMANTE, Judge.

{1} Appellant Guillermo Rivera (Worker) appeals the decision of the Workers' Compensation Judge (WCJ) to apportion Worker's attorney fees equally between Worker and Appellee Flint Energy (collectively with its insurer, Appellee Liberty Mutual Insurance Company, Employer). Worker argues that the Workers' Compensation Act obligated Employer to pay Worker's attorney fees when he recovered more at trial than he had previously offered to take in settlement. Because we hold that Worker's settlement offer failed to comply with the statute on which Worker relies, we affirm.

BACKGROUND

{2} Worker was injured in the course and scope of his employment in 2004. Over the next five years, Worker litigated various issues related to his injury before the Workers' Compensation Administration. Following the Workers' Compensation Administration Director's issuance of a recommended resolution, Worker's attorney faxed a letter to Employer's attorneys in June 2009. The letter stated that "[w]e would agree to settle as follows[,]" and listed eight factors comprising a proposed settlement. The letter concluded, "[p]lease review the information and offer I have given you and contact me." Employer did not accept Worker's offer.

{3} Trial of Worker's claims took place in July 2009. The resulting compensation order awarded Worker benefits in excess of those his counsel had proposed in his letter to Employer. Worker then filed an application for attorney fees, seeking payment of all fees by Employer under NMSA 1978, Section 52-1-54(F) (2003). That section allows a claimant who makes a pretrial settlement offer to recover attorney's fees, if the offer is (1) made pursuant to the statute, (2) for an amount less than is awarded at trial, and (3) rejected by the employer. The WCJ denied Worker's request for apportionment, finding that the letter did not "provide sufficient specificity or adhere sufficiently to the statute" to trigger the statute's fee-shifting provisions. Accordingly, the judge apportioned Worker's attorney fees, in the amount of $16,500, equally between Worker and Employer. Worker now appeals the apportionment of his attorney fees.

DISCUSSION

Standard of Review

{4} We review a WCJ's interpretation of a statute de novo. *Dewitt v. Rent-A-Center, Inc.*, 2009-NMSC-032, ¶ 14, 146 N.M. 453, 212 P.3d 341. We begin with the plain meaning of the statute's words and construe its provisions together to produce a harmonious whole. *Id.* Once we determine the meaning of the statute, we review the record to determine whether the findings and award are supported by substantial evidence. *Id.*

Worker's Letter Failed to Comply With Section 52-1-54(F)

{5} Section 52-1-54(F) provides that a litigant before the Workers' Compensation Administration "may serve upon the opposing party an offer to allow a compensation order to be taken against him." The statute further provides that, "if the worker's offer was less than the amount awarded by the compensation order, the employer shall pay one hundred percent of the attorney fees to be paid the worker's attorney." Section 52-1-54(F)(4). Worker's attorney sent the letter at issue about a month before trial. The letter proposed that Employer accept the following eight values in resolution of the case:

[Maximum medical improvement] date:	August 18, 2006
Impairment rating:	20%
Modifier points:	72
Total [permanent partial disability] % rate:	92%
PPD weekly $ rate.	$386.46
Overpayment through 6/24/09:	$8,433.93
Overpayment at $386.46/week:	21.82 weeks
Weeks remaining from 6/24/09.	423.18 weeks

The letter was silent in regard to Section 52-1-54(F). It did not refer to the section, nor to any language in the section. It did not indicate that the offer was to allow a compensation order to be taken against Employer or to invoke the fee shifting provision in the Act. Employer rejected Worker's offer, and the case proceeded to trial. At trial, the WCJ awarded Worker the following values for the first five of Worker's factors listed above:

[Maximum medical improvement] date	December 12, 2006
Impairment rating:	20%
Modifier points:	79
Total [permanent partial disability] rating:	99%
PPD weekly $ rate:	$415.87

Thus, it is undisputed that Worker was awarded more at trial than his counsel had offered in his June 2009 letter. Worker argued below, and argues on appeal, that the letter was subject to Section 52-1-54(F). Accordingly, Worker argues the WCJ erred by failing to require Employer to pay the entirety of Worker's attorney fees.

{6} The issue on appeal is whether Worker's letter constitutes a valid "offer to allow a compensation order to be taken against" Employer. *Id.* Employer argues that the WCJ was correct in finding that the letter did not adequately put Employer on notice that the letter was intended to trigger the fee-shifting provisions of Section 52-1-54(F). We agree.

{7} Neither party cites authority construing the requirements of a Section 52-1-54(F) offer or otherwise involving the adequacy of a settlement offer to trigger the statute's fee-shifting provision. Although we have construed the requirements of Section 52-1-54(F) before, the issue raised is one of first impression. Both parties cite *Naranjo v. Paull*, 111 N.M. 165, 803 P.2d 254 (Ct. App. 1990). The Naranjos sued the Paulls for losses they incurred in investments the Paulls had solicited from them. *Id.* at 166-67, 803 P.2d at 255-56. The Paulls argued that liability was barred by the Paulls' prior offer to repurchase the securities under NMSA 1978, Section 58-13-42(B) (repealed 1986), a section of the New Mexico Securities Act. *Naranjo*, 111 N.M. at 168, 803 P.2d at 257. This Court held that an offer sent by the Paulls to all their investors did not qualify as an "offer to repurchase securities" under the Securities Act and therefore could not protect the Paulls from suit. *Id.* As such, while it is useful by way of analogy, *Naranjo* provides only limited direct guidance in connection with the workers' compensation statute at issue here.

{8} *Naranjo* is instructive on another level. In *Naranjo*, we based our decision on fundamental contract principles, which translate directly to our analysis under Section 52-1-54(F). *See Naranjo*, 111 N.M. at 169, 803 P.2d at 258. At its most basic level, this case concerns specifically what type of contract Worker sought. As we recognized in *Naranjo*, "[i]n order to be legally operative and to create a power of acceptance, it is necessary that the offer shall contain all the terms of the contract to be made." *Id.* (internal quotation marks and citation omitted).

{9} Here, Employer argues that the offer from Worker's counsel failed to apprise Employer that the offer was intended to be governed by Section 52-1-54(F), whether on its face or through the filing of a certificate of service with the Workers' Compensation Administration. Employer notes that the offer did not mention the statute or state that the offer it contained was valid only for the ten-day period the statute requires. The offer did not refer to the statute's fee-shifting provision. Also, while we note that the offer was clearly offering to settle the case, Employer observes that it did not state that accepting the offer would require Employer to have a compensation order entered against it. Employer could reasonably have concluded that accepting Worker's offer to "settle" the case would result in the simple dismissal of the action before the Workers' Compensation Administration, rather than the formal entry of an order that the statute requires. We conclude that the offer did not set forth any language that can support the type of agreement Worker claims he intended. Such an omission makes the offer ambiguous as to whether Worker proposed an offer of settlement or an offer of judgment. "This flaw in the offer represents a fatal error in the offer and therefore the offer must be deemed to be incomplete . . . [and] a nullity." *Leonard v. Payday Professional*, 2007-NMCA-128, ¶23, 142 N.M. 605, 168 P.3d 177.

{10} Because the offer failed to either reference Section 52-1-54(F) or to otherwise mention language in that section that would put Employer on notice that the offer was one to allow a compensation order to be taken against Employer, we hold that it was not a valid and effective offer that could invoke the fee shifting provision in the Act. Because the offer did not set forth any language indicating that it was an offer under Section 52-1-54(F), we hold that it was not a valid offer of such an agreement. *See Naranjo*, 111 N.M. at 169, 803 P.2d at 258. Accordingly, we hold that the WCJ did not err by apportioning Worker's attorney fees evenly between Worker and Employer.

{11} We have previously analogized Section 52-1-54(F) to the Federal Rule of Civil Procedure 68, which itself is similar to our own Rule of Civil Procedure, Rule 1-068 NMRA. *Baber v. Desert Sun Motors*, 2007-NMCA-098, ¶ 18, 142 N.M. 319, 164 P.3d 1018, ("In *Lang v. Gates*, 36 F.3d 73 (9th Cir. 1994), cited by *Hise [v. City of Albuquerque*, 2003-NMCA-015, 133 N.M. 133, 61 P.3d 842], the Ninth Circuit Court of Appeals noted that an offer of judgment under the Federal Rule of Civil Procedure 68, which is worded substantially similar to Section 52-1-54(F), has the principle purpose 'to encourage settlement and to avoid litigation.'"). Despite their similarities, this case demonstrates the difference between the rules.

{12} Prior to 2003, Rule 1-068 mirrored Section 52-1-54(F) in that both required offers of judgment. The Rules Committee, however,

amended Rule 68, expressing its belief that requiring "a judgment be entered for the amount of the agreed-upon offer was a disincentive to some litigants to make offers" because those litigants preferred to settle the dispute informally without an entry of judgment. Rule 68, Committee Commentary. The rule now titles the procedure an "Offer of settlement" to make explicit that both offers of judgment and offers of settlement are acceptable means of triggering the rule, even where the only judgment entered is one of dismissal. Section 52-1-54(F) has undergone no such change. The title remains in part, "offer of judgment" and its language requiring "a compensation order to be taken" remains good law. Thus, while the purpose of both the statute and rule remain similar—to promote and encourage settlement, the technical requirements of triggering the offer do not.

{13} As guidance and clarification for the bench and bar, we are not suggesting that offers sufficient to allow fee-shifting need to follow any specific format to be effective. But at a minimum, if counsel's aim is to invoke the provisions of Section 52-1-54(F), the document conveying the offer must refer to the statute explicitly or address each of its material requirements, including that if the offer is accepted a judgment is to be entered against Employer.

CONCLUSION

{14} For the reasons stated herein, we affirm the WCJ's order awarding attorney fees.

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

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

J. MILES HANISEE, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2011-NMCA-120

Filing Date: October 27, 2011

Docket No. 30,000

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

CARLOS GOMEZ,

Defendant-Appellant.

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OPINION

VIGIL, Judge.

{1} Carlos Gomez entered into three separate plea agreements. In each, the State agreed that the total time Gomez could serve would be zero to nine years of incarceration, supervised probation, or treatment, or a combination thereof. It was also agreed that the sentences would be served concurrently with each other. The district court accepted the agreements but misconstrued the plea agreements to permit a sentence of twenty-one years in prison, with sixteen years suspended, for an actual prison term of five years, plus five years of supervised probation. We reverse and remand for entry of a judgment and sentence that conforms to the plea agreements.

BACKGROUND

{2} Over the course of several months in 2007 and 2008 Gomez was charged in six different cases with nineteen criminal offenses. The offenses included possession of marijuana, methamphetamine, and cocaine, trafficking in cocaine, trafficking in heroin, tampering with evidence, bringing contraband into a jail, receiving stolen property, and several motor vehicle violations, among others. Gomez entered into three plea agreements with the State to resolve all six cases.

{3} The first plea agreement was presented to Judge Brown in September 2008 and resolved three of the six cases. Gomez agreed to plead guilty to the crimes charged in one of the three separate indictments. These were: trafficking cocaine, possession of methamphetamine, and receiving stolen property. In addition, Gomez agreed he was a habitual offender. In exchange, the State agreed to dismiss all the remaining charges contained in the indictments and not to file habitual offender proceedings. In the sentencing agreement, the parties agreed "that [Gomez] will serve zero (0) to nine (9) years of incarceration or supervised probation, program or combination of the both."

{4} At the guilty plea hearing, Judge Brown clarified that the sentencing agreement was that the sentences were to be served concurrently with each other. Judge Brown then advised Gomez, "[I]f you have the nine years, that's the maximum because everything else is smaller than that." At the conclusion of the hearing, Judge Brown formally approved the plea agreement. Judge Brown ordered a presentence report and set a sentencing hearing for a later date.

{5} The second plea agreement was presented to Judge Sheppard in January 2009 and resolved the fourth case. Gomez agreed to plead guilty to one count of trafficking cocaine and again admitted he is a habitual offender. The State again agreed to dismiss the remaining charge and not file a habitual offender proceeding. The sentencing agreement was that "[Gomez] will serve zero (0) to nine (9) years of incarceration or supervised probation, treatment program, or a combination of both" and that the sentence would run concurrent with the sentence to be imposed in the first case. At the plea hearing on this case, the prosecutor stated that the parties had agreed that "[Gomez] will serve a period of zero to nine years of incarceration or supervised probation, treatment or a combination of both[.]" Judge Sheppard formally approved the plea agreement. Judge Sheppard noted that a presentence report had been prepared, and he agreed with the parties' request for Judge Brown to impose sentence in both cases.

{6} The third plea agreement, which resolved the remaining two cases, was presented to Judge Butkus in February 2009. Gomez agreed to plead guilty to two charges of possession of cocaine, and again admitted he is a habitual offender. In exchange, the State again agreed to dismiss or not pursue any remaining charges and to not file a habitual offender proceeding. The sentencing agreement was that "[Gomez] will serve zero (0) to nine (9) years of incarceration, supervised probation, in a treatment program, or some combination thereof" and that the sentence would run concurrent with the sentence to be imposed in the first case and in the second case. At the plea hearing, the prosecutor advised the court that "[t]he sentencing agreement is that this case is ultimately going to be lumped into a series of other cases that are pending before Judge Brown, as I understand it. The sentence will be zero to nine years of incarceration, supervised probation or a treatment program or some combination of those three." Judge Butkus formally approved the plea agreement, and also agreed to allow Judge Brown to impose sentences in all three cases. All three plea agreements contained an identical provision stating "[i]f the [c]ourt finds the provisions of [the] agreement unacceptable, after reviewing it and any pre-sentence report, the [c]ourt will allow the withdrawal of the plea, and [the] agreement will be void."

{7} The sentencing hearing for all three consolidated cases was held before Judge Brown in February 2009. The parties informed Judge Brown that Gomez had been accepted into an in-patient treatment program in Fort Stanton and that they agreed to Gomez being sentenced to the program with the remainder of the sentence suspended. Defense counsel also noted that the presentence report recommended that Gomez be ordered to drug court and that the entire sentence be suspended. In response to questions from Judge Brown, counsel stated that Gomez preferred the drug court alternative with a deferred sentence. Judge Brown ruled, "I'm going to defer sentencing in this matter. Addressing Gomez, Judge Brown said:

> I'm going to give you the benefit of the doubt here and sentence you. One of your conditions of release while sentencing is pending is to sign up for, enter, and successfully complete the Drug Court program. At your successful completion of that program, you come back, and I will suspend any balance of the time you have. That's the big benefit to it.

> The downside is, since I'm not sentencing you today, if you go three years and then you blow it, I still got the full nine years hanging over your head. You don't get the credit while you're pending sentencing.
>
> Here's the deal: If I sentence you and put you on probation for nine years, if you go through Drug Court for three, or whatever, and then you go crazy and start doing drugs and blow it and . . . violate your probation, I can only sentence you to six more years in jail, because you had already served three on probation. But since I'm not sentencing you today, I'm not imposing any sentence. It's just being held out there. And if you go three years or whatever length of time, then you blow it, I've got that full nine years I can still impose.

Orders were entered directing Gomez's release with the condition that Gomez report to, and complete, drug court.

{8} However, one month later, drug court reported a violation by Gomez, and a bench warrant was issued for Gomez's arrest. Gomez appeared before Judge Brown in May 2009, a second time for sentencing. Judge Brown announced Gomez would be sentenced to twenty-one years imprisonment, with sixteen years suspended, resulting in an actual term of imprisonment of five years. In addition, Judge Brown said Gomez would be ordered to serve five years of probation upon his release. Gomez filed a motion to modify the sentence to bring it in conformity with the plea agreements. At the hearing on Gomez's motion, Judge Brown refused to reconsider the sentence because he interpreted the plea agreements to permit a sentence of five years of actual incarceration and five years of probation, as each was less than the nine-year cap. Gomez's counsel requested that the judge limit Gomez's post-incarceration probation to four years to comply with the plea agreements rather than leaving open the possibility that Gomez could "keep coming back on probation violations for [twenty-one] years." Judge Brown said that if Gomez wanted to avoid this result, he should not violate probation. The judgment and sentence was filed incorporating Judge Brown's oral sentence. Gomez appeals.

DISCUSSION

Standard of Review

{9} A plea agreement is a unique form of contract whose terms must be interpreted, understood, and approved by the district court. *State v. Mares*, 119 N.M. 48, 51, 888 P.2d 930, 933 (1994). When there is any ambiguity in a plea agreement and the district court resolves the ambiguity with the parties at the time of the plea, the agreement is no longer ambiguous on that point. *Id.* However, if an ambiguity is not resolved by the district court and no extrinsic evidence is introduced that would resolve it, "the reviewing court may rely on the rules of construction, construing any ambiguity in favor of the defendant." *State v. Fairbanks*, 2004-NMCA-005, ¶ 15, 134 N.M. 783, 82 P.3d 954. Under such circumstances, we review the terms of the plea agreement de novo. *Id.* In reviewing and interpreting plea agreements, our task is to construe their terms according to what a defendant reasonably understood when he entered the plea. *Mares*, 119 N.M. at 51, 888 P.2d at 933; *Fairbanks*, 2004-NMCA-005, ¶ 15 .

The Agreements Are That Gomez's Sentence Will Not Exceed Nine Years

{10} Gomez asserts that the sentence imposed in this case exceeds the terms set by his agreements. We agree. Gomez's plea agreements are unambiguous in stating that the total time he will serve pursuant to each agreement is zero to nine years of some combination of incarceration, supervised probation, or treatment. The agreements are also clear that the zero- to nine-year periods to be served pursuant to the second and third agreements are to be served concurrently with the sentence imposed under the first agreement. Therefore, the sentence requiring Gomez to serve a five-year period of incarceration, followed by a five-year period of supervised probation is not within the terms of the agreements. Nine years of any combination of incarceration, supervised probation, and treatment was the maximum that the district court could order Gomez to serve.

{11} We reject the State's argument that the use of the term "serve" in the first agreement indicates an intent to allow for an actual sentence of something greater than nine years, so long as any period above the nine-year cap is suspended or deferred. When a suspended sentence is imposed, the court sentences the defendant and enters an order "suspending in whole or in part the execution of the sentence[.]" NMSA 1978, § 31-20-3(B) (1985). Thus, a defendant is ordered to "serve" a period of imprisonment, but actual imprisonment is delayed unless, and until, the court orders otherwise. *See Mask v. State*, 829 N.E.2d 932, 936 (Ind. 2005) ("A suspended sentence differs from an executed sentence only in that the period of incarceration is delayed unless, and until, a court orders the time served in prison."). This is reflected in the judgment and sentence actually filed in this case, wherein Judge Brown sentenced Gomez "to the custody of the Corrections Department of the State of New Mexico *to be imprisoned* for the term [of] twenty-one (21) years for the basic sentence." (Emphasis added.) Thus, Gomez was clearly ordered by the judgment and sentence to "serve" a prison term greater than nine years. Suspending execution of sixteen years of actual incarceration unless, and until, Judge Brown orders otherwise, does not change the fact that Gomez was sentenced to a prison term of twenty-one years.

{12} The twenty-one year sentence of incarceration was not in accordance with the plea agreements, despite the fact that sixteen years were suspended. In the event that Gomez violates probation, he will be required to serve the full sentence (minus credit for time served on probation), which is clearly in excess of the nine-year cap set forth in the plea agreements.

{13} The second and third agreements contain a provision that "[a]ny 'cap' or other limitation on incarceration shall be a limitation on imprisonment only at initial sentencing" and state that if Gomez violates probation, the district court may sentence him without considering the limitation. However, the first agreement does not. Because the basic sentences for the offenses in the second and third agreements were nine and three years, respectively, the district court had no authority to impose a sentence higher than nine years under either the second or third agreements. The State suggests that this means that the possible nine-year sentence under the second plea agreement and the possible three-year sentence under the third agreement could be run consecutively to each other for a total of twelve years. The State cites no authority to

support this proposition, and where both the second and third agreements state that the sentence in each is to run concurrently with the one imposed under the first agreement, the most reasonable reading is that the sentences imposed under all three agreements will begin to run at the same time—at the time that the sentence in the first agreement begins. As it is only the first agreement that involves crimes for which the basic sentences totaled more than nine years, we look only at that agreement for any intent that the nine-year cap would be limited to the initial sentencing.

{14} We conclude that Gomez reasonably understood that the limit on the entire sentence he could potentially be ordered to serve was nine years, in any combination of prison, supervised probation, or treatment program. This understanding was reasonable in light of the plain language of the plea agreements and as a result of the hearing held before the three judges who accepted the plea agreements. Further, a suspended sentence, which allows for the possibility that he could actually serve more than nine years in prison, violates the plea agreements. Construing any ambiguity in the agreements in the light most favorable to Gomez, we come to the same conclusion.

On Remand, the District Court Must Enforce the Agreements

{15} Since Gomez's sentence was not in conformity with the plea agreements, the question is what remedy is appropriate. Gomez does not want to withdraw his plea, and he asserts that he should be permitted to enforce the agreements as written. We agree.

{16} New Mexico jurisprudence is clear that when a defendant pleads guilty or no contest in exchange for a specific, guaranteed sentence, he is entitled to specific performance of the plea agreement or be given the opportunity to withdraw the plea. *State v. Pieri*, 2009-NMSC-019, ¶¶ 5, 30, 33, 146 N.M. 155, 207 P.3d 1132. Once the plea is accepted, the court is bound by the dictates of due process to honor the agreement and is barred from imposing a sentence that is outside the parameters set by the plea agreement. *State v. Sisneros*, 98 N.M. 279, 281, 648 P.2d 318, 320 (Ct. App. 1981), *aff'd in part, rev'd in part on other grounds*, 98 N.M. 201, 202, 647 P.2d 403, 404 (1982). Our Supreme Court has expressly recognized that such is the case when a plea agreement contains a maximum incarceration potential after a probation violation, such as the case now before us. In *Mares*, 119 N.M. at 51, 888 P.2d at 933, the Court said:

> [T]he parties should be able to negotiate the terms of a plea agreement to the full extent allowed by law. If the prosecution wishes to offer a maximum potential incarceration provision in exchange for a guilty plea, it should be allowed to do so. The fact that such a plea may prevent the trial court from ordering that a defendant be incarcerated after a probation violation is something that the prosecution must weigh before it decides to offer the plea agreement. When all parties agree, however, that a plea agreement will include a maximum potential incarceration provision that governs both sentencing and post-sentencing procedures, and the trial court approves the agreement, this Court will enforce that provision and require the trial court to suspend the agreed-upon period of incarceration.

Id.

{17} We do not hesitate to conclude that each district court judge approved the plea agreement presented him. At Gomez's three plea hearings, the judges orally approved the agreements and signed them, indicating that the agreements were accepted. Although each judge postponed sentencing and each agreement provided that "[i]f the [c]ourt finds the provisions of this agreement unacceptable, after reviewing it and any pre-sentence report, the [c]ourt will allow the withdrawal of the plea, and this agreement will be void," no judge stated he intended to reserve his decision to accept or reject the plea until he was able to review the presentence report. Importantly, even after the presentence report was prepared and presented to Judge Brown, he did not reject the plea agreements. In fact, all the indications are that Judge Brown accepted the plea agreements and intended to comply with them. Most telling is Judge Brown's statement at the hearing on Gomez's motion to reconsider, in which Judge Brown stated he believed that the sentence complied with the terms of the agreements. We therefore conclude that the plea agreements were approved and accepted. However, this record reflects that Judge Brown also misunderstood the terms of the plea agreements.

{18} The question before us is whether, notwithstanding the misunderstanding, the plea agreements must be enforced under *Pieri*, *Sisneros*, and *Mares*. Our conclusion is in the affirmative. *See Elmore v. Commonwealth*, 236 S.W.3d 623, 628-29 (Ky. Ct. App. 2007) (holding that where the district court misconstrued the plea agreement, on remand the defendant should be permitted to choose whether to enforce the agreement as written or withdraw his guilty plea); *State v. Reaves*, 2008 SD 105, ¶ 11, 757 N.W.2d 580 (holding that where the district court misconstrued the plea agreement to permit it to sentence the defendant to any legal sentence, so long as it suspended any portion above the fifteen-year cap, enforcement of the agreement as written was the proper remedy). A defendant who has pled guilty in exchange for a specific sentence is entitled to have the agreement enforced as a matter of due process. *Sisneros*, 98 N.M. at 281, 648 P.2d at 320. Similarly, when the prosecution has acted in reliance on the agreement by dismissing charges or allowing potential witnesses to be excused from testifying, it too has an interest in having the agreement enforced. When an agreement is capable of different interpretations, the district court has authority to clear up any ambiguity before it approves and accepts the plea agreement, and the agreement is no longer ambiguous as to that matter. However, when the district court imposes a sentence that does not conform to the agreement, the interests of justice are better served by enforcing the agreement instead of forcing a defendant to either accept a sentence that does not conform to the agreement, or alternatively, by forcing the defendant to withdraw the guilty plea.

CONCLUSION

{19} The judgment and sentence is vacated and the case is remanded to the district court to enter a judgment and sentence that conforms to the plea agreements.

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

MICHAEL E. VIGIL, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

TIMOTHY L. GARCIA, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2011-NMSC-045

Filing Date: December 14, 2011

Docket No. 33,028

STATE OF NEW MEXICO ex rel. HON. MIMI STEWART, HON. BEN LUJAN, HON. ELEANOR CHAVEZ, HON. ANTONIO LUJAN, HON. MIGUEL GARCIA, and HON. CISCO McSORLEY, members of the New Mexico Legislature and citizens of New Mexico,

Petitioners,

v.

HON. SUSANA MARTINEZ, Governor of the State of New Mexico, HON. DIANNA J. DURAN, Secretary of State of New Mexico, and HON. CELINA BUSSEY, Secretary of New Mexico Department of Workforce Solutions,

Respondents,

and

HON. GARY KING, Attorney General of the State of New Mexico,

Intervenor.

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[redacted]

[redacted]

OPINION

CHÁVEZ, Justice.

I. INTRODUCTION

{1} The New Mexico Legislature passed House Bill 59 during the 2011 legislative session. H.B. 59, 50th Leg., 1st Sess. (N.M. 2011) [hereinafter H.B. 59]. House Bill 59 sought to amend five different sections of the Unemployment Compensation Law (the Act), NMSA 1978, §§ 51-1-1 to -59 (1936, as amended through 2010), in order to address the impending insolvency in the unemployment compensation fund. In addition to reducing benefits to the unemployed, House Bill 59 increased employer contributions to the unemployment compensation fund over the contributions that would be made in 2011. H.B. 59, § 51-1-11(I)(6). Governor Susana Martinez partially vetoed House Bill 59 by striking one of the variables in Section 51-1-11(I)(6) that was necessary to calculate employer contributions beginning on January 1, 2012. The Petitioners, each of whom are legislators, seek a writ of mandamus invalidating Governor Martinez's partial veto. Because the effect of the partial veto was to exempt most employers from making what would otherwise be mandatory contributions to the unemployment compensation fund for calendar year 2012, we hold that the partial veto was invalid. We therefore issue a writ of mandamus ordering that House Bill 59 be reinstated as passed by the Legislature.

II. BACKGROUND

A. *The Unemployment Compensation Law*

{2} When the Legislature first enacted the Act in 1936, the legislators found it worthwhile to include "[a]s a guide to the interpretation and application" of the Act, a "declaration of state public policy." 1936 N.M. Laws (Special Session), ch. 1, § 2. The declaration stated that

> [e]conomic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. . . . The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. *The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this State requires the enactment of this measure, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.*

Id. (restated as NMSA 1978, § 51-1-3) (emphasis added). The Act establishes an unemployment compensation fund and the parameters for unemployment benefit eligibility. *See generally* NMSA 1978, §§ 51-1-1 to -59. In relevant part to this Opinion, the Act establishes employers' rates of contribution to the unemployment

compensation fund based on "benefit experience." *See* NMSA 1978, § 51-1-11 (2010). Less-established employers, who have not yet had "accounts chargeable" for thirty-six months, are charged a flat rate of two percent. *Id.* Subsection F. More-established employers, on the other hand, which have "accounts chargeable" with benefits for the preceding thirty-six months, contribute to the unemployment compensation fund on the basis of (1) *the employer's record*, and (2) *the condition of the fund*, according to Section 51-1-11(I). *See* § 51-1-11(F). There are exceptions to this framework for certain employers that have recently acquired other "employing units," *see* § 51-1-11(F)(1), and for certain employers conducting business outside New Mexico, *see* § 51-1-11(F)(2).

{3} Section 51-1-11(I) of the Act provides that the more-established employers' annual contribution rates are determined by the combined effect of two variables, a reserve rate ("Reserve Rate") assigned to each employer and an annual contribution rate schedule ("Contribution Schedule"). Section 51-1-11(I)(4) provides a chart called the "table of employer reserves and contribution rate schedules," which determines an employer's contribution rate based on the intersection of the row representing the employer's Reserve Rate and the column representing the Contribution Schedule. *See* § 51-1-11(I)(4). The Reserve Rate is dependent on a particular employer's unemployment record; it is calculated "by the excess of the employer's total contributions over total benefit charges computed as a percentage of the employer's average payroll reported for contributions." Section 51-1-11(I)(1).

{4} In any given year, the Contribution Schedule is the same for all established employers. The Contribution Schedule ranges from Schedule 0 to Schedule 6. *See* § 51-1-11(I)(2)(a)-(g). Determining the relevant Contribution Schedule has varied over the years. During some years a statutory formula was applied to determine the relevant schedule, while during other years the Legislature specified which schedule would be applied for a given year. When determined by formula, the Contribution Schedule is inversely related to the condition of the unemployment compensation fund. Section 51-1-11(I)(2). The Contribution Schedule increases when the unemployment fund, as a percentage of total payrolls, decreases. *Id.* Likewise, when the amount in the fund becomes a larger proportion of total payrolls (i.e., the fund becomes healthier), the Contribution Schedule decreases, lowering employers' annual contribution rates. *Id.* Prior to House Bill 59, Section 51-1-11(I) of the Act provided that "for each calendar year *after 2011*," the Contribution Schedule to be applied depended on a calculation based on a statutory formula. Section 51-1-11(I)(2) (2010) (emphasis added). House Bill 59 amended Section 51-1-11(I)(2) by changing the effective date for calculating the Contribution Schedule by formula to "each calendar year *after 2012*." H.B. 59, § 51-1-11(I)(2) (emphasis added).

{5} In addition to delaying the onset of a formula-based Contribution Schedule, House Bill 59 set a fixed Contribution Schedule for the year 2012, making the variable independent from the relative health of the unemployment fund. *See* H.B. 59, § 51-1-11(I)(6), as passed by the Legislature ("[F]rom January 1, 2012 through December 31, 2012, each employer making contributions pursuant to this subsection shall make a contribution at the rate specified in Contribution Schedule 3."). It set the Contribution Schedule for 2012

at Schedule 3, higher than both the fixed Contribution Schedule in 2010 (Schedule 0), § 51-1-11(I)(6) (2010), and the fixed Contribution Schedule for 2011 (Schedule 1), *id.* (2011). Thus, under House Bill 59 as passed by the Legislature, the Contribution Schedule continued to be specified by the Legislature independent from the health of the unemployment compensation fund for 2011 and 2012, H.B. 59, § 51-1-11(I)(5)-(6), but set by formula beginning in 2013, H.B. 59, § 51-1-11(I)(2). Because the health of the fund is not known, it is not clear what the 2012 Contribution Schedule would be if it was set by the formula, a matter that gains importance with Governor Martinez's partial veto.

B. *Partial Veto to House Bill 59*

{6} Governor Martinez vetoed one substantive provision from House Bill 59, the provision of Section 51-1-11(I) that fixed the 2012 Contribution Schedule at Schedule 3.[1] She explained her veto in an executive message:

> While solvency [of the unemployment compensation fund] is a legitimate concern, the rate increase [implemented by the Legislature] is not triggered by insolvency.
>
> The reason the contribution rate would increase is because the current law locking the rate at Schedule 1 will sunset on December 31, 2011. Once that law sunsets, the rate will again be determined by the floating calculation. To avoid the floating calculation, this bill arbitrarily sets the contribution rate at Schedule 3, beginning January 1, 2012. However, the legislature could have instead continued the contribution rate at Schedule 1 and thus prevented any tax increase, regardless of the status of the fund.

House Executive Message No. 40, 2011 Regular Session at 2. The "floating calculation" to which the Governor refers is the Contribution Schedule set by formula, as explained above. The "increase" to which the Governor refers must be a comparison of the fixed Contribution Schedule in 2011, Schedule 1, with the fixed Contribution Schedule in 2012, Schedule 3, because the formula-based schedule is not known. As previously mentioned, it is not clear if the formula-based Schedule would have been higher or lower than Schedule 3. What is clear, however, is that with either a floating Contribution Schedule or Schedule 3, all employers would have been obligated to make some level of contribution to the fund. The veto message expresses the intent to use the line-item veto to eliminate the "arbitrarily set" Contribution Schedule. By implication, Governor Martinez intended to continue the mandatory employer contributions, but at a lower rate.

{7} The Governor's veto, however, did not accomplish a reversion to a "floating calculation" for the Contribution Schedule or to any schedule. By retaining the provision of House Bill 59 that delayed the onset of a formula-set Contribution Schedule until 2013, H.B. 59, § 51-1-11(I)(2), and vetoing only the language that provided for a fixed, interim Contribution Schedule, H.B. 59, § 51-1-

[1]In addition, she deleted the "and" that preceded the vetoed provision of the subsection, making the remainder of Section 51-1-11(I) grammatically correct.

11(I)(6), the Governor's veto, perhaps inadvertently, left a void, as there is no Contribution Schedule for 2012. Without a Contribution Schedule in 2012, there is no basis with which to determine employer contributions to the unemployment fund by established employers for calendar year 2012. These employers have effectively been exempted from what has been a mandatory contribution requirement since the Act's inception. *See* § 51-1-3 ("[T]he general welfare of the citizens of this state requires . . . the compulsory setting aside of unemployment reserves."); *see also* § 51-1-9(A) ("Contributions shall accrue and become payable by each employer for each calendar year in which he is subject to the payments of contributions under the Unemployment Compensation Law."); § 51-1-11(F) (2010) ("For such an [established] employer, the contribution rate shall be determined pursuant to Subsection I of this section on the basis of the employer's record and the condition of the fund.").

C. *A Writ of Mandamus Is Proper in this Case*

{8} This Court has ruled on the constitutionality of a governor's veto in past cases involving writs of mandamus. *See State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 364, 524 P.2d 975, 980 (1974). Initially, we did not address the merits of the petition for writ of mandamus filed in this case because, in her executive message, the Governor expressed her intent to include the Act on the agenda of the 2011 Special Session on redistricting. Because the special session took place before the effective date of the language vetoed by Governor Martinez, addressing the issue during the special session would have been a plain, speedy, and adequate remedy in the ordinary course of law that was available to Petitioners; therefore, a writ of mandamus was not warranted. *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 12, 128 N.M. 154, 990 P.2d 1277 ("Mandamus is a drastic remedy to be invoked only in extraordinary circumstances" and when there is not "a plain, speedy and adequate remedy in the ordinary course of law." (internal quotation marks and citations omitted)). In addition, this was not a situation in which legislators would have had to override the Governor's veto by a two-thirds majority pursuant to Article IV, Section 22 of the New Mexico Constitution. While a veto override may not constitute an adequate remedy if a veto is unconstitutional, only a majority of the Legislature would have needed to vote favorably on legislation introduced during the special session in order for it to reach the Governor's desk.

{9} When no resolution was reached on the issue during the 2011 Special Session, Petitioners asserted that their petition was ripe and asked us to rule on the merits. The next legislative session in January 2012 will not start, much less produce a possible remedy, until after the language at issue in House Bill 59 takes effect. Therefore, we have exercised our discretion to decide the merits of the petition.

D. *The Veto Is Invalid Because What Remained Resulted in an Unworkable and Incomplete Act*

{10} Petitioners assert two arguments in support of their petition for a writ of mandamus invalidating Governor Martinez's partial veto and reinstating House Bill 59 as written by the Legislature. First, House Bill 59 is not a bill appropriating money, and therefore the Governor does not have the authority to partially veto the legislation. Second, if House Bill 59 is a bill appropriating

money, Governor Martinez's partial veto is invalid because it distorts the legislators' intent in enacting House Bill 59. In response, the Governor contends that House Bill 59 is a bill appropriating money, and that because she struck the entirety of Section 51-1-11(I)(6), the veto is constitutional.

{11} The Governor has constitutional authority to approve or disapprove any part or item of any bill appropriating money. N.M. Const. art. IV, § 22. Any bill appropriating money is not synonymous with the General Appropriation Act. *State ex rel. Dickson v. Saiz*, 62 N.M. 227, 233-34, 308 P.2d 205, 209 (1957). This partial veto power permits the Governor to meaningfully participate in the appropriations process. *Id.* Significantly, the Legislature cannot circumvent the Governor's veto power by the careful drafting of legislation. *Kirkpatrick*, 86 N.M. at 364, 524 P.2d at 980 ("The Legislature may not properly abridge that power by subtle drafting of conditions, limitations or restrictions upon appropriations."). Conversely, the Governor may not exercise the partial veto power to "in effect create legislation inconsistent with that enacted by the Legislature, by the careful striking of words, phrases, clauses or sentences." *Id.* at 365, 524 P.2d at 981.

{12} Ordinarily, we would first answer whether the bill being partially vetoed is an appropriation bill, because if the bill does not appropriate money, the Governor does not have constitutional authority to partially veto the bill. *See Chronis v. State ex rel. Rodriguez*, 100 N.M. 342, 344, 670 P.2d 953, 955 (1983) ("[B]ecause the Act does not appropriate money, we hold that the Governor's veto power was invalidly exercised in violation of Article IV, Section 22 [of the New Mexico Constitution]."). However, the dispositive and perhaps less complex question in this case is whether the Governor's partial veto of House Bill 59 destroyed the whole of the item or part, leaving a workable piece of legislation without creating legislation that is inconsistent with the Act. Therefore, for purposes of this Opinion, we assume, without deciding, that House Bill 59 is a bill appropriating funds.

{13} To begin the analysis, we acknowledge that the Governor of the State of New Mexico has broad veto authority. *State ex rel. Coll v. Carruthers*, 107 N.M. 439, 442, 759 P.2d 1380, 1383 (1988) ("New Mexico differs from most other states with item-veto provisions because it allows the broadest possible veto authority by additionally providing authority to veto 'parts', not only 'items'."). This authority stems from the Constitutional Convention that "specifically adopted a proposal which increased the partial veto power to parts of bills of general legislation which contained incidental items of appropriation." *Saiz*, 62 N.M. at 235, 308 P.2d at 210 (internal quotation marks and citation omitted).

{14} We have previously considered the contours of this power. We recognized in *Saiz* that this ability to veto parts was a "quasi-legislative" function.

> Our Constitution does not, necessarily, foreclose the exercise by one department of the state of powers of another but contemplates in unmistakable language that there are certain instances where the overlapping of power exists. Indeed, when the Governor exercises his right of partial veto he is exercising a quasi-legislative function.

62 N.M. at 236, 308 P.2d at 211. We held in

Kirkpatrick, however, that the Governor could overstep such power by eliminating substantive parts of a bill.

> The power of partial veto is the power to disapprove.... It is not the power to enact or create new legislation by selective deletions.... Thus, a partial veto must be so exercised that it eliminates or destroys the whole of an item or part and does not distort the legislative intent, and in effect create legislation inconsistent with that enacted by the Legislature, by the careful striking of words, phrases, clauses or sentences.

86 N.M. at 365, 524 P.2d at 981.

{15} Thus, a Governor uses the partial veto properly if the veto eliminates or destroys the whole of an item or part, otherwise leaving intact the legislative intent regarding the remaining provisions in the bill. All language that relates to the subject to be proscribed by the veto must be vetoed for the veto to be valid. In addition, the remaining legislation must continue to be a workable piece of legislation.

{16} For example, in *Saiz*, we held that New Mexico Governor John E. Miles constitutionally vetoed a "part" of a bill appropriating money. 62 N.M. at 236, 308 P.2d at 210-11. The part of the bill that he vetoed consisted of several non-consecutive provisions, all relating to the same purpose. Each of the vetoed subsections and portions of subsections was part of the amended bill's language that were enacted to permit Sunday alcohol sales. To illustrate, Governor Miles's message stated that he had vetoed:

> All part [sic] of sub-section (a) of Section 1204, which reads as follows:
>
> Provided, however, that the licenses of retailers shall allow them to sell and deliver alcoholic liquors, and the licenses of dispensers and clubs shall allow them to sell, serve, deliver and permit the consumption of alcoholic liquors on their licensed premises on Sundays between the hours of 2:00 P.M. and 11:00 P.M. in municipalities within or composing local option districts, and in counties composing local option districts, outside of the limits of the municipalities therein situated, if a majority of all votes cast at an election in any such municipality or county are in favor of the sale of alcoholic liquors on Sundays in each municipality or county.
>
> All of sub-section (b) of Section 1204.
>
> All of sub-section (c) of Section 1204.
>
> That part of sub-section (d) of Section 1204, which reads as follows:
>
> or on any Sunday between 2:00 A.M. and 2:00 P.M. and between 11:00 P.M. and midnight;
>
> All that part of sub-section (e) of Section 1204, which reads as follows:
>
> in any municipality or county which has not voted in favor of the sale of alcoholic liquor on Sundays

> therein, under the provisions of this Act.

Id. at 232, 308 P.2d at 208 (internal quotation marks omitted) (quoting the Governor's veto message).

{17} We held that it did not matter that the veto eliminated entire subsections, portions of other subsections, or portions of the bill that were not adjacent to one another. *Id.* at 236, 308 P.2d at 210-11. Each of the vetoed provisions needed to be eliminated in order for the Governor to fully amend the bill so as not to permit alcohol sales on Sunday. Each provision that was vetoed made up the "part" of the bill that permitted alcohol sales on Sunday.

> [Governor Miles] went through the bill before him with meticulous care, lifting from it, wherever found, the part or parts germane to the subject about to be proscribed, and which together, made up a rounded whole, and took such part or parts from the bill. It mattered not where in the bill they rested if they constituted an integral part of the subject being partially vetoed—out they came!

Id. at 237, 308 P.2d at 212 (per curiam, on motion for rehearing). The "challenged act [was] not invalid or unconstitutional on any of the grounds raised against it, including the claim that the act [was] bad because the partial veto applie[d] to part of a section or sub-section." *Id.* at 236, 308 P.2d at 210. Had the Governor only stricken one or two of the provisions that referred to alcohol sales, leaving other related provisions intact, the veto would not have been complete and would have otherwise distorted the remaining provisions in a way that made the remaining bill unworkable. For example, had the Governor not vetoed the portions of Subsections (d) and (e), the legislation would have been ambiguous regarding what was meant by reference to Sunday liquor sales.

{18} We adopted our approach in *Saiz* by considering the approach taken by several other state supreme courts. *See id.* For example, in *Cascade Telephone Co. v. Tax Commission of Washington*, one of the primary cases upon which we relied in *Saiz*, the Washington Supreme Court considered state constitutional language that allowed a governor to partially veto a "section or sections, item or items." 30 P.2d 976, 977 (Wash. 1934). Despite the use of the word "sections" in the Washington Constitution, the Washington Supreme Court concluded that the reference did not mean the "sections" designated by the legislature, but rather the parts of the bill related by subject matter: "By the artful arrangement of the subject-matter and an arbitrary division into sections, the Governor's power might be unduly limited or enlarged without reason." *Id.* The Washington Supreme Court concluded that the Washington Constitution's reference to "sections" intended groupings based on subject matter and not simply what was termed a "section" in the passed legislation. *Id.* Likewise, Governor Miles's veto in *Saiz* eliminated a "part" of the bill, despite the noncontiguous provisions, due to the vetoed provisions' shared subject matter. 62 N.M. at 236, 308 P.2d at 210-11.

{19} In *Saiz* we also relied on Wisconsin jurisprudence because the Wisconsin Constitution has a partial veto provision almost identical to New Mexico's. 62 N.M. at 235, 308 P.2d at 210. In *State ex rel. Wisconsin Telephone Co. v. Henry*, 260 N.W. 486 (Wis. 1935), the Wisconsin governor had

vetoed portions of a bill that authorized a certain tax and appropriated the revenues for emergency relief. *See State ex rel. Sundby v. Adamany*, 237 N.W.2d 910, 915 (Wis. 1976) (describing the facts underlying the *Henry* dispute). The vetoed portions declared the bill's intent and created an agency to administer the fund. *Id.* The Wisconsin Supreme Court held that the constitution's reference to "part or parts" empowered the governor to veto any part or parts of an appropriation bill, "regardless of their nature, unless they constitute inseparable conditions or provisos upon the particular appropriation involved." *Id.* Inseparability was not a concern in *Henry* because there was no "expressly stated connection between the parts disapproved and the parts which were approved by the Governor." 260 N.W. at 491. The Wisconsin Supreme Court in *State ex rel. Martin v. Zimmerman*, 289 N.W. 662 (Wis. 1940) later applied the *Henry* separability test for the completeness of a veto, holding that a veto was proper because it left behind "an effective and enforceable law on fitting subjects for a separate enactment by the legislature." *Martin*, 289 N.W. at 665.

{20} The Wisconsin Supreme Court's opinion in *Adamany* is also instructive. In *Adamany*, the Wisconsin governor vetoed several provisions in a bill appropriating money, each of which required five percent of the electors from towns, villages, cities, and counties to sign and file a petition in order for the respective governing bodies to hold a referendum vote on particular tax increases. 237 N.W. at 911-12. The effect of the governor's vetoes was that the governing bodies of towns, villages, cities, and counties would *always* be required to hold a referendum in order to increase that particular tax, not just when five percent of the voters in the particular jurisdiction signed a petition requesting a referendum. *Id.* at 912. The Wisconsin Supreme Court upheld the veto because "even if the result effectuates a change in legislative policy, *as long as the portion vetoed is separable and the remaining provisions constitute a complete and workable law*," the veto is valid. *Id.* at 916 (emphasis added). In addition, the vetoes were upheld because they did not cause any inconsistency within the rest of the bill. In fact, the court commented that the governor's vetoes had eliminated confusion that had existed in the legislation prior to the veto. *Id.* at 918 ("Moreover, the vetoes resolved an inconsistency created by the sections immediately preceding each challenged section.").

{21} In this case, the Governor's veto message expressed disapproval of House Bill 59's "arbitrary" Contribution Schedule, Schedule 3, for 2012. The veto deleted only the language that set the Contribution Schedule to Schedule 3 for 2012 and retained the language that delayed the sunrise of the formula-based Schedule until 2013. The Governor's veto, however, did not return the Act to its former language, providing for the default, formula-based Schedule, or to any schedule for 2012. Rather, the veto arbitrarily eliminated the Contribution Schedule variable used to determine established employer contributions to the unemployment compensation fund for the year 2012. Unlike the veto in *Saiz*, the Governor's veto did not completely delete all the provisions in House Bill 59 that would have addressed the concerns described in the Governor's veto message. Instead, the Governor's veto deleted a portion of the bill that specifically related to another portion of the bill that was retained: the "after 2012" language found in House Bill 59, Section 51-1-11(I)(2), had been added to delay the formula-based Contribution

Schedule during 2012, the year for which the vetoed provision had provided an interim, fixed Contribution Schedule.

{22} Here, unlike the veto upheld in *Adamany*, the Governor's veto creates, rather than eliminates, inconsistencies within both House Bill 59 and the Act as a whole. As mentioned earlier in this Opinion, the Act's purpose statement provides that employer contributions will be "*compulsory*," § 51-1-3 (emphasis added), and other provisions of House Bill 59 provide that established employers' contribution rates "*shall* be determined . . . on the basis of the employer's record and the condition of the fund as of the computation date for the calendar year," H.B. 59, § 51-1-11(F) (emphasis added). The Governor's veto eliminates established employers' contributions for 2012 by making it impossible to determine the 2012 employer contribution rate. By only deleting certain language, the setting of the 2012 Contribution Schedule to Schedule 3, and leaving other phrases relating to the same subject matter intact, the delay of a formula-based Contribution Schedule until after 2012, the Governor's veto impermissibly left an incomplete and unworkable Act.

{23} Because we conclude that the Governor's partial veto had the effect of altering the remainder of the Act by nullifying its application to established employers in 2012, we hold that the veto was unconstitutional. Both parties have urged us to reinstate House Bill 59 as passed by the Legislature in the event we conclude that the partial veto is invalid. Accordingly, we issue the writ, reinstating House Bill 59 as passed by the Legislature.

III. CONCLUSION

{24} We hold that the partial veto to House Bill 59 is unconstitutional because after the Governor vetoed the language regarding the increase to the 2012 Contribution Schedule from Schedule 1 to Schedule 3, what remained was an unworkable piece of legislation. For the foregoing reasons, we hold that the partial veto to House Bill 59 is constitutionally invalid. Accordingly, we issue a writ of mandamus ordering the reinstatement of House Bill 59 as passed by the Legislature.

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

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

PATRICIO M. SERNA, Justice

PETRA JIMENEZ MAES, Justice

RICHARD C. BOSSON, Justice

RODERICK KENNEDY, Judge
Sitting by designation

Certiorari Granted, December 7, 2011, No. 33,287

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2011-NMCA-121

Filing Date: October 25, 2011

Docket No. 30,110

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ELIAS URIOSTE,

Defendant-Appellant.

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OPINION

SUTIN, Judge.

{1} Following a jury trial, Defendant Elias Urioste was convicted of voluntary manslaughter, aggravated battery with a deadly weapon, three counts of tampering with evidence, and two counts of conspiracy to commit tampering with evidence. His victim was Vincent Espinosa (Victim). Defendant was sentenced to a total of forty years imprisonment. We affirm Defendant's convictions of voluntary manslaughter, aggravated battery, and tampering with evidence, and we reverse Defendant's convictions of conspiracy to commit tampering with evidence.

BACKGROUND

{2} Victim was last seen by his family on January 28, 2007. On that date, Victim and his brother were helping their grandmother move. Victim told his brother that he had to "go down to the valley[,]" and later that day he had planned to go to a barbeque. Victim's friends and family never heard from him again.

{3} On January 28, 2007, Fred Barncastle and his family were driving around the Double Eagle Airport watching airplanes. As Barncastle drove east, away from the airport,

he noticed a fire to the south that "started up real fast, and then . . . died down[.]" He guessed that the fire was on the mesa. Around the same time that he noticed the fire, Barncastle also noticed a "dull gray" Lincoln automobile coming from the south. Barncastle, who was going the speed limit, noticed that the Lincoln passed him "pretty fast."

{4} On February 19, 2007, Matthew Cordova took his daughters "out riding around" near the Double Eagle Airport. As he drove down a dirt road, he spotted what he described as "a man laying there burn[ed] to death" underneath a burned couch. The body was later identified as that of Victim.

{5} Detective Jennifer Garcia, the lead criminalist in the investigation collected a number of items of evidence from the scene. Among other items near Victim's body, Detective Garcia found five .9 millimeter bullet casings just to the northwest of Victim's head.

{6} Victim's body, having been transported to the office of the medical investigator, was examined by the chief medical investigator, Dr. Ross Zumwalt. Dr. Zumwalt determined that Victim had been shot three times, once in the chest and twice in the head. Two of the three bullets passed through Victim's body and were not recovered. One bullet, however, was recovered from just beneath the skin in the back of Victim's skull. Later analysis of the recovered bullet revealed that it was a .9 millimeter Luger, the same caliber as casings found near Victim's body.

{7} Dr. Zumwalt could not determine whether the chest wound or the head wounds occurred first. He suspected that Victim was still alive when the chest wound occurred because Victim "certainly bled a lot." He added that the head wounds, which would have been fatal in and of themselves, "would not necessarily have caused [Victim's] heart and lungs to stop functioning for a little while[,] . . . so the chest wound could have been second or it could have been first[.]"

{8} Dr. Zumwalt concluded that the three shots occurred within minutes of one another, and he explained that Victim would not have lived long after either the shots to his head or to his chest. Dr. Zumwalt also concluded that Victim would have been rendered unconscious immediately from the head wounds and within a few seconds from the chest wound. Whether the head wounds or the chest wound came first, however, Victim would have lived for only a short period of time.

{9} Victim's body had been burned. While Victim's body was "badly charred," Dr. Zumwalt concluded that Victim was probably dead before the fire because there was no evidence in Victim's body of soot or carbon monoxide inhalation. The arson investigator determined that the fire was incendiary or intentionally started.

{10} "[S]ometime before March 2007[,]" for reasons unrelated to the present case, police raided the home of Brandon Neal, a member of the "South Side" gang. Neal began cooperating with the police and decided to "give [the police] everything [he knew]" because he was planning to leave New Mexico. Among other things, Neal knew Defendant and knew details of Victim's murder as they had been related to Neal by Defendant.

{11} According to Neal, Defendant said that he (Defendant), along with Victim and two others, were driving around in

Defendant's gray Lincoln Town Car popping "zany bars" (narcotic pills). Defendant and Victim "got into some kind of argument and [Defendant] happened to shoot [Victim,]" and when this happened, Defendant was driving and Victim was in the back seat. After Victim had been shot, at first, they (Defendant and two others) were going to take Victim to the hospital but when they realized he was unconscious, they chose instead to "put him on a couch in the mesa and . . . [light] him on fire."

{12} According to Neal, Defendant also said that he and the two others had burned the vehicle. At some point prior to having burned the Lincoln, however, Defendant "gave it away . . . to one of [Neal's] little friends," but when Neal told his friend what had occurred in the vehicle, "the guy . . . dropped it off somewhere." Defendant claimed, however, that he sold the vehicle to Neal.

{13} Another gang member, who belonged to the "TCK" gang and affiliated with the "South Side" gang, Jason Rubio, also shared information about Victim's death with police. According to Rubio, Defendant told him "[t]hey[, Defendant and two others,] jacked [Victim], took him to the mesa, poured gas down his throat[,] made him drink gas, put the gun to his head, made him drink gas, shot him[,] and lit him on fire." Rubio also knew that the incident occurred in Defendant's "silver" Lincoln Town Car.

{14} "[A]t some point" during the investigation into Victim's homicide, Detective Garcia learned from the lead homicide detective, Judy Chavez, that a Lincoln Town car that was suspected to have been involved in this case was at a tow yard in Albuquerque. Detective Garcia along with a team of criminalists and homicide detectives examined the vehicle. The interior of the vehicle was "completely burned" from a fire that appeared to have originated in the back seat. The front seat and the steering wheel were melted or charred, and there was much more damage to the back seat. A portion of the back seat was collected because it appeared to have a bullet hole through the metal behind the seat. The detectives also collected a bottle with a white rag or shirt tucked into it called a "molotov cocktail."

{15} Defendant makes three arguments on appeal. First, he contends that his convictions for kidnapping and aggravated battery violate the prohibition against double jeopardy and argues that they were not supported by substantial evidence. Second, Defendant contends that his convictions for tampering with evidence and conspiracy to tamper with evidence were a violation of the prohibition against double jeopardy and a violation of his due process rights, and he argues that they were the result of cumulative errors at trial. Finally, Defendant argues that the district court erred in admitting evidence both of gang affiliation and of threats against witnesses. We examine each of Defendant's arguments. We affirm all of Defendant's convictions with the exception of the conspiracy to tamper with evidence charges, which we reverse on the basis of a due process violation.

DISCUSSION

Prohibition Against Double Jeopardy Was Not Violated by Defendant's Convictions for Kidnapping and Aggravated Battery

{16} Defendant argues that his convictions for kidnapping with an intent to inflict death or physical injury, in violation of NMSA 1978, Section 30-4-1(A)(4) (2003), and for aggravated battery with a deadly weapon,

inflicting great bodily harm, in violation of NMSA 1978, Section 30-3-5(C) (1969), when coupled with his conviction for voluntary manslaughter in violation of NMSA 1978, Section 30-2-3(A) (1994), violated his constitutional right to be free from double jeopardy because all three convictions were premised on the unitary conduct of fatally shooting Victim. We review de novo Defendant's claim that his right to be free from double jeopardy was violated. *State v. Quick,* 2009-NMSC-015, ¶ 6, 146 N.M. 80, 206 P.3d 985.

{17} This case is a double-description, multiple-punishment case. The proper analysis to determine whether a double jeopardy violation has occurred is a two-pronged test known as the *Swafford* test. *State v. Armendariz*, 2006-NMSC-036, ¶ 20, 140 N.M. 182, 141 P.3d 526. The *Swafford* test first requires a determination of whether the conduct underlying the offenses was unitary. *Armendariz*, 2006-NMSC-036, ¶ 21. "If the conduct [was] not unitary, then the inquiry is at an end and there is no double jeopardy violation." *State v. Contreras*, 2007-NMCA-045, ¶ 20, 141 N.M. 434, 156 P.3d 725 (internal quotation marks and citation omitted).

{18} "If two events are sufficiently separated by either time or space . . . , then it is a fairly simple task to distinguish the acts." *Swafford v. State*, 112 N.M. 3, 13-14, 810 P.2d 1223, 1233-34 (1991). "In determining whether [a d]efendant's conduct was unitary, we consider whether [a d]efendant's acts were separated by sufficient indicia of distinctness." *State v. Lopez*, 2008-NMCA-002, ¶ 16, 143 N.M. 274, 175 P.3d 942 (internal quotation marks and citation omitted). "Distinctness may . . . be established by the existence of an intervening event, the defendant's intent as evinced by his or her conduct and utterances, the number of victims, and the behavior of the defendant between acts." *Id.* (internal quotation marks and citation omitted).

{19} To the extent that Defendant and the State have differing views of the facts surrounding Victim's death and the associated crimes, we "view the evidence in the light most favorable to the verdict and resolve all conflicts and indulge all inferences in favor of upholding the verdict." *State v. McClendon*, 2001-NMSC-023, ¶ 3, 130 N.M. 551, 28 P.3d 1092. Our primary concern is to ensure that each act supporting Defendant's separate convictions was supported by sufficient evidence. *See id.* ¶ 5. "In reviewing the facts of the case to determine if each [act was] distinct from the others, we must indulge in all presumptions in favor of the verdict." *Id.* (internal quotation marks and citation omitted).

{20} Because the jury convicted Defendant on the charge of voluntary manslaughter and not on the charges of first or second degree murder, we must conclude that the jury found that the fatal shot was the first shot which was fired inside Defendant's vehicle and that this shot took place before Victim was transported to the mesa. The jury instruction on voluntary manslaughter required, for a determination of guilt, that the jury find sufficient provocation to justify Defendant's actions. Any provocation could have only occurred in the vehicle before Victim was transported to the mesa.

{21} Dr. Zumwalt testified that, because of the destructive nature of the chest wound, Victim would have "probably been unconscious within a few seconds" but may have been alive for "several minutes[.]" The only evidence of Victim's condition after

having been shot twice in the head is that he would have been "immediately unconscious[.]" Thus, it would be reasonable for the jury to presume that, once Victim was taken to the mesa, he could not possibly have provoked Defendant. The jury necessarily determined that the voluntary manslaughter occurred when Defendant shot Victim in the chest in the vehicle. We turn to the other criminal activity.

{22} The jury could have concluded, based on the evidence presented, that either of the two gunshots on the mesa constituted an aggravated battery that occurred before Victim died from the initial gunshot wound to the chest. Those gunshot wounds occurred within minutes after the first gunshot wound in the vehicle and at a different location. We hold that Defendant's conduct in shooting Victim twice in the head was sufficiently "separated by . . . time [and] space" from the first gunshot wound inside Defendant's vehicle. *See State v. Mireles*, 2004-NMCA-100, ¶¶ 27-28, 136 N.M. 337, 98 P.3d 727 (concluding that convictions for second degree murder and shooting at or from a motor vehicle were separated by time and space because the defendant first shot the victim from inside a car, then exited the vehicle, chased the victim, and shot him again).

{23} We turn now to the kidnapping charge. The jury was instructed that in order to find Defendant guilty of kidnapping, the State was required to prove that (1) ". . . [D]efendant took and transported [Victim] by force, intimidation, or deception; [and (2)] . . . [D]efendant intended to hold [Victim] against [his] will to inflict death or physical injury [upon him.]"

{24} With regard to the first kidnapping element, the State presented evidence that after shooting Victim in the chest, in the vehicle, Defendant and the two others considered taking him to the hospital but, because he was unconscious, decided instead to take him to the mesa. A number of other jurisdictions have determined that use of force required for a kidnapping conviction is significantly decreased when the victim is unconscious at the time that he is taken by his kidnapper. *See State v. Bernal*, 713 P.2d 811, 812 (Ariz. Ct. App. 1985) (holding that the defendant committed kidnapping by abducting the unconscious victim and killing her before she regained consciousness); *People v. Daniels*, 97 Cal. Rptr. 3d 659, 682 (Ct. App. 2009) (stating that "[s]ince an incapacitated person, like an infant, has no ability to resist being taken and carried away, . . . the amount of force required to kidnap an incapacitated person is simply the amount of physical force required to take and carry the . . . person away" (alterations omitted) (internal quotation marks and citation omitted)); *State v. Valdez*, 977 P.2d 242, 253 (Kan. 1999) (finding sufficient confinement for a kidnapping conviction where the victim's unconscious body was placed in a car and driven away), *abrogated on other grounds by State v. James*, 79 P.3d 169 (Kan. 2003); *State v. Pendleton*, 759 N.W.2d 900, 904-05, 910 (Minn. 2009) (upholding the defendant's conviction for first degree murder in the course of a kidnapping due to the defendant's movement of the victim's unconscious body). We agree with these authorities and hold that the jury could reasonably have concluded that the requisite force to support Defendant's kidnapping conviction was the force that was used to transport the unconscious Victim to the mesa after he was shot in the chest.

{25} Regarding the second kidnapping element, the jury could reasonably have inferred that at the moment Victim was shot in

the chest by Defendant, Victim was in the vehicle against his will, thereby making his physical association with Defendant no longer voluntary. *See State v. Pisio*, 119 N.M. 252, 260, 889 P.2d 860, 868 (Ct. App. 1994) (stating that "[t]he key to the restraint element in kidnapping is the point at which [a v]ictim's physical association with [a d]efendant was no longer voluntary"). Therefore, sufficient evidence was presented for the jury to conclude that both elements of the kidnapping instruction were met.

{26} Unlike the aggravated battery, the underlying actions supporting Defendant's convictions for voluntary manslaughter and kidnapping were not sufficiently separated by time and space. We therefore rely on other indicia of distinctness to determine whether the jury could reasonably have inferred an independent factual basis for these two crimes. *Lopez*, 2008-NMCA-002, ¶ 16. Distinctness may be indicated by a number of factors, including that different types of force were used to commit each crime. *See State v. Stone*, 2008-NMCA-062, ¶ 22, 144 N.M. 78, 183 P.3d 963.

{27} Here, evidence of Defendant's use of two different types of force to commit each crime constitutes a sufficient indication of distinctness to uphold Defendant's kidnapping conviction. The State presented evidence that after Defendant shot Victim and after some thought, Defendant kept Victim's unconscious body in the vehicle and drove him to the mesa. A jury could reasonably have inferred from this evidence that Defendant used two different types of force to commit voluntary manslaughter and kidnapping. The first, shooting Victim inside Defendant's vehicle, and the second, keeping the unconscious Victim in the vehicle and transporting him to the mesa. *See State v. Martinez*, 2006-NMSC-007, ¶ 47, 139 N.M. 152, 130 P.3d 731 (concluding that actions underlying the defendant's conviction for kidnapping, based on tying up the victim, and murder, based on stabbing her in the chest, were sufficiently distinct); *State v. Bernal*, 2006-NMSC-050, ¶¶ 12, 20-21, 140 N.M. 644, 146 P.3d 289 (upholding two attempted robbery convictions where the assailants poked the victim with their guns and threatened her with violence, and shot and killed the other victim).

{28} We conclude that the jury could reasonably have inferred an independent factual basis for all three of Defendant's convictions, and we do not second-guess the factual conclusions of a jury. *See State v. Garcia*, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057 (explaining that the appellate courts will not "invade the jury's province as fact-finder by second-guessing [its] decision" (alteration omitted) (internal quotation marks and citation omitted)). We therefore hold that Defendant's convictions for aggravated battery, kidnapping, and voluntary manslaughter were not based on unitary conduct and did not violate his right to be free from double jeopardy. *See Swafford*, 112 N.M. at 14, 810 P.2d at 1234 (stating that "similar statutory provisions sharing certain elements may support separate convictions and punishments where examination of the facts presented at trial establish that the jury reasonably could have inferred independent factual bases for the charged offenses").

{29} With regard to Defendant's claim that his convictions for voluntary manslaughter, kidnapping, and aggravated battery were not supported by sufficient evidence, we note that this contention, although it is raised in a point heading, is not expounded on in subsequent paragraphs of his brief in chief. While this Court's policy is to

refrain from reviewing "unclear or undeveloped arguments which require us to guess at what parties' arguments might be[,]" we note that in this case, the facts sufficiently provide substantial evidence to support Defendant's convictions. *State v. Fuentes*, 2010-NMCA-027, ¶ 29, 147 N.M. 761, 228 P.3d 1181.

Tampering with Evidence and Conspiracy

{30} Defendant claims that his convictions for tampering with evidence and conspiracy to tamper with evidence were based on cumulative errors that violated his constitutional rights of due process and freedom from double jeopardy. Our review of double jeopardy claims is de novo. *State v. Rodriguez*, 2006-NMSC-018, ¶ 3, 139 N.M. 450, 134 P.3d 737. Likewise, we conduct a de novo review of constitutional questions of due process. *State v. Calabaza*, 2011-NMCA-053, ¶ 9, 149 N.M. 612, 252 P.3d 836.

{31} We first examine Defendant's claimed due process violation with regard to the two convictions of conspiracy to tamper with evidence. Procedural due process "requires the [prosecution] to provide reasonable notice of charges against a person and a fair opportunity to defend." *State v. Dominguez*, 2008-NMCA-029, ¶ 5, 143 N.M. 549, 178 P.3d 834 (internal quotation marks and citation omitted). It "also requires that criminal charges provide criminal defendants with the ability to protect themselves from double jeopardy." *Id.* (internal quotation marks and citation omitted). In *Dominguez*, this Court affirmed the district court's dismissal of five counts against the defendant that "could not be tied to individual, factually distinguishable incidents of alleged misconduct." *Id.* ¶ 1. Here, Defendant argues, and the State concedes, that the conspiracy to tamper with evidence charges violated Defendant's due process rights. *Cf. State v. Caldwell*, 2008-NMCA-049, ¶ 8, 143 N.M. 792, 182 P.3d 775 ("This Court . . . is not bound by the [prosecution's] concession[,] and we conduct our own analysis[.]").

{32} The jury instructions pertaining to the conspiracy charges required the State to prove that (1) Defendant and another person agreed to commit tampering with evidence; (2) Defendant and another person intended to commit tampering with evidence; and (3) this occurred on or about January 28, 2007 through February 19, 2007. Three identical instructions were given and each pertained to an identical charge against Defendant which read:

> . . . on or about or between the dates of January 28, 2007[,] through February 19, 2007, in Bernalillo County, New Mexico, [Defendant] and another person by words or acts agreed together to commit [tampering with evidence], and they intended to commit [tampering with evidence], contrary to [NMSA 1978, Section] 30-28-2 [(1979)] and [NMSA 1978, Section] 30-22-5 [(2003).]

{33} Here, as in *Dominguez*, "[n]othing in the indictment [or in the jury instructions] provided any information that would distinguish one count from any other count." 2008-NMCA-029, ¶ 2. Because the counts were not tied to particular actions or offenses, the conspiracy for tampering with evidence charges provided Defendant "with little ability to defend himself" and rendered impossible the jury's task of concluding that Defendant was guilty of some of the offenses but not others. *Id.* ¶ 8 (internal quotation marks and

citation omitted). Therefore, because the State failed "either [to] charge ongoing conduct as a single offense or [to] charge [Defendant] with and provide evidence of distinct offenses that [would] support multiple counts[,]" we reverse Defendant's conspiracy to tamper with evidence convictions as they constituted a violation of procedural due process. *Id.* ¶ 11.

{34} Defendant's three convictions for tampering with evidence, on the other hand, were supported by sufficient indicia of distinctness and were supported by sufficient evidence. Defendant relies on *State v. Saiz*, 2008-NMSC-048, ¶ 38, 144 N.M. 663, 191 P.3d 521, *abrogated on other grounds by State v Belanger*, 2009-NMSC-025, 146 N.M. 357, 210 P.3d 783; and he relies on *State v. DeGraff*, 2006-NMSC-011, ¶ 34, 139 N.M. 211, 131 P.3d 61, for the proposition that "imposing multiple punishments for tampering charges directed at the same item of evidence," which in this case he asserts was the Lincoln, violates the unit of prosecution principles articulated in those cases. We are not persuaded.

{35} In *Saiz*, the defendant was convicted of nine counts of tampering with evidence based on his attempts to clean the scene of his crime, dispose of the body of his victim, and clean his clothing the day after the crime. 2008-NMSC-048, ¶¶ 36, 41. Our Supreme Court determined that "[w]hile [the d]efendant performed dozens of individual physical acts in disposing of and altering a great number of evidentiary items, there were really only three conceptually separate crimes of tampering[.]" *Id.* ¶ 41. The first occurred at the scene of the crime when the defendant cleaned and painted various items immediately after the crime; the second when the defendant disposed of the victim's body in another town; and the third when he attempted to clean his clothes the next day at his home. *Id.* ¶¶ 36, 41. Similarly, in *DeGraff*, the defendant was convicted of five counts of tampering with evidence. 2006-NMSC-011, ¶ 1. Three of the defendant's convictions were based on the act of disposing of a single box containing three pieces of evidence. *Id.* ¶¶ 32, 36-37. Our Supreme Court concluded that disposing of the box constituted a single act of tampering and dismissed two of the defendant's five tampering convictions. *Id.* ¶¶ 37-39.

{36} Here, unlike *Saiz* or *DeGraff*, Defendant's separate tampering charges and convictions with regard to the Lincoln were based on distinct acts, separated by time and space. *See Quick*, 2009-NMSC-015, ¶ 25 (stating that "[d]istinctness may be established by determining whether the acts constituting the two offenses [were] . . . separated by time or space" (internal quotation marks and citation omitted)). Whereas Count 11 was related to Defendant's act of giving away the Lincoln in which Victim had been shot, Count 13 charged Defendant with having regained possession, and then taking it away and setting fire to it. And unlike the defendants in *Saiz* and *DeGraff*, whose convictions were reversed based on the fact that their acts of tampering were committed in a single location and within the same time frame, here, Defendant committed two distinct acts of tampering when he first gave away the vehicle, and subsequently, at a different time and place, when he regained possession of and set fire to the vehicle. Thus, the two latter tampering convictions related to the vehicle did not constitute a violation of Defendant's constitutional rights.

{37} Nor are we persuaded by Defendant's argument that the tampering charges were not supported by sufficient evidence. In support

of his insufficient evidence argument Defendant cites *State v. Silva*, 2008-NMSC-051, ¶¶ 19-20, 144 N.M. 815, 192 P.3d 1192, and *State v. Duran*, 2006-NMSC-035, ¶¶ 15-16, 140 N.M. 94, 140 P.3d 515. Neither case supports Defendant's position. In *Silva*, the prosecution failed to present "any evidence, circumstantial or otherwise, of an overt act" by the defendant from which the jury could infer an intent to disrupt the police investigation. 2008-NMSC-051, ¶ 19. Similarly, in *Duran*, there was no evidence of any act by the defendant to destroy or hide evidence, with the only support for the tampering charge stemming from the fact that the evidence was not found. 2006-NMSC-035, ¶ 15. Here, on the other hand, the State presented evidence of Defendant's intent to disrupt the police investigation by first giving away the vehicle and then by retrieving it and intentionally setting fire to its interior.

{38} Neal's testimony supported an inference that Defendant gave away the vehicle and that he later regained possession of the vehicle and intentionally set fire to it in order to interfere with the police investigation. In addition to Neal's testimony, the State presented evidence that the car had intentionally been burned in a fire that likely started in the back seat and that the back seat revealed a bullet hole. The State also presented a witness who saw a "young man" with a sprite bottle near the vehicle moments before it was on fire. Therefore, here, unlike *Silva* and *Duran*, the State presented evidence to support a verdict of guilty on the tampering with evidence charges. Viewing the evidence in the light most favorable to the jury's verdict, we hold that the evidence presented was sufficient to support the convictions. *See State v. Gallegos*, 2011-NMSC-027, ¶ 15, 149 N.M. 704, 254 P.3d 655 (stating that in addition to viewing the evidence in the light most favorable to the prevailing party, the appellate courts also resolve all conflicts and indulge all permissible inferences in favor of the verdict).

{39} Finally, with regard to the tampering with evidence convictions, Defendant argues that reversible error occurred when the district court allowed the indictment to be amended after the State rested its case. We review de novo whether the district court properly allowed amendment of the indictment. *State v. Roman*, 1998-NMCA-132, ¶¶ 8-9, 125 N.M. 688, 964 P.2d 852.

{40} The original indictment charged Defendant with four counts of tampering with evidence. While the specific acts of tampering varied as to each charge, all four charges alleged that Defendant had committed tampering "with intent to prevent the apprehension, prosecution[,] or conviction of [Jose Sullivan]." Sullivan, who allegedly was present when Victim was killed and was involved in the related crimes, was not involved with Defendant's trial. At the close of the State's case, among the various motions made by Defendant's counsel was a motion to dismiss all counts of tampering with evidence based on the lack of evidence presented that the acts were done "in order to prevent Jose Sullivan from being caught." The State argued that there had been a clerical error and requested, under Rule 5-204 NMRA, that the indictment be amended to reflect Defendant's name in place of Jose Sullivan. The district court found that the amendment was appropriate under Rule 5-204(A) and (C) and would not be prejudicial to Defendant. The jury was instructed accordingly.

{41} While Defendant argues on appeal that all of the tampering charges should be dismissed because, among other reasons,

Defendant was "deprived . . . of sufficient notice and opportunity to present an adequate and effective defense[,]" he did not make this argument below. Nor on appeal does he present a persuasive argument to indicate in what way he was prejudiced by the amendment. "The mere assertion of prejudice, without more, is insufficient to establish prejudicial error warranting reversal of a conviction." *State v. Marquez*, 1998-NMCA-010, ¶ 20, 124 N.M. 409, 951 P.2d 1070 (internal quotation marks and citation omitted).

{42} Moreover, as the district court noted at trial, everyone had "been working under the assumption that . . . [the charge] was directed to [Defendant.]" And as this Court has previously held, "[a] variance is not fatal unless the accused cannot reasonably anticipate from the indictment what the nature of the proof against him will be." *Id.* We see no basis for reversal of the tampering with evidence convictions. As to Defendant's claim of cumulative error with regard to the tampering convictions, having rejected Defendant's assertions of error, we conclude that the doctrine of cumulative error does not apply. *See State v. Quinones*, 2011-NMCA-018, ¶ 41, 149 N.M. 294, 248 P.3d 336 (explaining that where there is no error, there is no cumulative error).

Gang Affiliation and Threats Against Witnesses

{43} Defendant's final claim on appeal is that he was prejudiced by the district court's admission at trial of "evidence of gang affiliation and threats against witnesses." We review the district court's admission of evidence under an abuse of discretion standard. *Id.* ¶ 19. Unless the district court's ruling on a matter was "clearly untenable or not justified by reason[,]" we cannot say it was an abuse of discretion. *Id.* (internal quotation marks and citation omitted).

{44} Prior to trial, the parties agreed and the district court ruled that, for the limited purpose of identity (i.e., nicknames), evidence of gang membership would be permitted. At trial, neither Rubio nor Neal testified as to Defendant's gang membership. It was only through Defendant's own testimony on cross-examination that the jury learned that Defendant, like Neal and Rubio, was from the "South Side" gang. Insofar as Defendant agreed prior to trial that gang nicknames were admissible for purposes of identity and insofar as he provided the only affirmative evidence of his own gang membership, we see no basis for his claim. *See State v. Handa*, 120 N.M. 38, 45-46, 897 P.2d 225, 232-33 (Ct. App. 1995) (stating that a defendant may not invite error and later complain about it); *State v. Padilla*, 104 N.M. 446, 450, 722 P.2d 697, 701 (Ct. App. 1986) (stating that a defendant may not "urge his own action as a ground for reversing his conviction" (internal quotation marks and citation omitted)). As invited error provides no grounds for appeal, we reject Defendant's argument regarding the prejudicial nature of gang affiliation evidence.

{45} Defendant also contends that he was prejudiced by evidence of threats made toward witnesses. The record reflects that the only evidence presented regarding threats toward any witness was Rubio's trial testimony. While Rubio related incidents of threats against him and his family pending his testimony in this matter, it was clear, as acknowledged by Defendant's counsel, that none of the threats were made by Defendant. Furthermore, although Defendant's counsel objected at trial to any discussion of threats that had been made, the objection was a broad

one, in which counsel, without any specificity claimed that the testimony was "just prejudicial[.]" Notably, notwithstanding the State's argument as to why Rubio's testimony about the threats was relevant, Defendant's counsel did not make an argument regarding why the prejudicial nature of the testimony outweighed its prejudice. *See* Rule 11-403 NMRA (reading, in part, that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice").

{46} It is well established that in order to preserve an argument for appeal, an objection "must be made with sufficient specificity to alert the mind of the trial court to the claimed error[.]" *State v. Riley*, 2010-NMSC-005, ¶ 24, 147 N.M. 557, 226 P.3d 656 (internal quotation marks and citation omitted). While Defendant argues in this Court that testimony regarding the threats "encouraged the jury to draw the inference that [Defendant] was a gang member with a propensity to engage in violent criminal behavior and, more particularly, that he and the gang with whom he allegedly affiliated were somehow responsible for threatening the State's two informants[,]" this argument was not raised below with "sufficient specificity [so as] to alert the mind of the trial court to the claimed error." *Id.* We will not consider arguments not properly preserved in the district court, and we therefore decline further examination of this issue. *See Quinones*, 2011-NMCA-018, ¶¶ 25-26. We hold that the district court did not abuse its discretion in admitting testimony related to gang affiliation or threats to witnesses.

CONCLUSION

{47} We affirm the district court as to Defendant's convictions for voluntary manslaughter, aggravated battery, kidnapping, and tampering with evidence. We reverse Defendant's convictions of conspiracy to tamper with evidence. We remand to the district court for proper adjustment to Defendant's sentence in accordance with this Opinion.

{48} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

TIMOTHY L. GARCIA, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMSC-001

Filing Date: December 5, 2011

Docket No. 31,100

TIMOTHY C. ALLEN,

Petitioner,

v.

TIM LEMASTER, Warden, and STATE OF NEW MEXICO,

Respondents.

Melissa Hill
Corrales, NM

for Petitioner

Gary K. King, Attorney General
M. Victoria Wilson, Assistant Attorney General
Santa Fe, NM

for Respondents

OPINION

DANIELS, Chief Justice.

{1} Timothy Allen appeals the district court's dismissal with prejudice of his petition for writ of habeas corpus alleging ineffective assistance of counsel in connection with his death sentence. The district court did not consider the merits of Allen's claims but instead dismissed the petition as a sanction for his refusal to answer court-ordered deposition questions, which Allen claimed violated his privilege against self-incrimination and attorney-client privilege. We hold that deposing Allen was improper under Rule 5-503 NMRA, which prohibits the State from compelling witness statements from criminal defendants. We also hold that communications relevant to Allen's claims of ineffective assistance of counsel are excepted from the attorney-client privilege under evidence Rule 11-503(D)(3) NMRA and may be inquired into with his counsel and other witnesses in the habeas proceedings. We reverse the dismissal of Allen's petition for habeas corpus and remand to the district court to determine the merits of his two ineffective assistance of counsel claims.

I. FACTUAL AND PROCEDURAL BACKGROUND

{2} Allen was convicted and sentenced to death for the 1994 kidnapping, sexual assault, and murder of a seventeen-year-old victim. *See State v. Allen*, 2000-NMSC-002, ¶¶ 1-2, 128 N.M. 482, 994 P.2d 728. This Court affirmed his convictions and sentences on direct appeal. *Id.* ¶ 1.

{3} On March 20, 2002, Allen filed a petition for writ of habeas corpus that raised thirteen claims, supported by exhibits and affidavits.

The district court ordered an evidentiary hearing on the two claims that alleged ineffective assistance of counsel and dismissed the petition's other eleven claims without an evidentiary hearing. Allen's ineffectiveness claims allege that his trial attorneys failed to conduct an adequate pretrial investigation of his social and mental health history and, as a result, failed to present evidence at either the guilt or penalty phase of trial that Allen had been abused as a child and currently suffered from severe neuropsychological deficits and psychiatric disorders.

{4} Discovery in preparation for an evidentiary hearing on Allen's ineffectiveness claims included (1) taking witness statements from the three attorneys who represented him at trial; (2) obtaining photocopies of his Public Defender Department file, medical and mental health files, and Department of Corrections records; (3) deposing twenty personal history witnesses who had provided affidavits in support of his petition for writ of habeas corpus; (4) deposing the psychologist who had evaluated his sanity in preparation for trial; and (5) obtaining a court-ordered psychiatric evaluation of him during which he answered all questions without limitation.

{5} The State also deposed Allen personally on two separate occasions. Despite Allen's requests for protective orders, the district court ruled that he was subject to deposition on all issues related to the habeas corpus proceedings on the theory that he waived his constitutional privilege against self-incrimination and his attorney-client privilege by filing a petition for writ of habeas corpus that raised ineffective assistance of counsel claims.

{6} At Allen's first deposition, he invoked his privilege against self-incrimination and refused to answer any questions. The district court ordered him to answer all questions relating to his communications with his trial attorneys. Allen then answered over three hundred questions addressing his communications with and observations of his trial attorneys and probing his knowledge of the attorneys' tactical and strategic decisions before and during trial. He refused to answer other questions in reliance on the self-incrimination clauses of the Fifth Amendment to the United States Constitution and Article II, Section 15 of the New Mexico Constitution.

{7} The State then moved the district court to dismiss Allen's habeas corpus petition with prejudice as a sanction for his refusal to answer all deposition questions. The district court ordered that he be deposed again to give him "one last opportunity to answer the specific questions ordered by the Court to be answered." The court also ordered the State to present all proposed deposition questions "verbatim" so that Allen could respond with any specific objections. The State proposed twenty-eight new questions in addition to the eighty-eight questions that Allen had previously refused to answer. He objected to each of those questions on multiple grounds.

{8} The district court held a hearing on the proposed deposition questions and ordered Allen to answer specified questions. He refused to answer many of the court-approved questions. In response, the district court issued an order dismissing his petition for writ of habeas corpus with prejudice in its entirety, stating that "Defendant is in contempt of Court for failing to answer questions in his deposition as directed."

{9} Allen filed a petition for writ of certiorari in this Court raising twenty-three issues. We

granted certiorari and requested briefing on four issues: (1) whether the district court erred by finding that Allen waived his state and federal privileges against self-incrimination by filing a petition for writ of habeas corpus; (2) whether the deposition questions exceeded the scope of his waiver of the attorney-client privilege; (3) whether his depositions were ordered in violation of Rule 5-503 that prohibits the State from compelling statements from criminal defendants; and (4) whether dismissal of his ineffective assistance of counsel claims was an excessive and unconstitutional sanction for contempt of court.

{10} We hold that Rule 5-503 of the Rules of Criminal Procedure for the District Courts precludes taking a compelled statement or deposition of a criminal defendant, including one who is in the postconviction habeas corpus phase of a criminal proceeding. We also hold that communications specifically relevant to Allen's ineffective assistance of counsel claims are "relevant to an issue of breach of duty by the lawyer to the lawyer's client" and are therefore not protected under the attorney-client privilege by the explicit terms of Rule 11-503(D)(3). Because our application of established procedural and evidentiary rules requires reversal of the district court's dismissal of Allen's habeas corpus claims, we need not address any further issues in this certiorari proceeding.

II. DISCUSSION

A. Standard of Review

{11} This case requires us to interpret and apply the New Mexico Rules of Criminal Procedure and Rules of Evidence. The proper interpretation of our Rules of Criminal Procedure is a question of law that we review de novo. *See State v. Lohberger*, 2008-NMSC-033, ¶ 18, 144 N.M. 297, 187 P.3d 162. We likewise review de novo both "the trial court's construction of the law of privileges," *Estate of Romero ex rel. Romero v. City of Santa Fe*, 2006-NMSC-028, ¶ 6, 139 N.M. 671, 137 P.3d 611, and "[t]he question of whether a party has waived the attorney-client privilege," *Gingrich v. Sandia Corp.*, 2007-NMCA-101, ¶ 12, 142 N.M. 359, 165 P.3d 1135. When construing our procedural rules, we use the same rules of construction applicable to the interpretation of statutes. *See Walker v. Walton*, 2003-NMSC-014, ¶ 8, 133 N.M. 766, 70 P.3d 756. "We first look to the language of the rule." *In re Michael L.*, 2002-NMCA-076, ¶ 9, 132 N.M. 479, 50 P.3d 574. "If the rule is unambiguous, we give effect to its language and refrain from further interpretation." *Id.* (citation omitted). We also seek guidance from the rule's language, history, and background. *See Roark v. Farmers Group, Inc.*, 2007-NMCA-074, ¶ 50, 142 N.M. 59, 162 P.3d 896.

B. Rule 5-503 Precludes Compelling a Statement from a Defendant in a Criminal Proceeding, Which Includes Habeas Corpus Review Under Rule 5-802 NMRA

{12} In order to understand the issues of this case, it is helpful to review the origins and development of the writ of habeas corpus that has become an integral phase of modern criminal proceedings, including those in New Mexico. Habeas corpus procedures have been used over the centuries in England and the United States to bring a person before a court for various purposes. *See In re Forest*, 45 N.M. 204, 208, 113 P.2d 582 584 (1941) ("The right [to a habeas corpus proceeding] antedated the Magna Carta."); Charles Alan

Wright, *Law of Federal Courts* § 53 at 350-52 (5th ed. 1994); Eric M. Freedman, *Habeas Corpus: Rethinking the Great Writ of Liberty* 1 (2001); William F. Duker, *A Constitutional History of Habeas Corpus* 7 (1980). The most significant form, historically called habeas corpus ad subjiciendum, is to test the lawfulness of a prisoner's conviction and confinement; and this form has earned recognition in the law as the "Great Writ." David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 Notre Dame L. Rev. 59, 59 n.2, 66-67 (2006); Lyn S. Entzeroth, *Struggling for Federal Judicial Review of Successive Claims of Innocence: A Study of How Federal Courts Wrestled With the AEDPA to Provide Individuals Convicted of Non-Existent Crimes With Habeas Corpus Review*, 60 U. Miami L. Rev. 75, 78 (2005).

{13} Historically, common-law writs of habeas corpus had been civil in form. In 1965 this Court adopted a new procedural rule governing postconviction relief, Rule 93, in our Rules of Civil Procedure. *See* NMSA 1953, § 21-1-1(93) (Vol. 4, 1969 Pocket Supp.). Under Rule 93, a prisoner could "[move] the court that imposed his or her sentence to 'vacate, set aside or correct the sentence'" under certain circumstances, and "a prisoner applying for a writ of habeas corpus first had to exhaust his or her remedies under [Rule 93] before seeking the writ." *Cummings v. State*, 2007-NMSC-048, ¶¶ 11-12, 142 N.M. 656, 168 P.3d 1080. Following the adoption of Rule 93, this Court held in a number of cases that postconviction proceedings under Rule 93 were civil in nature and therefore governed by our Rules of Civil Procedure. *See, e.g.*, *State v. Gilbert*, 78 N.M. 437, 439, 432 P.2d 402, 404 (1967) ("Proceedings under Rule 93 . . . are governed by the Rules of Civil Procedure."); *State v. Weddle*, 77 N.M. 420, 423, 423 P.2d 611, 614 (1967) ("[A]ctions under Rule 93 should be considered to be civil."), *superseded by rule change* as recognized in *Caristo v. Sullivan*, 112 N.M. 623, 628, 818 P.2d 401, 406 (1991).

{14} In 1972, this Court adopted comprehensive Rules of Criminal Procedure for the District Courts. *See* Rule 5-101 NMRA Compiler's Notes. In the order adopting those rules, this Court "provided in part that any rules of civil procedure governing criminal proceedings are hereby repealed." *Id.* (internal quotation marks omitted). The scope rule specifically provided that these criminal rules "govern the procedure in the district courts of New Mexico in *all criminal proceedings*." Rule 5-101(A) (emphasis added). This Court then adopted specific provisions, at that time codified in criminal rule 57, to govern postconviction motions in criminal cases and classified them within our newly created Rules of Criminal Procedure, thereby superseding Rule 93 for all motions for postconviction relief filed on or after September 1, 1975. *See* NMSA 1953, § 41-23-57 (Vol. 6, 2d Repl., 1975 Pocket Supp.).

{15} The placement of habeas corpus regulation within our Rules of Criminal Procedure demonstrated this Court's recognition that postconviction motions challenging a conviction or sentence in a criminal case are in reality part of a criminal proceeding. As this Court explained in *Caristo*, 112 N.M. at 628-29, 818 P.2d at 406-07,

> [t]he committee commentary to Rule 57 expressed the position that the rule was intended to incorporate the federal view of post-conviction

> motions under 28 U.S.C. § 2255 (1988)—that such proceedings are a further step in the movant's *criminal* case and not a separate civil action. Thus, the committee stated that Rule 57 "supersedes cases holding that the post-conviction remedy is a separate civil action."
>
> We agree with the committee that post-conviction habeas petitions are not appropriately characterized as civil actions.

(Footnote and citation omitted.)

{16} Over twenty-five years ago, we replaced Rule 57 with Rule 5-802, entitled "Habeas corpus," which has been applicable to habeas corpus petitions since March 1, 1986. Rule 5-802 & Compiler's Notes; *see also Caristo*, 112 N.M. at 629, 818 P.2d at 407. Our adoption of Rule 5-802 was "part of a re-codification of our rules" and "did away with the general concept of a 'post-conviction remedy'" by creating a single rule governing "the procedure for a habeas petitioner to exercise his or her long-established constitutional right to petition this Court" for habeas corpus review of the lawfulness of the petitioner's criminal conviction. *Cummings*, 2007-NMSC-048, ¶ 18. Rule 5-802 eliminated much of the postconviction motion practice previously conducted under Rules 93 and 57 and became the primary means for a prisoner to seek postconviction relief in New Mexico. *Cummings*, 2007-NMSC-048, ¶¶ 19-21.

{17} Habeas corpus proceedings under Rule 5-802, like motions for postconviction relief under former Rule 57, are in every real sense a continuation of a defendant's criminal case. Thus, this Court in *Caristo* rejected the parties' assertion that habeas corpus actions are governed by the Rules of Civil Procedure because "post-conviction habeas actions under [Rule 5-802], as under Rule 57, are no longer appropriately characterized as civil proceedings." *Caristo*, 112 N.M. at 628-29, 818 P.2d at 406-07 (footnote omitted).

{18} As this history demonstrates, both our procedural rules and our judicial precedents have come to reflect the reality that postconviction habeas corpus proceedings are part of a defendant's criminal case. *See* Rule 5-802(F) (referring to the petitioner as "the defendant"); *State v. Davis*, 2003-NMSC-022, ¶ 1, 134 N.M. 172, 74 P.3d 1064 (calling a habeas corpus petitioner "Defendant"). Even the district court in this case referred to Allen as "Defendant" throughout its order dismissing his habeas petition for failure to answer deposition questions.

{19} The role of a Rule 5-802 habeas petition as part of a criminal proceeding is exemplified in a case like this, in which a defendant alleges ineffective assistance of counsel, because a petition for writ of habeas corpus often presents the criminal defendant's first opportunity to raise this claim. *See State v. Hunter*, 2006-NMSC-043, ¶ 30, 140 N.M. 406, 143 P.3d 168 ("[H]abeas corpus proceedings are the preferred avenue for adjudicating ineffective assistance of counsel claims, because the record before the trial court may not adequately document the sort of evidence essential to a determination of trial counsel's effectiveness," in which case "an evidentiary hearing on the issue of trial counsel's effectiveness may be necessary." (internal quotation marks and citations omitted)). If a habeas corpus petitioner establishes that he or she has been denied the constitutional right to effective assistance of counsel and therefore never had a constitutionally adequate trial or sentencing in

the first place, the remedy is to vacate the conviction or sentence and require those proceedings to be conducted in a constitutionally compliant manner. *See, e.g.*, *Rael v. Blair*, 2007-NMSC-006, ¶¶ 1, 29, 141 N.M. 232, 153 P.3d 657 (reversing due to ineffective assistance of counsel and remanding for a new trial).

{20} In death sentence cases in particular, a habeas corpus action is made a mandatory phase of a defendant's criminal proceeding by Rule 5-802. Rule 5-802(F)(1) requires automatic state court habeas corpus review "upon issuance of the mandate of the Supreme Court affirming the sentence of death." The district court is required to "promptly appoint counsel to represent the defendant," *id.*, and counsel is required to file a petition for writ of habeas corpus on the defendant's behalf. Rule 5-802(F)(3). Rule 5-802 recognizes that a defendant in a habeas corpus proceeding retains many of the protections of our criminal law. *See* Rule 5-802(A). These provisions underscore that Allen's criminal proceedings are not yet concluded.

{21} With regard to whether a defendant may be compelled to give a statement or deposition in connection with the defendant's habeas petition, Rule 5-802 contains no exception to the criminal discovery provisions of Rule 5-503, which prohibits the State in a criminal proceeding from compelling witness statements or depositions from defendants. Defendant argues that since postconviction habeas corpus proceedings are part of a criminal proceeding, Rule 5-503's prohibition against compelling statements from a defendant must govern discovery conducted in preparation for the habeas corpus evidentiary hearing. The State argues that, because Rule 5-802 itself does not address depositions or other discovery, a district court can fashion any discovery procedures it chooses, without regard to the generally applicable discovery limitations of the Rules of Criminal Procedure. The State also contends that the provisions of Rule 5-503 do not apply to Defendant because he is no longer protected by the presumption of innocence and because he has the burden of persuasion to overcome the validity of his conviction. *See Roberts v. Staples*, 79 N.M. 298, 301, 442 P.2d 788, 791 (1968) ("In habeas corpus proceedings, the movant has the burden of showing that he [or she] is entitled to the writ and the writ should be denied where the allegations are insufficient.").

{22} Rule 5-503 is the exclusive procedural rule governing compelled statements and depositions in a criminal proceeding in the district courts. Compelled statements are the primary means of obtaining information from witnesses during discovery in a criminal case and can be required from "[a]ny person, *other than the defendant*, with information which is subject to discovery." Rule 5-503(A) (emphasis added). The availability of depositions in criminal proceedings is even narrower than that of nondeposition witness statements: "While depositions are allowable in criminal cases, the circumstances permitting their use must be exceptional." *McGuinness v. State*, 92 N.M. 441, 442, 589 P.2d 1032, 1033 (1979). Under Rule 5-503(B), depositions are allowed in criminal proceedings only "upon:

> (1) agreement of the parties; or
> (2) order of the court . . . upon a showing that it is necessary to take the person's deposition to prevent injustice."

{23} Generally, the district court is justified in ordering a person's deposition in a

criminal case only if the State shows that the person would be unable or unwilling to attend the trial or a hearing. *See* Rule 5-503 Comm. Commentary; *see also McGuinness*, 92 N.M. at 442, 589 P.2d at 1033 (explaining that depositions generally cannot be used where the witness, whose testimony in court could be obtained by proper process, is within the jurisdiction of the court); 5 Wayne R. LaFave et al., *Criminal Procedure* § 20.2(e), at 374-75 (3d ed. 2007) (explaining that fewer than a dozen states allow broad use of depositions in criminal cases and that, where depositions are allowed, they are available "primarily for the purpose of preserving the testimony of a witness likely to be unavailable at trial").

{24} New Mexico's Rules of Criminal Procedure and those in other jurisdictions universally prohibit depositions of criminal defendants. *See* LaFave et al., *supra*, § 20.2(e), at 376-77 (explaining that, although the states that allow depositions in criminal cases generally allow both the defense and the prosecution to use this discovery tool, "[t]he one exception, of course, is that the prosecution may not depose the defendant"); *see, e.g.*, Ariz. R. Crim. P. 15.3(a) (enumerating circumstances under which the court may order a deposition "of any person except the defendant"); N.D. R. Crim. P. 15(a)(1) ("[T]he defendant may not be deposed unless the defendant consents.").

{25} To the extent the State argues that Allen has waived his privilege against self-incrimination by filing a petition for writ of habeas corpus setting forth the allegations of his claim for relief, we disagree. The petition itself is merely a pleading and not evidence. If offered into evidence, it would be hearsay under Rule 11-801(C) NMRA, and no argument has been made that it fits within any exclusion or exception to the exclusion of hearsay evidence in Rules 11-802 to -804 NMRA. Of course, if Allen should voluntarily present his own testimony in the course of the habeas corpus proceedings, he opens himself up to cross-examination in the same manner as any other witness. *See Brown v. United States*, 356 U.S. 148, 155-56 (1958) (explaining that when a criminal defendant chooses to testify, the defendant determines the area of disclosure and is subject to cross-examination on matters raised by his or her own testimony); *State v. Wildgrube*, 2003-NMCA-108, ¶ 29, 134 N.M. 262, 75 P.3d 862 (quoting *Brown* with approval).

{26} We conclude that Rule 5-503 precludes the State from deposing Allen in this case. We need not reach the hypothetical New Mexico constitutional question whether, in the absence of Rule 5-503's prohibition against compelled statements from a defendant, a court could compel a deposition or other statement from a defendant in a habeas proceeding, notwithstanding a claim of privilege against self-incrimination. We simply note the undeniable reality that a defendant's compelled testimony in a habeas action could result in imprisonment or death if the compelled statements bring about a denial of his habeas action, on the one hand, or contribute to evidence used to incriminate him in his retrial or resentencing if he prevails in the habeas, on the other.

{27} We also need not reach the question whether forcing a criminal defendant on habeas review to forfeit his protection from self-incrimination in order to assert his constitutional right to effective assistance of counsel at his first trial or sentencing could create an impermissible constitutional conflict. *See generally Simmons v. United States*, 390 U.S. 377, 394 (1968) (holding that "when a defendant testifies in support of a motion to

suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt" because it is "intolerable that one constitutional right should have to be surrendered in order to assert another"); *State v. Brown*, 2006-NMSC-023, ¶ 9, 139 N.M. 466, 134 P.3d 753 ("[I]t is well settled that forcing a criminal defendant to surrender one constitutional right in order to assert another is intolerable." (internal quotation marks and citation omitted)).

{28} The reason those state and federal constitutional questions need not be resolved in this action is because the dispositive resolution to this case is explicitly provided by our established Rules of Criminal Procedure. "It is an enduring principle of constitutional jurisprudence that courts will avoid deciding constitutional questions unless required to do so. We have repeatedly declined to decide constitutional questions unless necessary to the disposition of the case." *Schlieter v. Carlos*, 108 N.M. 507, 510, 775 P.2d 709, 712 (1989); *see also Baca v. N.M. Dep't of Pub. Safety*, 2002-NMSC-017, ¶ 12, 132 N.M. 282, 47 P.3d 441 (noting that courts exercise judicial restraint by deciding cases on the narrowest possible grounds and avoid reaching unnecessary constitutional issues).

{29} Because postconviction habeas corpus is part of Allen's criminal proceedings under our Rules of Criminal Procedure, we hold that it was improper under Rule 5-503 for the district court to order him to answer questions at a deposition and to dismiss his habeas petition or otherwise sanction him for his refusal to answer the questions.[1]

C. Communications Relevant to Allen's Ineffective Assistance of Counsel Claims Are Excepted from Attorney-Client Privilege by Rule 11-503(D)(3) and Are Subject to Other Forms of Discovery

{30} The district court found that Allen had waived his attorney-client privilege regarding all communications with his attorneys by raising ineffective assistance of counsel claims. Allen argues that the district court construed any waiver of the attorney-client privilege more broadly than was justified by his claim of ineffective assistance of counsel. Accordingly, we address the extent to which his claim of ineffective assistance of counsel affects the applicability of his attorney-client privilege in the course of discovery and other proceedings below.

{31} The prevailing view in United States jurisdictions is that communications relevant to a claim of ineffective assistance of counsel are not protected by the attorney-client privilege. *See* Edward J. Imwinkelried, *The New Wigmore: Evidentiary Privileges* § 6.13.2, at 945 (2002); *see also Strickland v. Washington*, 466 U.S. 668, 691 (1984) (explaining that determining whether a

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[1] As this Court noted in *Caristo*, 112 N.M. at 629 n.5, 818 P.2d at 407 n.5, Rule 5-802 "appears to apply to all habeas corpus proceedings" and not just to criminal postconviction proceedings. Different considerations might apply to the rare habeas proceedings that do not involve postconviction challenges to the legality of a criminal conviction, but we need not address those hypothetical issues here.

defendant had effective counsel may require "inquiry into counsel's conversations with the defendant" to properly assess "counsel's investigation decisions [and] other litigation decisions"). Courts reach this result "in two different ways, by establishing either a waiver by the holder or . . . a special exception to the scope of the privilege." Imwinkelried, *supra*, § 6.12, at 840. Because New Mexico's Rules of Evidence contemplate both exceptions to and waiver of the attorney-client privilege, we must consider which of the two theories applies to communications relevant to an ineffective assistance of counsel claim.

{32} Just as the "rules of evidence . . . govern the admissibility of evidence during the penalty phase of [a] capital felony sentencing proceeding," *State v. Sanchez*, 2008-NMSC-066, ¶ 22, 145 N.M. 311, 198 P.3d 337, they must also apply in the habeas phase because both are controlled by the express terms of Rule 11-101 NMRA that the evidence "rules govern proceedings in the courts of the State of New Mexico." No exception to that general rule of applicability is provided for habeas corpus cases in any New Mexico court rule, statute, judicial precedent, or other provision of law.

{33} The attorney-client privilege in New Mexico is expressly provided for and governed by New Mexico's Rules of Evidence. *See* Rule 11-503; *Pub. Serv. Co. of N.M. v. Lyons*, 2000-NMCA-077, ¶¶ 11-13, 129 N.M. 487, 10 P.3d 166. In this regard, New Mexico's approach to the privilege differs from that taken by the Federal Rules of Evidence, which has no codified attorney-client privilege. *See* Fed. R. Evid. 501 (providing that the common law continues to govern attorney-client privilege). Although New Mexico's attorney-client privilege generally applies to "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client," Rule 11-503(B), "[t]here is no privilege . . . [a]s to a communication relevant to an issue of breach of duty by the lawyer to the lawyer's client," Rule 11-503(D)(3).

{34} The common law has long recognized that even where an attorney-client privilege exists, it can be waived by the client. *See* 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2292, at 554 (McNaughton rev. 1961) (providing the common-law elements of the privilege and stating that its protection may be waived); *see, e.g.*, *Blackburn v. Crawfords*, 70 U.S. 175, 194 (1865) ("The client may waive the protection of the [attorney-client privilege]. The waiver may be express or implied."). Federal courts have accordingly held that a habeas corpus petitioner waives the attorney-client privilege for communications relevant to claims of ineffective assistance of counsel. *See, e.g.*, *United States v. Pinson*, 584 F.3d 972, 977-78 (10th Cir. 2009) ("When a habeas petitioner claims that he received ineffective assistance of counsel, he puts communications between himself and his attorney directly in issue, and thus by implication waives the attorney-client privilege with respect to those communications."). If we needed to reach the issue of waiver in this case, Rule 11-511 NMRA and its general waiver provisions provide that any of our evidentiary privileges can be waived by the holder of the privilege if he or she "voluntarily discloses or consents to disclosure of any significant part of the matter or communication."

{35} Jurisdictions following the federal model for evidentiary privileges have no codified exceptions to the attorney-client privilege and must employ a waiver analysis

to reach the conclusion that communications relevant to a claim of an attorney's breach of duty to the client are not protected by the attorney-client privilege. *See, e.g.*, *State v. Walen*, 563 N.W.2d 742, 753 (Minn. 1997) (holding "that a defendant who claims ineffective assistance of counsel necessarily waives the attorney-client privilege as to all communications relevant to that issue"). Even states with codified exceptions to the attorney-client privilege often use the term "waiver" instead of "exception" to describe why communications relevant to ineffectiveness claims are not covered by the privilege. *See, e.g.*, *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 11 (Ky. 2002) (finding that "waiver of the lawyer/client privilege is implied and automatic . . . where a defendant testifies adversely to his attorney's competence" (internal quotation marks and citation omitted) and explaining that this "universally accepted" principle is "embodied in KRE 503(d)(3)," which codifies an exception for communications relevant to an attorney's alleged breach of duty).

{36} Despite the plain language of Rule 11-503(B), New Mexico precedents have not previously explained that communications relevant to ineffective assistance of counsel claims are excepted at the outset from the attorney-client privilege rather than waived. *See, e.g.*, *State v. Reyes*, 2002-NMSC-024, ¶ 47, 132 N.M. 576, 52 P.3d 948 (explaining that the trial court was unable to resolve one of the defendant's ineffective assistance of counsel claims because the defendant did not waive his attorney-client privilege); *State v. Richardson*, 114 N.M. 725, 730, 845 P.2d 819, 824 (Ct. App. 1992) (recognizing that an evidentiary hearing on the defendant's ineffective assistance of counsel claims "may require inquiry into confidential communications between defense counsel and his client" and holding that "by raising the issue on appeal [the d]efendant waives any claim to confidentiality" under Rule 11-503(D)(3)). We now clarify that in New Mexico an "exception" to the attorney-client privilege is analytically distinguishable from a "waiver" of that privilege and that the "breach of duty" exception provided by Rule 11-503(D)(3) applies to matters relevant to ineffectiveness claims, making it unnecessary to consider waiver of an existing privilege.

{37} New Mexico's evidentiary privileges are limited to those promulgated by this Court, and we avoid applying common-law principles that are inconsistent with the language of our rules. *See Pub. Serv. Co. of N.M.*, 2000-NMCA-077, ¶¶ 11, 14 (explaining that our courts must not "engage in the type of ad hoc judicial waiver analysis engaged in by other courts that are free to apply the common law"). The plain language of Rule 11-503(D)(3) states that "[t]here is no privilege . . . [a]s to a communication relevant to an issue of breach of duty by the lawyer to the lawyer's client." By claiming ineffective assistance of counsel, a habeas petitioner alleges a breach of his or her counsel's duty to provide effective assistance of counsel. Because there would be no attorney-client privilege for communications relevant to those claims, there is no privilege that could be subjected to a waiver analysis under the general provisions of Rule 11-511. *See State v. Journey*, 301 N.W.2d 82, 89 (Neb. 1981) (explaining that communications relevant to the defendant's ineffectiveness claim fell into Nebraska's exception to the attorney-client privilege and that the defendant could not waive a privilege he did not have). Application of a waiver analysis under Rule 11-511 is only appropriate in cases where no exception under Rule 11-503 applies in the first place. *See Pub. Serv. Co. of N.M.*, 2000-NMCA-077, ¶¶ 14, 22

(adopting a narrow approach to the "at-issue" waiver doctrine under Rule 11-511 to be used in cases where no exception applies).

{38} Accordingly, we hold that a habeas petitioner's claim of ineffective assistance of counsel removes from the protection of the attorney-client privilege those communications specifically relevant to the claim. *See* Rule 11-503(D)(3) ("There is no privilege . . . [a]s to a communication *relevant* to an issue of breach of duty." (emphasis added)). A petitioner asserting the attorney-client privilege bears the burden of demonstrating that the privilege applies. *See Piña v. Espinoza*, 2001-NMCA-055, ¶24, 130 N.M. 661, 29 P.3d 1062. It is then the judge's function to make evidentiary rulings determining whether lawyer-client communications are relevant to the specific ineffective assistance of counsel claims raised by the petitioner and thereby subject to the exception. Rule 11-104(A) ("Preliminary questions concerning . . . the existence of a privilege . . . shall be determined by the court."). Any communications between Allen and his trial counsel that are relevant to Allen's specific ineffectiveness claims are excepted from the attorney-client privilege, and those that are not relevant are neither excepted nor waived simply because Allen filed a petition for writ of habeas corpus.

{39} Notwithstanding our holding that the State may not compel a statement, including a deposition, of Defendant, it still may employ other means of discovery into nonprivileged attorney-client communications permitted under our Rules of Criminal Procedure. Under Rule 5-503(C), "parties may obtain discovery regarding any matter, not privileged, which is relevant to the offense charged or the defense of the accused person." Under Rule 5-503(A), the State can take a witness statement from any person other than Allen. The State can, for example, ask Allen's trial counsel about nonprivileged communications relevant to Allen's ineffectiveness claims. *See State v. Crislip*, 109 N.M. 351, 358, 785 P.2d 262, 269 (Ct. App. 1989) (Hartz, J., specially concurring) ("In habeas proceedings, there is an opportunity in an evidentiary hearing to have trial counsel fully describe his or her reasons for acting or failing to act." (internal quotation marks and citation omitted)).

III. CONCLUSION

{40} We reverse the dismissal of Allen's petition for writ of habeas corpus and remand to the district court for further proceedings consistent with this Opinion.

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

CHARLES W. DANIELS, Chief Justice

WE CONCUR:

PATRICIO M. SERNA, Justice

PETRA JIMENEZ MAES, Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-001

Filing Date: November 8, 2011

Docket No. 29,609

BOBBY WINDHAM and VICKIE K. WINDHAM,

Plaintiffs,

v.

L.C.I.2, INC., a New Mexico corporation,

Defendant-Appellee,

and

NATIONWIDE MUTUAL INSURANCE COMPANY,

Intervenor-Appellant.

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OPINION

VIGIL, Judge.

{1} The memorandum opinion filed in this case on September 28, 2011, is hereby withdrawn, and this opinion is substituted in its place.

{2} The City of Taos hired L.C.I.2, Inc. (L.C.I.2), to construct a structure surrounding a pre-existing recreation area, which included a swimming pool, and L.C.I.2 in turn subcontracted with Plaintiff's employer, Newt & Butch's Sheet Metal, Inc. (Newt & Butch) to install the roof on the structure. Under the

subcontract, Newt & Butch agreed to indemnify L.C.I.2 against and save it harmless from any and all claims, suits or liability for injuries to persons "on account of any act or omission of [Newt & Butch], or any of [its] officers, agents, employees or servants[.]" Pursuant to this provision in the subcontract, L.C.I.2 was named as an "additional insured" under a commercial general liability policy issued to Newt & Butch by Nationwide Mutual Insurance Company (Nationwide). In pertinent part, the policy provides that L.C.I.2 "is an additional insured only with respect to liability arising out of [Newt & Butch's] ongoing operations performed for [L.C.I.2]."

{3} While in the scope of his employment with Newt & Butch in installing the roof, Plaintiff, Bobby Windham, fell through the cutout for a skylight, and landed in the empty swimming pool. Plaintiff sued the general contractor, L.C.I.2, alleging that L.C.I.2 was negligent in failing to provide coverings of the cutouts for the skylights and in failing to implement, communicate, monitor, and enforce safety rules which would have prevented the accident. On the same basis, Plaintiff's wife sought damages for loss of consortium. L.C.I.2 denied liability, asserted that the work referred to in the complaint was being performed by the subcontractor, Newt & Butch, and that Plaintiff's injuries and damages were the result of Plaintiff's negligence, or the negligence of a third party, "thereby barring the relief requested or reducing it some percentage extent depending upon the degree of fault apportioned to Plaintiff or other third parties pursuant to the rules of pure comparative negligence adopted by the State of New Mexico."

{4} L.C.I.2 demanded a defense and indemnification from Nationwide as an additional insured under the policy. Nationwide accepted the defense under a reservation of rights. In pertinent part, Nationwide stated that under the policy, L.C.I.2 is an additional insured for damages arising out of Newt & Butch's ongoing operations performed for L.C.I.2. Accordingly, Nationwide said, it was reserving its rights, "because at this time, it is uncertain whether this incident arose out of [Plaintiff's] work for Newt & Butch's or whether [Plaintiff's] injuries arose out of L.C.I.2's individual negligence. Nationwide reserves its right to not defend or indemnify L.C.I.2 for any damages arising out of its individual negligence." Addressing Newt & Butch's contractual agreement to indemnify L.C.I.2, Nationwide reserved its rights "to not defend or indemnify L.C.I.2 for this matter in the event it is determined that [Plaintiff's] injuries arose out of the individual negligence of L.C.I.2." Nationwide then intervened in Plaintiffs' suit against L.C.I.2, and filed a complaint seeking a declaratory judgment that it had no duty to defend or indemnify L.C.I.2 from any claims asserted by Plaintiffs against L.C.I.2. Nationwide asserted that Plaintiffs made no claims against Newt & Butch; and under the express terms and conditions of the insurance policy and subcontract, it had no duty to defend or indemnify L.C.I.2. In addition, Nationwide asserted that pursuant to NMSA 1978, Section 56-7-1 (2003), any claim by L.C.I.2 for indemnity under the subcontract or insurance policy is void, unenforceable, and against public policy. L.C.I.2 denied that Nationwide was entitled to the declaratory judgment.

{5} Nationwide and L.C.I.2 filed motions for summary judgment in support of their respective positions. Nationwide argued that Plaintiffs only alleged that L.C.I.2 was negligent, and that an agreement by Newt & Butch in the subcontract or by its insurance to provide L.C.I.2 with a defense and indemnification for L.C.I.2's own negligence

violates Section 56-7-1. L.C.I.2 argued that as an additional insured, it is entitled to a defense and indemnification under terms of the policy. Moreover, L.C.I.2 argued, Section 56-7-1 is not a bar because L.C.I.2 does not seek indemnification for its own negligence, but a defense to Plaintiffs' suit to the extent Plaintiffs' claim against L.C.I.2 "arises out of" Newt & Butch's acts or omissions. Following a hearing, the district court granted L.C.I.2's motion for summary judgment and denied Nationwide's motion for summary judgment. Nationwide appeals. We affirm.

STANDARD OF REVIEW

{6} The material facts are undisputed. Thus, our review of the order granting L.C.I.2 summary judgment is de novo. *City of Albuquerque v. BPLW Architects & Eng'rs, Inc.*, 2009-NMCA-081, ¶ 7, 146 N.M. 717, 213 P.3d 1146 ("[I]f no material issues of fact are in dispute and an appeal presents only a question of law, we apply de novo review and are not required to view the appeal in the light most favorable to the party opposing summary judgment.").

DISCUSSION

Preliminary Matters

{7} Before addressing the merits, we note three preliminary matters. First, in a separate order, the district court granted summary judgment to L.C.I.2 on Plaintiffs' claims of negligence against L.C.I.2. In *Windham v. L.C.I.2, Inc.*, No. 29,212 (N.M. Ct. App. July 8, 2011), we filed a memorandum opinion reversing the summary judgment and remanded the case to the district court. Thus, any arguments premised on that summary judgment are no longer viable.

{8} Second, we note that Section 56-7-1 was amended in 2005. 2005 N.M. Laws, ch. 148, § 1. However, the subcontract between L.C.I.2 and Newt & Butch was signed while the 2003 version of the statute was in effect. Thus, the parties do not dispute, and we agree, that the 2003 version of Section 56-7-1 applies, and all references herein are to the 2003 version of the statute.

{9} Finally, Nationwide clarified in oral argument that while it acknowledges a duty to provide L.C.I.2 a defense as an "additional insured" under the commercial liability policy issued to Newt & Butch, its contention on appeal is that providing a defense in this case violates Section 56-7-1; and the duty is void. Thus, there is noissue before us concerning coverage of a duty to defend. We also observe that we are not presented with any question concerning a duty to indemnify in the present posture of the case.

Analysis

{10} We begin our analysis with the statute. Section 56-7-1 in pertinent part states:

> A. A provision in a construction contract that requires one party to the contract to indemnify, hold harmless, insure or defend the other party to the contract, including the other party's employees or agents, against liability, claims, damages, losses or expenses, including attorney fees, arising out of bodily injury to persons or damage to property caused by or resulting from, in whole or in part, the negligence, act or omission of the indemnitee, its officers, employees or agents, is void, unenforceable and against the public policy of the state.

B. A construction contract may contain a provision that, or shall be enforced only to the extent that, it:

(1) requires one party to the contract to indemnify, hold harmless or insure the other party to the contract, including its officers, employees or agents, against liability, claims, damages, losses or expenses, including attorney fees, only to the extent that the liability, damages, losses or costs are caused by, or arise out of, the acts or omissions of the indemnitor or its officers, employees or agents; or

(2) requires a party to the contract to purchase a project-specific insurance policy, including an owner's or contractor's protective insurance, project management protective liability insurance or builder's risk insurance.

. . . .

E. As used in this section, "indemnify" or "hold harmless" includes any requirement to name the indemnified party as an additional insured in the indemnitor's insurance coverage for the purpose of providing indemnification for any liability not otherwise allowed in this section.

{11} Nationwide argues: (1) Section 56-7-1 voids any duty to provide L.C.I.2 a defense because the complaint only alleges that L.C.I.2's acts or omissions caused Plaintiffs' injuries, Newt & Butch is not a party to the suit, the complaint makes no allegation of negligence against Newt & Butch, and there has been no finding that Newt & Butch was negligent; and (2) Section 56-7-1(B) and (E) only allow for a recovery of attorney fees *after* a determination that any losses of L.C.I.2 were caused by Newt & Butch, and only to the extent that such losses were caused by Newt & Butch.

{12} Nationwide's first argument is premised on its assertion that Section 56-7-1 on its face voids a provision in a construction contract which requires an indemnitor (Newt & Butch) to provide a defense to an indemnitee (L.C.I.2) for injuries caused by, or resulting from, in whole or in part, the negligence, act, or omission of the indemnitee (L.C.I.2).

{13} Our decision in *City of Albuquerque* is dispositive of Nationwide's arguments. In *City of Albuquerque*, BPLW designed and oversaw the construction of a rental car facility at the airport pursuant to a contract with the City. 2009-NMCA-081, ¶ 2. In pertinent part, the contract provided that BPLW agreed to defend the City for all suits brought against the City because of injury received or sustained by any person "arising out of or resulting from any negligent act, error, or omission of [BPLW] . . . arising out of the performance" of the contract. *Id.* ¶ 14 (alterations in original) (internal quotation marks and citation omitted). After the facility opened, a customer fell off a curb while exiting one of the buildings at the facility, filed suit against the City, and subsequently amended the complaint to add BPLW as a defendant. *Id.* ¶ 2. When it received the complaint, the City requested BPLW to honor its contractual obligation to defend the City, and BPLW refused. *Id.* ¶ 4. Accordingly, the City filed a cross-claim against BPLW, alleging that BPLW had a contractual duty to defend the City for any cause of action arising out of BPLW's performance of the contract. *Id.* The City filed a motion for partial

summary judgment asserting that BPLW had a legal duty to defend the City, and the district court granted the City's motion. *Id.* ¶ 5. On appeal, we affirmed the district court. *Id.* ¶ 32.

{14} Since neither party disputed that the allegations against the City were that the City itself was negligent, the initial question posed was whether the contract required BPLW to provide the City with a defense. *Id.* ¶ 13. Aside from very specific and limited exceptions that are not applicable here, we held that the plain language of the contract required BPLW to defend *all* suits brought against the City arising out of a negligent act, error, or omission of BPLW in performing the contract. *Id.* ¶¶ 15-16. This specifically included causes of action alleging that the City itself was negligent, as long as the cause of action arose from BPLW's performance of the agreement. *Id.* BPLW argued, as Nationwide does here, that enforcing the contractual obligation would violate Section 56-7-1. *Id.* ¶ 19. We disagreed and said:

> Here, requiring BPLW to fulfill its contractual obligation to defend the City against any suit against the City arising out of BPLW's alleged negligence in the performance of the contract does not violate Section 56-7-1 or the policy behind it. Instead, this interpretation of the contract is fully consistent with the requirements of the statute. It promotes safety in the construction project because it ensures that BPLW will be accountable for any harm caused by its performance of the agreement.

Id. ¶ 20. We recently reiterated our conclusion in *City of Albuquerque* that "requiring the contractor to indemnify and defend the City for the contractor's alleged negligence does not violate the construction anti-indemnity statute [Section 56-7-1] or the policy behind it." *Holguin v. Fulco Oil Servs. L.L.C.*, 2010-NMCA-091, ¶ 43, 149 N.M. 98, 245 P.3d 42, *cert. granted*, 2010-NMCERT-010, 149 N.M. 65, 243 P.3d 1147. We therefore conclude that Section 56-7-1 does not void Nationwide's obligation to provide L.C.I.2 a defense.

{15} Nationwide's second argument is premised on its attempt to distinguish *City of Albuquerque*. Nationwide argues that *City of Albuquerque* is distinguishable because it relied on exclusionary language that was eliminated in the 2003 amendment and because the new exclusionary language that was added does not refer to a duty to defend. Specifically, Nationwide argues, Section 56-7-1(A) is a general prohibition against agreements that allow an indemnitor (Newt & Butch) to indemnify an indemnitee (L.C.1.2) for the indemnitee's own negligence, and this general prohibition specifically refers to agreements to defend. Nationwide asserts that Section 56-7-1(B), which establishes when agreements generally prohibited by Section 56-7-1(A) will be permitted, specifically refers to many of the types of agreements listed in Section 56-7-1(A), but does not specifically refer to a duty to defend. In line with this reasoning, Nationwide asserts that even if Section 56-7-1(A) does not void the agreement, Section 56-7-1(B) and (E) only allow for a recovery of attorney fees *after* a determination that any losses of L.C.I.2 were caused by Newt & Butch, and only to the extent that such losses were caused by Newt & Butch. We disagree for two reasons.

{16} First, we specifically noted the 2003 amendments to Section 56-7-1 in *City of*

Albuquerque, and we concluded that the amendments did not void the contractual duty to defend in that case. 2009-NMCA-081, ¶¶ 19-20. We fail to see any material difference in the duty to defend in *City of Albuquerque* and the case before us now.

{17} Secondly, Nationwide in effect asks us to treat its duty to defend as a claim for indemnification. However, as we stated in *City of Albuquerque*, the duty to indemnify is distinct from the duty to defend, and resolution of whether there is a duty to defend does not necessarily depend on there being a duty to indemnify. *Id.* ¶ 31. The general rule giving rise to the duty to defend is well settled:

> If the allegations of the injured third party's complaint show that an accident or occurrence comes within the coverage of the policy, the insurer is obligated to defend, regardless of the ultimate liability of the insured. The question presented to the insurer in each case is whether the injured party's complaint states facts which bring the case within the coverage of the policy, not whether he can prove an action against the insured for damages. The insurer must also fulfill its promise to defend even though the complaint fails to state facts with sufficient clarity so that it may be determined from its face whether or not the action is within the coverage of the policy, provided the alleged facts tend to show an occurrence within the coverage.

Am. Emp'rs Ins. Co. v. Cont'l Cas. Co., 85 N.M. 346, 348, 512 P.2d 674, 676 (1973) (quoting 1 Long, The Law of Liability Insurance § 5.02 (1973)).

{18} In the case before us, L.C.I.2 is an "additional insured" under the policy issued to Newt & Butch by Nationwide "with respect to liability *arising out of* [Newt & Butch's] ongoing operations performed for [L.C.I.2]." (Emphasis added.). *City of Albuquerque* addressed how the phrase "arising out of" is to be construed: "The phrase 'arising out of' is given a broad interpretation by our courts and is generally understood to mean originating from, having its origin in, growing out of, or flowing from." 2009-NMCA-081, ¶ 22 (alteration omitted) (internal quotation marks and citation omitted). Applying *City of Albuquerque*, Plaintiffs' allegations against L.C.I.2 "arise out of" Newt & Butch's installation of the roof on the structure. Therefore, under our settled precedent, Nationwide has a duty to defend L.C.I.2 regardless of L.C.I.2's ultimate liability to Plaintiffs.

CONCLUSION

{19} The order of the district court is affirmed.

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

MICHAEL E. VIGIL, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

CYNTHIA A. FRY, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMSC-002

Filing Date: December 14, 2011

Docket No. 32,917

MICHAEL L. LOBATO,

Plaintiff,

v.

STATE OF NEW MEXICO ENVIRONMENT DEPARTMENT, ENVIRONMENTAL HEALTH DIVISION, et al.,

Defendants.

Santiago E. Juarez
Albuquerque, NM

for Plaintiff

Narvaez Law Firm, PA
Henry F. Narvaez
Albuquerque, NM

for Defendants

OPINION

DANIELS, Chief Justice.

{1} This case is before us on certification from the United States District Court for the District of New Mexico to answer two questions on whether the New Mexico Department of Labor's[1] Charge of Discrimination form fairly and adequately allows a claimant to exhaust administrative remedies and preserve the right to pursue judicial remedies for individual liability claims under the New Mexico Human Rights Act (NMHRA), NMSA 1978, Sections 28-1-1 to -14 (1969, as amended through 2007). We hold that the Charge of Discrimination form is so misleading that exhaustion of administrative remedies in the circumstances of this case is not required.

I. FACTUAL AND PROCEDURAL HISTORY

{2} In 2008, Plaintiff Michael L. Lobato filed two complaints and one amended complaint

[1]The New Mexico Department of Labor is now the New Mexico Department of Workforce Solutions. *See* NMSA1978, § 9-26-2 (2007). Because the Department of Labor's name appears on the form at issue in this case, we refer to the department by its former name.

with the United States Equal Employment Opportunity Commission (EEOC) charging his employer, the New Mexico Environment Department, with discrimination in violation of Title VII of the Civil Rights Act of 1964 (Civil Rights Act), 42 U.S.C. §§ 2000e–2000e-17 (2006). Plaintiff filed his administrative complaints by using the New Mexico Department of Labor, Human Rights Division's[2] (NMHRD) official Charge of Discrimination form. Submitting this form to either the EEOC or the NMHRD constitutes filing with both agencies, as is noted on the form directly above the signature line: "I want this charge filed with both the EEOC and the State or local Agency. . . ." *See* 9.1.1.8(F)(2) NMAC (9/1/1998) ("[A] complaint which is first filed with any duly authorized civil rights agency holding a work sharing agreement . . . with the [NMHRD] shall be deemed to have been filed with the [NMHRD] as of the date on which the complaint was first filed with any of these agencies."); *see also Mitchell-Carr v. McLendon*, 1999-NMSC-025, ¶ 13, 127 N.M. 282, 980 P.2d 65 (stating that the NMHRD-EEOC work-sharing agreement "contemplates that a person will be allowed to use federal EEOC procedures to set in motion the grievance procedures of the NMHRA to the limited extent that, if he or she initially files a complaint with the EEOC, that complaint will be deemed to have been properly filed with the [NMHRD] as well."); *Sabella v. Manor Care, Inc.*, 1996-NMSC-014, ¶ 9, 121 N.M. 596, 915 P.2d 901 (holding that the "NMHRD procedural requirements may be met by filing a complaint with either the NMHRD or the EEOC").

{3} According to the instructions on the NMHRD's Charge of Discrimination form, Plaintiff was required to (1) name the "Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency" he believed discriminated against him; (2) provide that entity's street address and phone number; and (3) explain the "PARTICULARS" of his charge. Nothing on the NMHRD Charge of Discrimination form instructed Plaintiff to add any identification of individual agency employees involved in the alleged discrimination.

{4} In December 2009, Plaintiff filed a complaint in the United States District Court for the District of New Mexico stating in part that the EEOC "complaints [had been] processed to conclusion." This judicial complaint was based on the same work-related incidents and alleged, among other claims, violations of both the Civil Rights Act and the NMHRA. Plaintiff named as defendants the New Mexico Environment Department and multiple employees of the department. The individually named defendants responded by filing a motion to dismiss, arguing that (1) individuals are not subject to liability under the Civil Rights Act, and (2) Plaintiff did not exhaust his NMHRA administrative remedies and preserve his right to sue any individual defendant not specifically identified in Plaintiff's original NMHRD Charge of Discrimination forms.

{5} The United States District Court granted Defendants' motion to dismiss on the Civil Rights Act claims. On the NMHRA claims, the district court denied the motion for those defendants identified by their job positions within the "PARTICULARS" narrative on Plaintiff's Charge of Discrimination forms, and *sua sponte* certified two questions to this Court regarding the defendants not otherwise identified in those administrative forms. *See*

[2]The Human Rights Division is now the Human Rights Bureau. *See* NMSA 1978, § 28-1-2(D) (2007).

NMSA 1978, § 39-7-4 (1997) and Rule 12-607 NMRA (providing this Court with the authority to answer certified questions). Having accepted certification, we reformulate those questions, as permitted by NMSA 1978, Section 39-7-5 (1997):

> (1) Does the NMHRD's Charge of Discrimination form, which instructs filers to identify the alleged discrimination by the name and address of the discriminating agency or entity but not the individual actor, provide a fair and adequate opportunity to exhaust administrative remedies against individual actors under the NMHRA?
>
> (2) If the Charge of Discrimination form is inadequate, what remedy is proper for a plaintiff who used the NMHRD form and consequently failed to exhaust administrative remedies against individuals?

II. STANDARD OF REVIEW

{6} This case requires us to interpret the language of the NMHRA, a matter of law we review de novo. *See State v. Nick R.*, 2009-NMSC-050, ¶ 11, 147 N.M. 182, 218 P.3d 868. When interpreting a statute, our primary goal is "to ascertain and give effect to the intent of the Legislature." *Id.* "To determine legislative intent, we look not only to the language used in the statute, but also to the purpose to be achieved and the wrong to be remedied." *Hovet v. Allstate Ins. Co.*, 2004-NMSC-010, ¶ 10, 135 N.M. 397, 89 P.3d 69.

III. DISCUSSION

A. The Charge of Discrimination Form Violates the NMHRA.

{7} We first address the question of whether the NMHRD Charge of Discrimination form provides a fair and adequate opportunity to pursue individual liability claims as provided by the NMHRA. Plaintiff argues that the official form is inadequate and misleading because the form directed him to name the discriminating agency, but nothing in the form instructed him to identify individual agency employees involved in the alleged incidents. Defendants argue that any inadequacy in the form is rectified because (1) Plaintiff filed the NMHRD's Charge of Discrimination forms with the EEOC only, which supplements the form's information with an intake questionnaire in which Plaintiff mentioned some of the individuals relevant to his claim, and (2) some individual defendants could be identified in the narrative of the "PARTICULARS" section. Defendants take the position that both the NMHRD Charge of Discrimination form's "PARTICULARS" section and the supplemental EEOC questionnaire provide means to identify individual respondents and satisfy administrative exhaustion requirements. Based on the statutory language of the NMHRA and its legislative purpose, Defendants' arguments fail.

{8} The NMHRA is a comprehensive scheme enacted in 1969 for the primary purpose of providing administrative and judicial remedies for unlawful discrimination in the workplace. *See* §§ 28-1-7, -10, -11; *see also Mitchell-Carr*, 1999-NMSC-025, ¶ 16 (recognizing that the NMHRA provides "the right, the procedure, and the remedy" for discrimination complaints) (internal quotation marks and citation omitted). Unlike the Civil Rights Act, the NMHRA permits unlawful discrimination claims against individuals. *See* § 28-1-7(I) (defining unlawful acts by "any person" as well as any employer); *see also Sonntag v. Shaw*, 2001-NMSC-015, ¶ 12, 130 N.M. 238,

22 P.3d 1188 (recognizing individual liability for NMHRA discrimination claims). In keeping with the NMHRA's individual liability provisions, any person reporting unlawful discrimination must "file with the human rights division of the labor department a written complaint that *shall state the name and address of the person* alleged to have engaged in the discriminatory practice, all information relating to the discriminatory practice and any other information that may be required." Section 28-1-10(A) (emphasis added). *See also* 9.1.1.8(D)(2) NMAC (requiring the name and address of the "respondent" to be filed in the written complaint form; "respondent" is defined to include "person," 9.1.1.7(EE) NMAC (9/1/1998)).

{9} Despite these statutory and rule requirements, the NMHRD's official Charge of Discrimination form instructs filers to report only the employer or agency involved but does not instruct filers to report the "person" involved. Asking a filer to state the "PARTICULARS" of a claim does not overcome this defect, as an open-ended request to state the "PARTICULARS" does not alert the filer to the requirement that the filer must also provide the names and addresses of the individuals involved. Nor does the EEOC's use of a more detailed intake questionnaire overcome this defect. EEOC claims are resolved independently of NMHRD action. *See Mitchell-Carr*, 1999-NMSC-025, ¶ 15 (noting that the work-sharing agreement between the NMHRD and the EEOC recognizes dual filing but not dual resolution of discrimination complaints).

{10} While the names and addresses of individuals are superfluous to the federal Civil Rights Act claims, this information is critical to preserving judicial remedies against individuals under the NMHRA. NMHRA claims require administrative exhaustion before a plaintiff can bring suit. *See* § 28-1-13; *see also Sonntag*, 2001-NMSC-015, ¶¶ 12-13 (holding that a failure to name the owner of a corporation in his personal capacity barred suit against him in district court); *Mitchell-Carr*, 1999-NMSC-025, ¶¶ 10, 41 (holding summary judgment was proper because the individual defendant was not named in the original NMHRA complaint); *Sabella*, 1996-NMSC-014, ¶¶ 9, 23 (requiring exhaustion of administrative procedures as a prerequisite to suit in district court); *Luboyeski v. Hill*, 117 N.M. 380, 382-83, 872 P.2d 353, 355-56 (1994) (holding that individual defendants could not be named for the first time in district court). The NMHRA creates a cause of action against individuals, which necessarily requires the naming of these individuals in the administrative complaint, and requires administrative exhaustion against these individuals as a prerequisite to judicial remedies. For the NMHRD's official Charge of Discrimination form to ask for the name and address of the discriminating entity but not for the names and addresses of the individuals not only makes the complaint form inadequate to serve its statutory purpose but makes it affirmatively misleading. It creates a trap for unwary claimants to forfeit their statutory rights and judicial remedies. Accordingly, we hold the NHMRD's Charge of Discrimination form fails to provide a fair and adequate opportunity to exhaust administrative remedies against individual defendants as required by the NMHRA.

B. Preserving Plaintiff's Access to the Courts Outweighs Administrative Notice and Prejudice Concerns.

{11} Having held that Plaintiff did not have a fair and adequate opportunity to exhaust administrative remedies against individual defendants, we turn to the question

of the appropriate remedy for Plaintiff. Plaintiff argues we should waive administrative exhaustion because the administrative remedies provided by the state are inadequate, relying on *Franco v. Carlsbad Municipal Schools*, 2001-NMCA-042, ¶ 20, 130 N.M. 543, 28 P.3d 531 (holding that exhaustion of administrative remedies was not required when the agency's failure to meaningfully inform an employee of those remedies thwarted the employee's ability to invoke them). Defendants argue that waiving administrative exhaustion violates their notice protections under the NMHRA, *see* § 28-1-10(B) and 9.1.1.8(H) NMAC (requiring anyone named in a complaint to be furnished with a copy of that complaint), and unduly denies Defendants an opportunity to resolve the dispute in administrative proceedings before the NMHRD, rather than before a court as defendants in a judicial proceeding. Weighing these harms, we conclude that barring Plaintiff's judicial remedy solely because he followed explicit and misleading instructions in the NMHRD's official complaint form is a far greater injustice than the less significant effect imposed on Defendants by the lack of formal individual notice in the antecedent administrative proceedings.

{12} The doctrine of administrative exhaustion arose as a way to coordinate the roles of the administrative and judicial branches, both of which are charged with regulatory duties. *State ex. rel Norvell v. Arizona Pub. Serv. Co.*, 85 N.M. 165, 170, 510 P.2d 98, 103 (1973) (distinguishing exhaustion from primary jurisdiction and noting that under the exhaustion doctrine, "judicial interference is withheld until the administrative process has run its course.") *See also* 5 Jacob A. Stein et al., *Administrative Law* § 49.01 (2011), at 49-2 (stating "[t]he doctrine of exhaustion of administrative remedies serves interests of judicial economy by requiring parties to pursue all administrative solutions before seeking judicial relief"). A rigid adherence to administrative exhaustion is not required in circumstances where the doctrine is inappropriate. *See Callahan v. N.M. Fed'n of Teachers–TVI*, 2006-NMSC-010, ¶ 24, 139 N.M. 201, 131 P.3d. 51 (noting the general rule that exhaustion is not required if the administrative remedies are inadequate); *Franco*, 2001-NMCA-042, ¶ 20 (holding that exhaustion is not required where the administrative remedies are inadequate); *see also* Stein, *supra*, § 49.02, at 49-47 (noting that exhaustion may be waived when agency proceedings are futile).

{13} In *Franco*, a school employee was given a written termination notice and a copy of the state regulations on termination but was not told of his right to present evidence at a special session of the school board, planned for that evening, at which his final termination would be voted on. *Franco*, 2001-NMCA-042, ¶ 6. Whether intentional or inadvertent, the school district's own procedures thwarted the employee's ability to exhaust—or even initiate—the administrative remedies afforded to him by statute. *Id.* ¶ 20. *Franco* held that in those circumstances exhaustion of the administrative remedies was not required. *See id.*

{14} In this case, like *Franco*, Plaintiff relied on the administrative procedures he was instructed to follow, and that reliance now threatens to deny him the statutory remedies to which he is entitled. Plaintiff's NMHRA claims are now time-barred. *See* § 28-1-10(A) (stating NMHRA complaints must be filed within three hundred days of the incident in question). While Defendants correctly note that the administrative notice requirements of the NMHRA will not have been met if

Plaintiff's suit is permitted to go forward, Defendants fail to show how this lack of notice in the administrative proceeding outweighs the harm of Plaintiff's forfeiture of his judicial remedy under the NMHRA. Because Plaintiff's suit arises out of the very incidents reported in the NMHRD Charge of Discrimination forms, Defendants were likely to have had at least constructive notice of their alleged involvement in these allegations during any prior administrative proceedings. Balancing the equities, we hold that in these limited circumstances the requisite administrative exhaustion of the NMHRA should not be required in order for Plaintiff to pursue his judicial remedies under the statute.

{15} To avoid this situation in the future and to honor legislative intent, we suggest the NMHRD revise its Charge of Discrimination form to instruct filers in plain language to include the names and addresses of any individuals involved. This will allow claimants to have an opportunity to pursue all of their rights under the NMHRA and will provide named defendants with notice and opportunity to be heard in all proceedings.

III. CONCLUSION

{16} In order to preserve individual liability claims under the NMHRA, we answer the two certified questions by holding (1) the NMHRD's Charge of Discrimination form failed to provide Plaintiff a fair and adequate opportunity to exhaust administrative remedies against individual defendants; and (2) because of this inadequacy, Plaintiff is not required to have exhausted administrative remedies against the previously unnamed individual defendants before pursuing his suit in the United States District Court.

{17} IT IS SO ORDERED.

CHARLES W. DANIELS, Chief Justice

WE CONCUR:

PATRICIO M. SERNA, Justice

PETRA JIMENEZ MAES, Justice

RICHARD C. BOSSON, Justice

STANLEY WHITAKER, Judge, Sitting by designation

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-002

Filing Date: November 16, 2011

Docket No. 30,323

MONICA MEZA,

Plaintiff-Appellant,

v.

MARGARITA TOPALOVSKI, M.D.,

Defendant-Appellee,

and

ROBERT L. LOPEZ, M.D.,

Defendant.

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Pro Se Appellant

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for Appellee

OPINION

VANZI, Judge.

{1} Plaintiff Monica Meza appeals the district court's grant of summary judgment in favor of Defendant Margarita Topalovski, M.D. (Dr. Topalovski). This case raises an issue of first impression as to whether a plaintiff who wrongly names a health care provider in an application to the New Mexico Medical Review Commission (MRC) is then allowed to use the MRC's own rules to amend her complaint and rely on the original filing date for purposes of applying the tolling period to a substitute health care provider. We conclude that filing an application with the MRC as to one provider cannot toll the limitations period as to another provider who was not named in the original application and for whom the statutory period in which to file a cause of action has passed. We affirm the district court's ruling in favor of Dr. Topalovski.

BACKGROUND

{2} The relevant facts of this case are not in dispute. After an ultrasound revealed a spot on her left kidney, Meza's surgeon recommended surgery to remove the growth. Meza agreed to the surgery and, on December 12, 2005, the surgeon removed the mass of tissue from Meza's kidney and sent it to Dr. Topalovski for a "frozen section" evaluation. Dr. Topalovski diagnosed the tissue specimen as cancerous and, based upon that information, Meza's entire left kidney was removed. Several weeks later, on February 27, 2006, Meza's treating physician informed Meza that the section taken from her kidney was benign.

{3} Meza filed an application for review with the MRC on December 11, 2008, alleging a malpractice claim against Robert L. Lopez, M.D. That application did not allege a malpractice claim against Dr. Topalovski. On March 23, 2009, Meza filed a "modified" or "amended" application for review with the MRC alleging a malpractice claim against Dr. Topalovski. The MRC issued its final decision on July 28, 2009. Meza filed her

complaint against Dr. Topalovski in district court shortly thereafter.

{4} Dr. Topalovski moved for summary judgment on the ground that Meza's claim was barred by the three-year statute of repose set forth in the New Mexico Medical Malpractice Act (MMA), NMSA 1978, Sections 41-5-1 to -29 (1976, as amended through 2008). The district court granted the motion, and Meza timely appealed.

DISCUSSION

{5} Meza raises two issues on appeal: (1) whether her initial application to the MRC against Dr. Lopez tolled the statute of limitations for purposes of adding a claim against Dr. Topalovski where the amended application adding Dr. Topalovski was filed more than three years after the date of the alleged malpractice, and (2) whether the claim against Dr. Topalovski should have been tolled based upon a discovery-based accrual date. Dr. Topalovski argues that the district court properly granted summary judgment on the ground that Meza's claim is barred by the MMA's three-year statute of repose. We begin with the appropriate standard of review and then address Meza's arguments.

Standard of Review

{6} "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. "On appeal from the grant of summary judgment, we ordinarily review the whole record in the light most favorable to the party opposing summary judgment to determine if there is any evidence that places a genuine issue of material fact in dispute." *City of Albuquerque v. BPLW Architects & Eng'rs, Inc.*, 2009-NMCA-081, ¶ 7, 146 N.M. 717, 213 P.3d 1146. "However, if no material issues of fact are in dispute and an appeal presents only a question of law, we apply de novo review and are not required to view the appeal in the light most favorable to the party opposing summary judgment." *Id.*

{7} In response to the motion for summary judgment, Meza adopted virtually all of Dr. Topalovski's undisputed facts and did not offer any facts of her own. Among other things, Meza agreed that the alleged act of malpractice occurred on December 12, 2005. Meza disagreed only with Dr. Topalovski's characterization of her March 23, 2009 application as a "second application for review," contending instead that it was an "[a]mended [a]pplication to the original [a]pplication." Because the disputed portrayal of the March 23, 2009 application does not affect our analysis in this case, we review the legal question presented de novo. *See id.*

The Original Filing Date in an Application to the MRC Does Not Toll the Statute of Limitations for an Untimely Application Against a Previously Unnamed Health Care Provider

{8} Section 41-5-22 of the MMA states that "[t]he running of the applicable limitation period in a malpractice claim shall be tolled upon submission of the case for the consideration of the [MRC] and shall not commence to run again until thirty days after the [MRC]'s final decision is entered in the permanent files of the [MRC] and a copy is served upon the claimant and [her] attorney by certified mail." Meza interprets this statutory provision to mean that Section 41-5-22 may be utilized to toll the statute of limitations for a previously unnamed health care provider for whom the limitations period has otherwise expired. As authority for her position, Meza

relies on the MRC's policies and procedures (the rules) that allow an applicant to add or delete parties upon proper notification to the MRC. Although we agree that the rules set forth procedures for correcting an inadequate application, we are not persuaded that they may be used to circumvent the strict limitations period of Section 41-5-13.

{9} Before turning to Section 41-5-22, we must first discuss the MMA's statute of repose, Section 41-5-13. Section 41-5-13 requires an action for medical negligence to be filed with the MRC "within three years after the date that the act of malpractice occurred." The language of the statute is clear. No claim may be brought unless it is filed within this statutorily prescribed period. Once a claim is filed, however, the limitation period may be tolled "upon submission of the case" to the MRC. Section 41-5-22. In reading the statute of limitations provision of Section 41-5-13 in conjunction with Section 41-5-22, it is clear that the Legislature intended that all claims against a health care provider must be timely filed before a claimant can avail herself of the MMA's tolling provision.

{10} This conclusion is further supported by the historical purpose of the statute. The MMA was enacted by the Legislature in an attempt to manage a perceived medical malpractice insurance crisis in New Mexico. *Roberts v. Sw. Cmty. Health Servs.*, 114 N.M. 248, 249-51, 837 P.2d 442, 443-45 (1992); *see Cummings v. X-Ray Assocs. of N.M., P.C.*, 1996-NMSC-035, ¶ 40, 121 N.M. 821, 918 P.2d 1321 ("New Mexico reformed its medical malpractice laws in 1976 in response to a much discussed medical malpractice crisis."). The Legislature's solution for preserving the ability of health care providers in New Mexico to maintain medical malpractice insurance "was to preclude almost all malpractice claims from being brought more than three years after the act of malpractice." *Cummings*, 1996-NMSC-035, ¶ 40. Thus, the running of the statute of limitations creates a substantive right for a provider to be free of liability after a specified period of time. Given the policies underlying the enactment of the statute, we believe it would contravene the mandatory language of Section 41-5-13 and would be inconsistent with the purposes of the MMA to allow Meza to utilize the tolling provision of Section 41-5-22 to assert a timely claim against Dr. Topalovski when the three-year statute of limitations had already expired.

{11} Meza argues that because the MRC's rules allow a claimant to add or delete parties, the statute of limitations is tolled under Section 41-5-22 regardless of Section 41-5-13's three-year filing requirement. We disagree, and for the reasons discussed above, we conclude that such corrections are allowed only if they are consistent with all of the provisions of the MMA, including the three-year limitations period. In this case, Meza filed an application alleging a malpractice claim against Dr. Lopez on December 11, 2008. That was the case she submitted to the MRC for consideration and which was subject to the tolling provision of Section 41-5-22. Although the MRC's rules allowed the addition of Dr. Topalovski as a party to the claim against Dr. Lopez, Meza nevertheless had to comply with the strict limitations period set forth in Section 41-5-13. She did not. Instead, Meza submitted her amended application against Dr. Topalovski on March 23, 2009. At that point, the applicable limitations period to bring an action for medical malpractice against Dr. Topalovski had passed. Consistent with the MRC's acknowledgment that the MMA "is the pertinent statute that governs all matters before the [MRC,]" we conclude that Meza cannot utilize her timely claim against Dr.

Lopez to toll her time-barred application against Dr. Topalovski.

{12} Meza urges this Court to apply Rule 1-015(C) NMRA principles to her amended application to the MRC. Applying these principles would allow Meza's amended application adding Dr. Topalovski as a party to timely relate back to the December 11, 2008 application against Dr. Lopez. As we have noted above, the tolling provision of Section 41-5-22 was not intended to give a claimant additional time beyond the statutorily prescribed period within which to formulate causes of action against a previously unnamed health care provider. It follows then that an amended application, improperly amended, will not relate back to the original time of filing, and an amended application adding a new party must be regarded as the initiation of a new action with regard to analysis pursuant to the statute of limitations. Because the underlying claim against Dr. Topalovski was filed outside the applicable time period, we hold that it cannot relate back to the filing of the application against Dr. Lopez.

{13} Meza appears to contend that Dr. Lopez fraudulently failed to disclose Dr. Topalovski's role in this matter and that she did not name Dr. Topalovski in her original application to the MRC because she had no way of learning of that doctor's involvement until the hearing before the MRC was underway. As authority for this proposition, Meza cites *Keithley v. St. Joseph's Hospital*, 102 N.M. 565, 698 P.2d 435 (Ct. App. 1984). We are not persuaded that our holding in *Keithley* is applicable to the facts of this case.

{14} In *Keithley*, this Court held that "the statute of limitations may be tolled where a physician has knowledge of facts relating to medical malpractice and fails to disclose such facts to the patient under circumstances where the patient may not be reasonably expected to learn of the improper acts." *Id.* at 569, 698 P.2d at 439. The case before us is distinguishable insofar as Meza did not claim, as did the plaintiff in *Keithley*, that the hospital concealed information about the patient's improper medical treatment until the statute of limitations had tolled. *See id.*

{15} Moreover, contrary to our holding in *Keithley*, Meza has not established that "she did not have the means to discover the fraud." *See id.* at 570, 698 P.2d at 440 ("A plaintiff who alleges that the statute has been tolled by fraud, either active or passive, must establish that she did not have the means to discover the fraud."). Although Meza's counsel stated at the hearing on Dr. Topalovski's motion for summary judgment that it had been "a real struggle on the part of the client and the attorney to determine who, in fact, were the proper parties," Meza did not claim or show below, nor does she claim on appeal, that she could not, through reasonable diligence, have discovered the fraud. *See id.* (explaining that in order to toll the statute of limitations, "it must appear that the fraud not only was not discovered, but could not have been discovered with reasonable diligence" (emphasis omitted) (internal quotation marks and citation omitted)). Therefore, our holding in *Keithley* does not apply to the facts of this case.

{16} We briefly address Meza's argument that Dr. Topalovski waived her statute of repose defense because she did not raise the defense in her answer to Meza's application to the MRC or at the hearing. Dr. Topalovski does not dispute that she did not include a statute of repose defense in her answer to Meza's application or at the hearing. However, she contends that she was not required to do so, and we agree. The MRC's rules explicitly provide that although counsel

is encouraged to provide a meaningful response to the application, "a recitation of affirmative defenses is not required by the [MRC.]" Because she was not required to raise the three-year statute of repose issue before the MRC, Dr. Topalovski did not waive this defense.

{17} We are aware of the reality that the alleged misdiagnosis in this case resulted in the unnecessary and complete removal of Meza's left kidney. But we are constrained by the time limits imposed by the Legislature on the commencement of actions for medical malpractice, and we are not at liberty to create an exception to the plain language of that statutory provision. In this case, Meza's cause of action accrued on December 12, 2005, and she filed her application against Dr. Topalovski on March 23, 2009, several months after the three-year limitations period expired. Meza cannot now rely on Section 41-5-22's tolling provision to assert a timely claim and, as a result, her amended complaint will not relate back. The district court did not err in granting summary judgment to Dr. Topalovski.

The Discovery Rule Does Not Apply Under the Circumstances of This Case

{18} Meza alternatively argues that she did not name Dr. Topalovski in her December 11, 2008 application because the "initial pathology reports were unclear who performed the initial frozen section analysis." She contends that the standard that this Court should employ in determining the time period by which she had to file her claim against Dr. Topalovski is the discovery date. Under this standard, the time period for Meza to file her application with the MRC would have been in January or February 2009 when Meza first received medical reports alerting her to Dr. Topalovski's involvement. For the reasons that follow, the discovery rule does not apply under the circumstances of this case.

{19} Our Supreme Court has interpreted Section 41-5-13 to be an occurrence-based statute of repose rather than a discovery-based statute of limitations. *Cummings*, 1996-NMSC-035, ¶¶ 50-51. The limitations period runs from the date of occurrence, as opposed to the date of discovery, and terminates the right to any action after a specific time has elapsed even though no injury has yet manifested itself. Section 41-5-13; *Cummings*, 1996-NMSC-035, ¶ 50. It is undisputed in this case that the alleged act of malpractice occurred on December 12, 2005. It was incumbent on Meza to investigate and evaluate her claim—including obtaining her medical records—to determine what involvement Dr. Topalovski had before the limitation period expired. Because the discovery rule does not apply here and because Meza did not file her application until March 23, 2009, her claim is time-barred. The district court properly granted Dr. Topalovski's motion for summary judgment.

CONCLUSION

{20} We affirm the district court's order granting summary judgment in favor of Dr. Topalovski.

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

LINDA M. VANZI, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

RODERICK T. KENNEDY, Judge

[redacted]

[redacted]

Certiorari Granted, January 9, 2012, No. 33,182

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-003

Filing Date: August 18, 2011

Docket No. 27,889

MOONGATE WATER COMPANY, INC., a New Mexico public utility,

Plaintiff-Appellant/Cross-Appellee,

v.

CITY OF LAS CRUCES,

Defendant-Appellee/Cross-Appellant.

[redacted]

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[redacted]

OPINION

GARCIA, Judge.

{1} This appeal requires us to consider whether a certificate of public convenience and necessity (CCN) issued by the Public Regulatory Commission (PRC) grants a public utility exclusive service rights against a municipality with a population less than or equal to two hundred thousand people. The district court granted summary judgment

against the City of Las Cruces (the City) and found that the City's expansion into the service area of Moongate Water Co., Inc. (Moongate) constituted a partial taking of Moongate's exclusive property interest under its CCN. After a subsequent evidentiary hearing, the district court found that the evidence did not support an award of damages to Moongate as a result of the taking. Moongate appeals the district court's damages determination, arguing that denying any value for the partial taking of its property interest was error and per se unconstitutional. In a cross-appeal, the City contends that the district court erred by determining that Moongate's CCN granted it exclusive service rights against the City, and absent a right of exclusivity, the district court erred by concluding that a taking occurred.

{2} We hold that the district court erred in determining that Moongate acquired exclusive service rights against the City through its CCN, and consequently, the court erred in awarding summary judgment to Moongate on the taking issues. As a result, we reverse the district court's award of summary judgment in favor of Moongate on its claims of a partial taking of its property interest by inverse condemnation (Count II) and regulatory taking of that interest under constitutional taking clauses (Count III), and we remand for further proceedings consistent with this Opinion. Because we reverse on these grounds, we do not reach the additional arguments raised by the parties on appeal.

FACTUAL AND PROCEDURAL HISTORY

{3} Since 1983, Moongate has been a privately owned and regulated public utility company supplying water to rural residents in an unincorporated area referred to as the East Mesa and Organ Pass area on the outskirts of Las Cruces city limits, including Section 15. Over time, development in Section 15 required that Moongate expand its system by extending water lines and increasing water storage capacity within this area.

{4} In 1995, the City began planning for population growth and city expansion on the East Mesa. The City secured water rights through the State Engineer's Office and secured capital funding to build additional water servicing infrastructure. In 2004 and 2005, the City also agreed to annex a portion of Section 15 as part of the development for three new subdivisions called Dos Sueños, Los Enamorados, and Rincón Mesa. The City constructed the necessary water lines and infrastructure as part of its municipal water utility system and began servicing water to the residents as they requested service in the three new subdivisions.

{5} Subsequent to the City's annexation and development approval for the new subdivisions in Section 15, Moongate filed a complaint and an amended complaint against the City. In Count I of the amended complaint, Moongate sought, among other things, a declaratory judgment stating that Moongate's CCN from the PRC gave it the exclusive right to provide water to the service area annexed by the City for the three new subdivisions. In Count II, Moongate requested payment of just compensation for the City's partial taking of its property right pursuant to the inverse condemnation statute, NMSA 1978, § 42A-1-29(C) (1983). Count III sought compensation for the regulatory taking of Moongate's property under the United States and New Mexico Constitutions.

{6} The City moved for summary judgment on all three counts, arguing that the City's municipal water utility was not subject to PRC regulation, Moongate's CCN did not give it an

exclusive right to serve the disputed area against the City, and no taking occurred as a result of the lawful competition between the City and Moongate. Moongate subsequently filed a cross-motion for summary judgment on Counts II and III, arguing that Moongate was entitled to just compensation or damages as the result of the City's taking of Moongate's exclusive right to serve the disputed area.

{7} The district court granted summary judgment in favor of Moongate on Counts II and III, and Moongate subsequently withdrew its claims for relief under Count I. The court concluded that the City effectuated a taking of Moongate's property interest based upon the loss of Moongate's exclusive right to serve the relevant portion of Section 15 pursuant to its CCN. The court reasoned that unless otherwise determined by the PRC, Moongate's CCN was a grant of exclusive territory under NMSA 1978, Section 62-9-1 (2005). The court further interpreted NMSA 1978, Section 62-3-2.1(C) (1991), to prohibit the City from providing service in areas covered by Moongate's CCN until the City elected to be subject to the Public Utilities Act (PUA), NMSA 1978, Sections 62-1-1 to 62-6-28, 62-8-1 to 62-13-15 (1884, as amended through 2010), or exercised its authority to condemn the disputed area. The court further determined that Moongate would be entitled to provide proof of any damages that resulted from the City's intrusion into Moongate's service area, and the court set the evidentiary portion of the damages question for a bench trial.

{8} Thereafter, the district court proceeded with a bench trial to value the damages incurred by Moongate as a result of the taking of a portion of Moongate's exclusive CCN service area. Ultimately, the district court determined that the evidence did not support a damages award to Moongate.

{9} The City now appeals the district court's award of summary judgment in favor of Moongate on the taking issues in Counts II and III, arguing that the court erred as a matter of law in determining that Moongate's CCN granted it exclusive service rights against the City. Moongate appeals the district court's determination that the evidence did not support a damages award.

DISCUSSION

{10} On appeal, the parties' arguments regarding whether the district court erred in awarding summary judgment to Moongate on the taking issues and Moongate's entitlement to damages depend upon interpretation of the PUA to determine whether Moongate's CCN granted Moongate the exclusive right to serve the disputed area against the City's water system.

Standard of Review

{11} Determining whether a CCN issued pursuant to the PUA extends exclusive service rights to a public utility against a municipal water system is a question of statutory interpretation that we review de novo. *See Pub. Serv. Co. of N.M. v. N.M. Pub. Util. Comm'n*, 1999-NMSC-040, ¶ 14, 128 N.M. 309, 992 P.2d 860 (stating that statutory interpretation is a question of law that we review de novo). "Our goal in interpreting a statute is to determine and give effect to legislative intent." *N.M. Bd. of Veterinary Med. v. Riegger*, 2007-NMSC-044, ¶ 11, 142 N.M. 248, 164 P.3d 947. In construing a statute, we first examine "the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different [meaning] was intended." *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2007-NMSC-053, ¶ 20, 142 N.M. 533, 168 P.3d 105. Additionally,

"where several sections of a statute are involved, they must be read together so that all parts are given effect." *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599. "When statutory language is clear and unambiguous, [the appellate courts] must give effect to that language and refrain from further statutory interpretation. Only if an ambiguity exists will we proceed further in our statutory construction analysis." *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.3d 135 (internal quotation marks and citation omitted).

Applicability of the PUA to Municipal Water Systems

{12} A municipality that owns or operates a water utility system is ordinarily authorized to furnish water outside its corporate boundaries pursuant to NMSA 1978, Section 3-27-8 (1965). However, this statutory authority is limited if the municipality is subject to the restrictions of the PUA, Sections 62-1-1 to -6-26.1 and 62-8-1 to -13-14. *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995). The PUA is "a comprehensive regulatory scheme granting the PRC the policy-making authority to plan and coordinate the activities of New Mexico public utilities[.]" *Doña Ana Mut. Domestic Water Consumers Ass'n v. N.M. Pub. Regulation Comm'n*, 2006-NMSC-032, ¶ 16, 140 N.M. 6, 139 P.3d 166.

{13} The PUA expressly excludes a municipality from the definition of a "public utility," and a municipality is not subject to the operation of the PUA or any of its provisions unless an exception applies. Section 62-3-3(E), (G). The PUA provides that "[i]n the absence of voluntary election by a municipality to come within the provisions of the [PUA], *the municipality shall be expressly excluded from the operation of that act and from the operation of all its provisions*, and no such municipality shall for any purpose be considered a public utility[.]" Section 62-3-3(E) (emphasis added). Additionally, Section 62-6-4(A) grants the PRC exclusive jurisdiction to regulate public utilities, but expressly provides that "[n]othing in this section . . . shall be deemed to confer upon the [PRC] power or jurisdiction to regulate or supervise the rates or service of any utility owned and operated by any municipal corporation."

{14} Pursuant to Section 62-3-3(E), the first exception under which a municipality may be subject to the PUA is by voluntarily electing to subject itself to all of the provisions of the PUA under Section 62-6-5. *See Morningstar*, 120 N.M. at 588, 904 P.2d at 37 (recognizing that a municipality may choose to submit itself to full regulation by the PUA under Section 62-6-5). Section 62-6-5 provides that "[n]otwithstanding any of the provisions in Section 62-6-4 . . . , any municipality desiring to avail itself of all the benefits of the [PUA] . . . may elect to come within the provisions of that act."

{15} In 1991, the Legislature amended the PUA to provide a second exception under which a municipality may be subject to PUA under limited circumstances. *See* 1991 N.M. Laws, ch. 143, §§ 1, 2 (codified as Section 62-3-2.1 and Section 62-9-1.1). Section 62-3-2.1(C) states that "[t]he following are declared to be the objects and purposes" of the 1991 amendment:

> Experience has proven that the construction, development and extension of proper plants and facilities cannot be accomplished

> without unnecessary duplication and economic waste within areas certificated to water . . . utilities without controls against duplicative intrusions into certificated areas by municipal utilities. A rational basis exists to prohibit intrusion of municipal water . . . facilities or service into areas in which a public utility furnishes regulated services until that municipality elects to come within the terms of the [PUA], in which event both systems will be brought into parity of treatment with respect to the [PRC's] independent jurisdiction and power to prevent unreasonable interference between competing plants, lines and systems. Without such controls as provided by Section 62-9-1.1 . . ., the declared policy of the [PUA], the provision of reasonable and proper utility services at fair, just and reasonable rates and the general welfare, business and industry of the state may be frustrated.

{16} Additionally, Section 62-9-1.1(A) and (B) provides that "[n]otwithstanding any other provision of the [PUA]," the PRC has authority and jurisdiction to determine whether a municipal water system would intrude into the public utility's CCN and to order the municipality to "cease and desist" from continued construction. However, Section 62-9-1.1(C) specifies that "[f]or purposes of this section, 'municipality' means any municipality that has a population of more than two hundred thousand . . . and is located in a class A county." As a result, our Supreme Court has interpreted Section 62-9-1.1 to provide the PRC with limited jurisdiction if a municipality with a population exceeding two hundred thousand intrudes into an area covered by a public utility's CCN. *Morningstar*, 120 N.M. at 588, 904 P.2d at 37.

{17} It is undisputed that the City has not elected to be subject to the PUA and that the City's population does not exceed two hundred thousand. Consequently, the City argues that the City is not subject to the PUA or jurisdiction by the PRC. However, Moongate contends that Section 62-3-2.1(C) prohibits all municipalities from intruding into an area covered by a public utility's CCN until the municipality elects to come within the terms of the PUA. Moongate further argues that Section 62-9-1.1 is a special provision that places the City of Albuquerque under limited PRC jurisdiction even in the absence of such an election.

{18} We interpret the plain language of Section 62-3-2.1(C) to explain the purpose behind the Section 62-9-1.1 exception for large municipalities. However, Section 62-3-2.1(C) does not create an additional exception applicable to all municipalities. Section 62-3-2.1(C) begins by stating that "[t]he following are declared to be the *objects and purposes*" of this 1991 amendment. (Emphasis added.) Section 62-3-2.1(C) then explains that based on experience, "*[a] rational basis exists to prohibit intrusion* of municipal water . . . facilities or service" into areas served by a public utility pursuant to a CCN. (Emphasis added.) Although Section 62-3-2.1(C) explains that "a rational basis exists" for prohibiting municipal water utilities from intruding into CCN areas, Section 62-3-2.1(C) does not contain any operative language that actually prohibits municipal water utilities from serving those areas. Instead, Section 62-3-2.1(C) identifies Section 62-9-1.1 as the operative control on intrusions by municipal utilities. *See* § 62-3-2.1(C) (stating that "[w]ithout such controls as provided by Section 62-9-1.1," the policies of the PUA

may be frustrated). As a result, we interpret Section 62-3-2.1(C) to explain the Legislature's intent in enacting Section 62-9-1.1. However, absent language providing the PRC with additional authority over municipalities, we determine that Section 62-3-2.1(C) does not further expand the scope of the PUA or the PRC's jurisdiction over municipalities beyond those controls it identifies in Section 62-9-1.1. *See El Paso Elec. Co. v. N.M. Pub. Regulation Comm'n*, 2010-NMSC-048, ¶ 6, 149 N.M. 174, 246 P.3d 443 (stating that the PRC "may exercise only its statutorily authorized jurisdiction").

{19} In *Morningstar*, a water association similarly argued that a small municipality was subject to the PUA's prohibition against intrusion into a public utility's service area. 120 N.M. at 583, 904 P.2d at 32. However, our Supreme Court determined that neither party was a "public utility" for purposes of the PUA. *Id.* at 588, 904 P.2d at 37. In pertinent part, the Court reasoned that "[u]nder Section 62-3-3(E), with two exceptions, all municipal water facilities are excluded from the PUA." *Morningstar*, 120 N.M. at 588, 904 P.2d at 37. Consequently, the Court held that the small municipality was not subject to the PUA or PRC jurisdiction since the municipality had not elected to be subject to the PUA and did not have a population exceeding two hundred thousand. *Id.* We similarly conclude that the City's municipal water utility is not subject to the PUA or PRC jurisdiction. Absent PRC jurisdiction, we note that jurisdiction before the district court was proper, and this Court has jurisdiction over the appeal. *See Fleming v. Town of Silver City*, 1999-NMCA-149, ¶¶ 2, 7, 128 N.M. 295, 992 P.2d 308 (concluding that jurisdiction before the district court and appellate jurisdiction before this Court were proper where a small municipality was not subject to PUA regulation).

{20} To the extent that Moongate argues that Section 62-3-2.1(C) is ambiguous regarding whether it applies to all municipalities, we recognize that any exception subjecting a municipality to the PUA must be explicit. In *Morningstar*, our Supreme Court noted that the plain language of Section 62-3-3(E) "could not be more explicit" in stating that "[n]o such municipality shall *for any purpose* be considered a public utility." *Morningstar*, 120 N.M. at 588, 904 P.2d at 37 (internal quotation marks and citation omitted). The Court further reasoned that "[o]nce something is defined out of a statute it cannot, without an unambiguous and specific provision, be brought back in." *Id.* at 589, 904 P.2d at 38. Finally, the Court reasoned that the two unambiguous exceptions subjecting municipalities to the PUA "show that when the [L]egislature intended the PUA to apply to municipalities it did so explicitly." *Id.* As a result, the Court concluded that any ambiguity in Section 62-9-1 did not create an exception subjecting small, non-certificated municipalities to the PUA. *Morningstar*, 120 N.M. at 589, 904 P.2d at 38.

{21} Unlike the two recognized exceptions under which a municipality is subject to the PUA, Section 62-3-2.1(C) does not contain explicit language indicating that it is creating an exception to the general exclusion of municipalities from the PUA. *See* § 62-6-5 (stating that "[n]otwithstanding any of the provisions in Section 62-6-4," a municipality may elect to be subject to the PUA); § 62-9-1.1(A), (C) (stating that "[n]otwithstanding any other provision of the [PUA]," the PRC has the authority and jurisdiction over a municipality with a population exceeding two hundred thousand that intrudes into a CCN area). Moreover, unlike the two recognized exceptions, Section 62-3-2.1(C) does not contain explicit language subjecting a

municipality to the PUA or PRC jurisdiction. *See* § 62-6-5 (stating that when a municipality elects to avail itself of the benefits of the PUA, "it shall be subject to all the provisions of the [PUA]"); § 62-9-1.1(A), (C) (providing that Section 62-9-1.1(A) confers additional PRC "authority and jurisdiction" over municipalities with a population exceeding two hundred thousand). As a result, we conclude that Section 62-3-2.1(C) identifies a public policy concern but lacks the explicit language required to create an additional exception subjecting small municipalities to the PUA or to PRC jurisdiction established under the PUA.

{22} Moongate also relies on *Doña Ana*, 2006-NMSC-032, for the proposition that issuing a CCN to a public utility creates a presumption of exclusive service rights pursuant to Section 62-9-1. *Doña Ana* is distinguishable because it addressed the issue of an intrusion by one regulated utility into the CCN area of another regulated utility. 2006-NMSC-032, ¶¶ 3, 6, 8 n.1 (noting that the PRC had jurisdiction since the dispute was between a regulated public utility and a regulated mutual domestic water association). Our Supreme Court has previously recognized that "[o]nly utilities that fall within the [PRC's] regulatory jurisdiction can obtain territorial protection under Section 62-9-1 or Section 62-9-1.1." *Morningstar*, 120 N.M. at 590, 904 P.2d at 39. As a result, granting a CCN to a public utility only protects that utility "from intrusion by another certificated utility, or by a non-certificated municipality with a population exceeding two hundred thousand[.]" *Id.* (citation omitted).

{23} Moongate argues that interpreting Section 62-3-2.1(C) to prohibit intrusions by only large municipalities would frustrate the Legislature's intent of encouraging investment by public utilities and preventing the economic waste caused by duplicative municipal water service in CCN areas. We recognize that Section 62-3-2.1(D) requires that the provisions of the PUA and its 1991 amendment "be liberally construed to carry out their purposes." However, because the plain language of Section 62-3-2.1(C) and Section 62-9-1.1 limits the scope of the 1991 amendment to municipalities with a population exceeding two hundred thousand, we do not proceed beyond a plain language analysis. *See Marbob Energy Corp.*, 2009-NMSC-013, ¶ 9 (concluding that "[w]hen statutory language is clear and unambiguous, [the appellate courts] must give effect to that language and refrain from further statutory interpretation") (internal quotation marks and citation omitted). We further note that the creation of any new exception subjecting small municipalities to the PUA is within the purview of the Legislature and not this Court. *See Hartford Ins. Co. v. Cline*, 2006-NMSC-033, ¶ 15, 140 N.M. 16, 139 P.3d 176 (reasoning that it is the duty of the Legislature to make laws and the duty of the courts to expound them).

{24} In *Public Service Co. of New Mexico*, 1999-NMSC-040, ¶ 21, our Supreme Court rejected a public utility's similar argument that excluding a small municipality from the PUA would frustrate the Legislature's explicit policy of promoting efficient power grids in New Mexico. The Court reasoned that it was "unpersuaded . . . that the express policy [statement] should be read so broadly as to offend the plain language of Section 62-3-3(E)[.]" *Pub. Serv. Co. of N.M.*, 1999-NMSC-040, ¶ 21. Similarly, we reject Moongate's argument that the Legislature's express policy statement in Section 62-3-2.1(C) overcomes the plain language of Section 62-3-3(E) excluding municipalities from the PUA. Accordingly, we conclude that Moongate's CCN did not grant Moongate exclusive

service rights against the City's water utility.

Summary Judgment Regarding the Taking Issues and Moongate's Entitlement to Damages

{25} The district court concluded that Moongate was entitled to summary judgment as a matter of law on Counts II and III based upon Moongate's exclusive right to serve the disputed area. The City contends, however, that since Moongate did not have exclusive service rights against the City, the district court erred by awarding summary judgment to Moongate on the taking issues and determining that Moongate was entitled to any proven damages.

{26} Summary judgment was appropriate in this case if there were no genuine issues of material fact, and Moongate was entitled to judgment as a matter of law. *See Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. In a motion for summary judgment, the movant has the initial burden of establishing a prima facie case for summary judgment. *Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶ 10, 148 N.M. 713, 242 P.3d 280. "Once this prima facie showing has been made, the burden shifts to the non-movant to demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Id.* (internal quotation marks and citation omitted). "Because resolution on the merits is favored, a reviewing court view[s] the facts in a light most favorable to the party opposing the motion and draw[s] all reasonable inferences in support of a trial on the merits." *Edward C. v. City of Albuquerque*, 2010-NMSC-043, ¶ 43, 148 N.M. 646, 241 P.3d 1086 (alterations in original) (internal quotation marks and citation omitted).

{27} Moongate argues that it was entitled to summary judgment as a matter of law because its CCN gave Moongate exclusive service rights in the disputed area. However, Moongate did not provide any argument or authority either below or on appeal that summary judgment was appropriate absent the exclusivity of its service rights against the City. As a result of our determination that Moongate's CCN did not grant Moongate exclusive service rights against the City, we conclude that Moongate failed to meet its burden of establishing a prima facie case that it was entitled to summary judgment. Consequently, we hold that the district court erred in granting summary judgment to Moongate on Counts II and III.

CONCLUSION

{28} For the foregoing reasons, we reverse the district court's award of summary judgment to Moongate on Counts II and III, and we remand to the district court for further proceedings consistent with this Opinion.

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

TIMOTHY L. GARCIA, Judge

I CONCUR:

MICHAEL E. VIGIL, Judge

JONATHAN B. SUTIN, Judge (specially concurring).

{30} I acknowledge *Morningstar*'s view of Section 62-9-1.1(A) and (C). *Morningstar*, 120 N.M. at 588, 904 P.2d at 37. I will not attempt to distinguish *Morningstar* based on its facts. Our Opinion here with its analyses, in which I concur, solidifies, with *Morningstar*, Section 62-9-1.1(C) as limiting to large municipalities the broad policy and intent of Section 62-3-2.1(C) and the

operative effect of Section 62-9-1.1(A). I am nevertheless puzzled as to why the Legislature went to the trouble of enacting Sections 62-3-2.1(C) and 62-9-1.1(A). These two provisions unmistakably and elaborately express a purpose and set in motion an operative administrative process designed to protect public utilities from municipal encroachment into a public utility's CCN area. Had the Legislature had in mind their applicability only to large municipalities, one would think that when enacting these two provisions, the Legislature would have approached the language in the provisions or the statutory framework much differently. What comes to mind is that the Legislature giveth and the Legislature taketh away, and we cannot question the wisdom of these enactments. I am, however, impressed that legislative silence after *Morningstar* would appear to indicate that the Legislature agrees with the statements in *Morningstar* and is satisfied that Section 62-9-1.1(C) was intended to limit the operative effect of Section 62-9-1.1(A) to large municipalities.

JONATHAN B. SUTIN, Judge

STATE V. DICKERT, 2012-NMCA-004

Certiorari Denied, December 6, 2011, No. 33,295; and Certiorari Denied, December 7, 2011, No. 33,297

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-004

Filing Date: October 13, 2011

Docket No. 29,720

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

AUDIE DICKERT,

Defendant-Appellant.

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OPINION

CASTILLO, Chief Judge.

{1} There were two motions for rehearing filed in this case. We deny the State's motion for rehearing. We grant Defendant's motion for rehearing. The opinion filed on July 26, 2011 is withdrawn, and the following opinion is substituted in its place.

{2} Around midnight on May 30, 2007, after having consumed a considerable amount of alcohol, Defendant accompanied three friends to a party in a desert area outside Las Cruces, New Mexico. There was a serious altercation, and Defendant was identified as one of the persons who attacked other attendees; who inflicted significant harm on one of them; who severely damaged two vehicles using a baseball bat and rocks; and who took or orchestrated the taking of some Red Bull, two cell phones, a car stereo faceplate, and compact discs. He was indicted for numerous crimes related to the events of the evening. The primary issue in this case relates to jury instructions. At trial, Defendant testified and denied having committed the acts underlying the crimes charged. At the close of trial, Defendant requested a jury instruction on intoxication as a defense to the specific intent crimes charged. The district court refused the jury instruction on the ground that Defendant's theory of noninvolvement was inconsistent with the defense of intoxication. The propriety of this ruling is a question of first impression in New Mexico. Because a criminal defendant has a right to an instruction on any recognized defense for which evidence has been presented and because we leave it to the jury to assess the credibility of the theories offered, we hold that the jury instruction on intoxication should have been given. Thus, we reverse and remand for a new trial on the specific intent crimes. Defendant also claims error based on a confrontation clause violation, insufficient evidence, admission of evidence, and ineffective assistance of counsel. We affirm on these issues.

BACKGROUND

{3} We begin with a summary of the testimony presented at Defendant's trial. Because Defendant was ultimately convicted of several of the counts charged, we view the evidence in the light most favorable to the verdict. *State v. Apodaca*, 118 N.M. 762, 766, 887 P.2d 756, 760 (1994).

{4} On May 30, 2007, Defendant attended a party at a location in the desert outside of Las Cruces known as "the pit." The pit is an area in the desert surrounded by hills where teenagers or college students go to associate and have bonfires. Defendant arrived at the pit around midnight and had been drinking heavily beforehand. He was accompanied by Chad Williams, Kadrian Lucero, and Isaac Gutierrez.

{5} When Defendant arrived, there was only a small group of people present. This group included Jacob Baca, Jacob Vasquez, Cesar Villa, Jeff Martinez, and Crystal Marshal.

{6} At that time, Jeff and Crystal were employed by the Red Bull beverage company and were on a promotional tour. They had been given use of a Red Bull company car as part of their duties. The car was adorned with a replica of a Red Bull can on its roof and had

the Red Bull logo painted on its side. They had driven the company vehicle to the pit and had gratuitously dispensed Red Bulls throughout the evening.

{7} Defendant, Kadrian, and Chad approached the group. Defendant was agitated and angry and inquired several times about a person named Patrick. The group repeatedly denied knowing this person, and eventually Defendant and his companions began to walk toward their vehicle. They returned, however, and again they angrily confronted the group.

{8} This time, Defendant claimed that someone had thrown a rock at them and demanded to know who was responsible. The members of the other group all denied having thrown a rock, but Defendant would not accept this response. He became enraged, took off his shirt, and attempted to punch Jacob V. Jacob V. avoided several punches and fled into the desert.

{9} Jacob B. knew Defendant somewhat and unsuccessfully attempted to calm him down. Defendant continued to act aggressively, and Jacob B. backed away. Kadrian and Chad had armed themselves with baseball bats at this point and approached Jacob B. They accused him of throwing the rock, so Jacob B. also fled into the desert. As Jacob B. was fleeing, the three men screamed that they intended to kill him.

{10} Cesar also knew Defendant somewhat and similarly attempted to reason with him, but this proved fruitless. Kadrian hit Cesar with a rock; Chad then threatened Cesar with a bat and told him to shut up or he would hit him. Cesar also fled into the desert.

{11} Meanwhile, Jeff and Crystal tried to get to the Red Bull car to escape the situation but were prevented from leaving when Defendant instructed Chad and Kadrian to stop them. The three men then confronted Jeff and Crystal and demanded that they relinquish all of their Red Bull. Jeff and Crystal complied with this demand. At one point, Chad struck Jacob V.'s dog with a bat and Jeff protested. Jeff was then struck with a bat and was rendered unconscious. Kadrian picked Jeff up, and Defendant hit him with the bat again. This act was repeated once more. Defendant also punched Jeff while he was lying on the ground unconscious.

{12} After the attack on Jeff ended, Defendant took Jeff's cell phone from his pocket. Simultaneously, Chad demanded that Crystal give him her phone, which she did. Cesar witnessed this activity from a distance and stated that Defendant orchestrated the theft of the phones.

{13} Crystal pleaded with Defendant and his companions to leave them alone, but her requests were ignored. She had been instructed to lie down and had done so. At some point, however, she stood in defiance, and Defendant commanded her to get back on the ground and pushed her down. She stood back up, and Defendant pushed her down again. When she stood up a third time, Defendant started screaming incoherently at her.

{14} Eventually, Chad responded to Crystal's pleas and helped Crystal put Jeff in the Red Bull car. Crystal drove away hurriedly and, as she was driving away, she heard Defendant yell at Chad for allowing them to leave. Cesar witnessed Defendant smash out the rear windshield of the Red Bull car as Crystal drove off.

{15} During the course of the melee, Defendant participated in attacking both the Red Bull car and Cesar's Ford Ranger. The vehicles were struck with bats and rocks, and both vehicles sustained significant damage. In addition, Defendant entered Cesar's truck and took his stereo faceplate and compact disc collection. Cesar heard Defendant and his accomplices indicate their intention to steal the truck, but they could not get the truck started so they abandoned this plan.

{16} Defendant and his accomplices eventually fled the pit and traveled to a Circle K. The police had been contacted and arrested Defendant and the other men at that location. Cesar's stereo faceplate and compact disc collection as well as numerous cans of Red Bull were found inside the car driven to the Circle K by Defendant's group. At the police station, Defendant's behavior was erratic and violent.

{17} Chad and Kadrian were charged separately and entered into plea agreements. They testified against Defendant at his trial. The two Jacobs, Cesar, Jeff, and Crystal also testified, as did several of the officers who were involved in the aftermath of the incident. Defendant testified, and he denied both engaging in most of the above-described conduct and committing the charged crimes.

{18} At the close of trial, the district court granted a directed verdict as to several of the charges. Defendant requested an intoxication instruction pursuant to UJI 14-5111 NMRA as a defense to the specific intent crimes he was charged with, but the court declined to issue the instruction on the basis that it conflicted with Defendant's testimony that he did not commit the crimes alleged.

{19} The jury found Defendant guilty and convicted him of eleven counts including: two counts of robbery for taking Jeff and Crystal's cell phones; one count of aggravated battery for attacking Jeff; aggravated assault, false imprisonment, conspiracy to commit false imprisonment for his conduct towards Crystal; burglary of a vehicle for entering Cesar's truck with the intent to commit a theft within; larceny for taking Cesar's stereo faceplate and compact disc collection; two counts of criminal damage to property for intentionally damaging Cesar's truck and the Red Bull car; and battery for his conduct towards Jacob V. Defendant was sentenced to twelve years' incarceration, with nine of those years suspended, and two years of parole. Defendant appeals.

DISCUSSION

{20} On appeal, Defendant raises five issues. First, he claims that the district court erred in refusing to issue his requested instruction on the defense of intoxication. Second, he asserts that his right to confrontation under the Sixth Amendment was violated when the court refused to allow him to cross-examine Chad about his mental faculties. Third, he challenges the sufficiency of the evidence underlying the two robbery convictions, the false imprisonment conviction, and the criminal damage to property conviction related to the damage sustained by Cesar's truck. Fourth, he claims that the court erred in admitting the State's photographic evidence because the State failed to lay a proper foundation. Finally, he claims, pursuant to *State v. Franklin*, 78 N.M. 127, 129, 428 P.2d 982, 984 (1967), and *State v. Boyer*, 103 N.M. 655, 658-60, 712 P.2d 1, 4-6 (Ct. App. 1985), that he received ineffective assistance of counsel at trial. We consider these issues in the order listed.

Intoxication Instruction

{21} The district court declined to issue the intoxication instruction on grounds that such an instruction would be inconsistent with Defendant's trial theory, i.e., that he did not commit any of the specific intent offenses. The district court has correctly characterized Defendant's trial theory. We have reviewed Defendant's testimony, and his position during trial was that he did not commit the specific intent offenses for which he was charged and convicted. On appeal, Defendant argues that there is nothing which precludes him from asserting inconsistent defenses and asserts that the court committed reversible error in withholding the instruction. The State responds that we need not address the inconsistent defense issue. Citing the right for any reason doctrine, the State claims that "there was insufficient evidence . . . to provide the jury with evidence to show that Defendant was intoxicated to the degree that he lacked the specific intent to commit the specific intent crimes." We first examine the State's claim that there was insufficient evidence to justify the issuance of the instruction and, because we disagree with this claim, we then consider the issue of inconsistent defenses.

Evidence supporting the instruction

{22} "We review de novo the question of whether there was evidence to support an instruction on intoxication as a defense." *State v. Romero*, 1998-NMCA-057, ¶ 22, 125 N.M. 161, 958 P.2d 119. "[W]e view the evidence in the light most favorable to giving the instruction." *Id.*

{23} "It is settled law that [a] showing of intoxication is a defense to a specific intent crime where the intoxication is to such a degree as would negate the possibility of the necessary intent." *Id.* (alteration in original) (internal quotation marks and citation omitted). "[E]vidence as to intoxication must be substantial and must relate to [the] defendant's condition as of the time of the commission of the [crime], or be so closely related in time that it can reasonably be inferred that the condition continued to the time of the commission of the [crime]." *Id.* ¶ 23 (second and third alterations in original) (internal quotation marks and citation omitted). "When there is evidence of intoxication at or near the time of the crime, a defendant need not present specific evidence as to what degree the intoxicant affected him. However, mere evidence that the defendant consumed an intoxicant is not enough." *Id.* ¶ 26. We examine the evidence presented at trial in light of these standards.

{24} Defendant testified that on the night of the incident he casually consumed alcohol between 5:00 p.m. and 10:00 p.m. He then went to a house party where he played drinking games and consumed between six to ten beers. He left the house party around midnight and traveled to the pit as a passenger in someone else's vehicle because he was too drunk to drive. During the drive to the pit—a period of about twenty minutes—he consumed "a good portion" of a bottle of Jaegermeister.

{25} Defendant's behavior at the pit party was variously described as crazed, out of control, wild, and a state of rage. Defendant did not consume alcohol while at the pit but, given the amount he had consumed earlier, he claimed he was nevertheless "pretty intoxicated." He was arrested at approximately 2:00 a.m. Defendant testified that the alcohol he had consumed prior to that point really "started kicking in" at the time of arrest, and he claimed he was "really bad"

when he arrived at the police station. Deputy Reyes interacted with Defendant at the station and testified that Defendant smelled of alcohol, acted belligerent and violent, and appeared to be drunk or on some form of narcotic.

{26} This evidence of intoxication was substantial both in terms of degree and proximity to the time of Defendant's alleged crimes, and we conclude that this evidence was sufficient to justify the requested instruction on intoxication. *State v. Hernandez*, 2003-NMCA-131, ¶ 20, 134 N.M. 510, 79 P.3d 1118 ("[The d]efendant was entitled to the [intoxication] instruction if there was any evidence supporting it."). We turn now to whether the district court correctly withheld the intoxication instruction because it was inconsistent with Defendant's trial theory of noninvolvement. We note that the State has chosen not to address this issue.

Inconsistent defenses

{27} "The [district] court's rejection of [the] defendant's submitted jury instructions is reviewed by this Court de novo, because it is closer to a determination of law than a determination of fact." *State v. Ellis*, 2008-NMSC-032, ¶ 14, 144 N.M. 253, 186 P.3d 245 (internal quotation marks and citation omitted). The permissibility of inconsistent defenses in this jurisdiction has been addressed by the New Mexico Supreme Court and our Court, but only in the specific context of entrapment and duress. *See Martinez v. State*, 91 N.M. 747, 749, 580 P.2d 968, 970 (1978) (discussing a defendant's entitlement to an entrapment instruction when the defendant's theory at trial was inconsistent with entrapment); *State v. Garcia*, 79 N.M. 367, 369, 443 P.2d 860, 862 (1968) (same); *State v. Buendia*, 1996-NMCA-027, 121 N.M. 408, 411, 912 P.2d 284, 287 (same); *State v. Wright*, 84 N.M. 3, 5, 498 P.2d 695, 697 (Ct. App. 1972) (same); *see also State v. Tom*, 2010-NMCA-062, ¶¶ 26-32, 148 N.M. 348, 236 P.3d 660 (discussing a defendant's entitlement to a duress instruction when the defendant's theory at trial was inconsistent with duress). The question before us does not deal with entrapment and duress but rather whether Defendant was entitled to an instruction on intoxication given his reliance on the defense of noninvolvement.

{28} As a general rule, "inconsistent defenses may be interposed in a criminal case." 21 Am. Jur. 2d *Criminal Law* § 183 (2008). "[A] defendant may raise the alternative defenses of intoxication and noninvolvement in the offense[.]" *Id.*; *State v. Broughton*, 425 N.W.2d 48, 51 (Iowa 1988) ("We hold it was error to refuse [the defendant's] requested instruction on voluntary intoxication on the ground [that] it was inconsistent with his claim of alibi."); *see also* 22 C.J.S. *Criminal Law* § 55, at 90 (2006) ("In general, the fact that one defense is based on the theory that the accused did not commit the offense does not deprive the defendant of the right to take advantage of other defenses, although based on the theory of justification or excuse.").

{29} At least three justifications animate this principle. First, "[a]s a general proposition[,] a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988); *accord State v. Trammel*, 100 N.M. 479, 481, 672 P.2d 652, 654 (1983) ("When evidence at trial supports the giving of an instruction on a defendant's theory of the case, failure to so instruct is reversible error."). Second,

> [t]he rule in favor of inconsistent defenses reflects the belief of modern criminal jurisprudence that a criminal defendant should be accorded every reasonable protection in defending himself against governmental prosecution. That established policy bespeaks a healthy regard for circumscribing the [g]overnment's opportunities for invoking the criminal sanction.

United States v. Demma, 523 F.2d 981, 985 (9th Cir. 1975). This excerpt from *Demma* was acknowledged by our Supreme Court in *Martinez*. *See Martinez*, 91 N.M. at 749, 580 P.2d at 970. Third, it is for the fact finder—not the court—to assess the credibility of defenses for which there exists sufficient evidence. *See id.* at 750, 580 P.2d at 971 ("Whether or not the defenses are believable is for the trier of fact to determine, inasmuch as alternative defenses are allowed."). We note an important corollary to this last justification: a criminal defendant who presents a jury with two totally inconsistent defenses must accept the potential peril of doing so. *See* 2 Wayne R. LaFave, *Substantive Criminal Law* § 9.8(f), at 108 (2003) ("[I]t would seem that the adversary process is itself a sufficient restraint upon resort to positions which are truly inconsistent. In a case where two positions are unquestionably logically inconsistent, a defendant who pursued both positions would certainly be found to be lacking credibility."). We agree with the justification for allowing inconsistent defenses to be simultaneously asserted and therefore adopt this position.

{30} In the present matter, there was sufficient evidence that Defendant was significantly intoxicated at the time of the incident at the pit party notwithstanding his denial at trial that he did not commit the crimes charged. Thus, the district court's refusal to issue the intoxication instruction was reversible error. *See Trammel*, 100 N.M. at 481, 672 P.2d at 654. Defendant is entitled to a new trial on the specific intent offenses for which he was convicted. We turn to the next issue on appeal.

Confrontation

{31} Defendant next argues that the district court violated his Sixth Amendment right to confrontation by limiting his cross-examination of Chad. Specifically, Defendant claims that he was wrongly precluded from inquiring about Chad's mental faculties and memory problems. We begin by reviewing the events at trial.

{32} During cross-examination, Defendant pressed Chad about the specific timing of the events leading up to the incident at the pit. Chad expressed frustration and explained "I'm not good on the time, sir. I'm not good at all on the times, like the streets and stuff like that too." Defendant responded by inquiring about Chad's educational background stating, "I believe you told us you didn't graduate from high school; is that correct?" Chad responded in the affirmative, and Defendant added, "[T]hat's because you have some problems?" Chad again responded in the affirmative. At this juncture, the State objected and a bench conference ensued.

{33} At the bench, the district court informed Defendant that he was attempting to improperly impeach Chad and further pointed out that Defendant had misunderstood Chad's testimony. Defendant explained that Chad had raised the issue of incompetency at his own trial, which suggested he might have "issues

with his memory." The district court replied that it was improper to attempt to raise that issue in front of the jury and informed Defendant that "[i]f he understands the questions you've asked him, I'm not fixing to let you impeach anything, those kinds of things, counsel. Not you, not him, not anybody. Okay." Defendant accepted the ruling and made no further objection.

{34} "Questions of admissibility under the Confrontation Clause are questions of law, which we review de novo." *State v. Aragon*, 2010-NMSC-008, ¶ 6, 147 N.M. 474, 225 P.3d 1280. In its answer brief, the State contends that we need not address the merits of Defendant's confrontation argument because he failed to preserve the claim. We agree. Defendant did not raise the issue of confrontation in response to the State's objection to Defendant's line of questioning and did not alert the court to this issue and invoke a ruling. *See* Rule 12-216(A) NMRA ("To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked[.]"); *State v. Lopez*, 2008-NMCA-002, ¶ 8, 143 N.M. 274, 175 P.3d 942 ("The objection must be timely and must specifically apprise the district court of the claimed error, resulting in an intelligent ruling from the district court."). As the confrontation claim was not preserved, it will not be addressed. The State goes on to argue that the issue on appeal is actually an evidentiary matter: the propriety of the court's limitation of Defendant's cross-examination. But, in his brief in chief, Defendant raised only the confrontation issue and cites authority related only to that claim. Thus, the evidentiary issue identified by the State is not before us. *See State v. Gallegos*, 101 N.M. 526, 530, 685 P.2d 381, 385 (Ct. App. 1984) (observing that issues not argued on appeal are deemed abandoned).

{35} Defendant acknowledges the preservation problem in his reply brief and asserts that, if preservation is an issue, we should review the matter for fundamental error. Although Defendant asserts that the court's ruling was fundamental error, he does not develop the argument and, accordingly, we will not engage in a fundamental error review. *State v. Gonzales*, 2011-NMCA-007, ¶ 19, 149 N.M. 226, 247 P.3d 1111 ("[T]his Court has no duty to review an argument that is not adequately developed.").

Sufficiency of the Evidence

{36} Defendant asserts that the evidence was insufficient to support the two robbery convictions, the conspiracy to commit false imprisonment conviction, and the criminal damage to property conviction related to the attack on Cesar's truck. We have already determined that Defendant is entitled to a new trial on the two robbery convictions and the conspiracy to commit false imprisonment conviction. Thus, we need only address Defendant's arguments concerning the criminal damage to property conviction.

{37} "The sufficiency of the evidence is assessed against the jury instructions because they become the law of the case." *State v. Quiñones*, 2011-NMCA-018, ¶ 38, 149 N.M. 294, 248 P.3d 336. The sufficiency review itself involves a two-step process. *State v. Huber*, 2006-NMCA-087, ¶ 11, 140 N.M. 147, 140 P.3d 1096. Initially, the evidence is viewed in the light most favorable to the verdict. *Id.* Then the appellate court must make a legal determination of "whether the evidence viewed in this manner could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt." *Apodaca*, 118 N.M. at 766, 887 P.2d at 760

(internal quotation marks and citation omitted). "[W]e will not reweigh the evidence nor substitute our judgment for that of the fact finder provided that there is sufficient evidence to support the verdict." *State v. Fuentes*, 2010-NMCA-027, ¶ 13, 147 N.M. 761, 228 P.3d 1181 (internal quotation marks and citation omitted).

{38} The jury was instructed that the essential elements of criminal damage to property included the following:

1. [D]efendant intentionally damaged property of another;
2. [D]efendant did not have the owner's permission to damage the property;
3. This happened in New Mexico on or about the 30th day of May, 2007.

{39} At trial, Cesar gave the following testimony. He had parked his Ford Ranger near the area of the pit that serves as both the entrance and exit. After the attack on Jeff ended, he observed Jeff and Crystal flee the pit in the Red Bull vehicle. Defendant and his accomplices started to leave shortly after. They got in their car and began to drive away, but as they neared his vehicle they stopped. Defendant, Kadrian, and Chad then got out of the car and began to bash out the windows on Cesar's truck. They also threw rocks at his truck and threw rocks through the windows. He then observed the men enter his vehicle and heard someone yell, "Take the truck," but they could not get it started. Eventually, they drove off, leaving the truck behind.

{40} After Defendant and his accomplices had departed, Cesar walked to his truck and inspected the vehicle. He discovered that they had done significant damage. The car was "all dinged up." There were two rocks inside the vehicle and shattered glass everywhere. Some of the glass had become embedded in the seats. The contents of the glove compartment were strewn throughout the vehicle. They had torn off the faceplate of his stereo, which irreparably damaged the entire stereo system. His rearview mirror was destroyed as was the windshield and all the other windows. The ignition column had also been irreparably damaged. All told, the vehicle sustained approximately $800 in damages.

{41} Cesar's testimony was consistent with other witness accounts. Chad testified that Defendant entered Cesar's vehicle in order to steal Cesar's stereo faceplate and stated that Defendant succeeded in doing so. Jacob V. testified that he observed Defendant throw a boulder through a vehicle window. Although he was unable to specify which vehicle, the jury could reasonably infer that it was Cesar's vehicle in light of Cesar's testimony that he observed Defendant throw rocks into his truck. *See State v. Garcia*, 2005-NMSC-017, ¶ 20, 138 N.M. 1, 116 P.3d 72 (recognizing that the jury is entitled to draw reasonable inferences from the evidence to reach a conclusion that the defendant committed a crime).

{42} Crystal offered a slightly different account of the events of the evening, but did testify, consistent with the other witnesses, that Defendant participated in damaging Cesar's vehicle. She stated that Defendant and Kadrian used a baseball bat to "bash" in the windows of both the Red Bull car and Cesar's vehicle and variously kicked both cars. Her testimony diverged from Cesar's account in that she stated that Defendant and Kadrian did the damage to Cesar's vehicle in her presence. Cesar testified that the damage to his vehicle occurred after Crystal and Jeff

had departed the scene and that Chad was also involved. It was for the jury to decide the significance of this inconsistency and to reconcile, as they saw fit, the varying accounts of the events in question. *See State v. Chavez*, 116 N.M. 807, 814, 867 P.2d 1189, 1196 (Ct. App. 1993) (stating that the "trier of facts weighs the testimony, determines credibility of witnesses, reconciles inconsistent or contradictory statements of a witness, and determines where the truth lies").

{43} We conclude that there was sufficient evidence to support the criminal damage to property conviction related to the attack on Cesar's truck. We proceed to the next issue on appeal.

Photographic Evidence

{44} Defendant asserts that the district court erred in admitting certain photographic evidence at trial. "We review claims that a trial court erred in admitting evidence for abuse of discretion." *State v. Macias*, 2009-NMSC-028, ¶ 16, 146 N.M. 378, 210 P.3d 804. However, we need not reach the merits of Defendant's argument. *See State v. Fuentes,* 2010-NMCA-027, ¶ 29, 147 N.M. 761, 208 P.3d 1181 (explaining that appellate court does not review unclear or underdeveloped arguments).

{45} In his brief, Defendant does not identify the specific photographs that were purportedly admitted in error, and there are no photographic exhibits included in the record on appeal. Rather, he asserts that his argument arises from his "continuing objection to the State's photographic exhibits." From this statement, it appears to us that Defendant may be attacking the admission of all of the State's photographic exhibits, but we are not sure. This is problematic as there are instances in the record where Defendant expressly stated he had no objection to the admission of certain photographic exhibits. Defendant has failed to identify which photographs were objectionable and which were not, and he appears to be asking us to sift through the record to figure out the factual underpinnings of his claim. This we will not do. *See Muse v. Muse*, 2009-NMCA-003, ¶ 72, 145 N.M. 451, 200 P.3d 104 ("We will not search the record for facts, arguments, and rulings in order to support generalized arguments.").

{46} Moreover, Defendant has not argued or identified the remedy he is entitled to as a result of the alleged error and has made no attempt to prove that the admission of the photographs prejudiced him or constituted reversible error. *State v. Jett*, 111 N.M. 309, 312, 805 P.2d 78, 81 (1991) ("An evidentiary ruling within the discretion of the court will constitute reversible error only upon a showing of an abuse of discretion, and a demonstration that the error was prejudicial rather than harmless[.]" (citation omitted)). In short, this section of Defendant's brief provides us with nothing to review. We conclude that Defendant failed to adequately develop his argument regarding the photographic exhibits and decline to address the matter further. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (declining to entertain a cursory and inadequately developed argument).

Ineffective Assistance of Counsel

{47} Lastly, Defendant argues, relying on *Franklin* and *Boyer*, that he received ineffective assistance of counsel at trial. Defendant identifies the correct standard of review that we employ in reviewing a claim of

ineffective assistance. *See State v. Bernal*, 2006-NMSC-050, ¶ 32, 140 N.M. 644, 146 P.3d 289 ("For a successful ineffective assistance of counsel claim, a defendant must first demonstrate error on the part of counsel, and then show that the error resulted in prejudice.").

{48} Defendant claims that "his trial attorney was ineffective for failing to interview important witnesses [who] were at the party. These witnesses would have shown that [Defendant] was not as involved in the incident as the State's witnesses portrayed." Defendant has not identified who these other "witnesses" are, or whether there were in fact other people at the party at the time of the incident. Moreover, Kadrian, Chad, and all of the victims testified that the only people present at the pit during the time of the attack were Defendant's group and the group Defendant attacked. Without more, we cannot review Defendant's ineffective assistance claim. *See Headley*, 2005-NMCA-045, ¶ 15.

CONCLUSION

{49} Defendant was entitled to an intoxication instruction on the specific intent crimes for which he was charged. Thus, we reverse and remand for retrial on the following six convictions: the two robbery convictions, charged as counts one and two in the indictment; aggravated battery, charged as count three in the indictment; conspiracy to commit false imprisonment, charged as count eight in the indictment and renumbered count seven at trial; burglary of a vehicle, charged as count nine in the indictment and renumbered count eight at trial; and larceny, charged as count ten in the indictment and renumbered count nine at trial. We reject Defendant's other arguments and affirm the remaining convictions which include: aggravated assault, charged as count six in the indictment and renumbered count five at trial; false imprisonment, charged as count seven in the indictment and renumbered count six at trial; criminal damage to property over $1,000, charged as count eleven in the indictment and renumbered count ten at trial; criminal damage to property under $1,000, charged as count thirteen in the indictment and renumbered count ten at trial; and battery, charged as count fourteen in the indictment and renumbered count twelve at trial. This matter is remanded to the district court for proceedings consistent with this Opinion.

{50} IT IS SO ORDERED.

CELIA FOY CASTILLO, Chief Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

TIMOTHY L. GARCIA, Judge

Certiorari Granted, January 6, 2012, No. 33,304

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-005

Filing Date: October 18, 2011

Docket No. 29,583

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

MURPHY HARDY,

Defendant-Appellee.

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OPINION

KENNEDY, Judge.

{1} Murphy Hardy (Defendant) was indicted for criminal sexual penetration of a minor (CSPM) to which he apparently confessed. The district court dismissed his case with prejudice, finding that, because there was no admissible evidence to establish the *corpus delicti*, Defendant could not be convicted through his confession alone. The State appeals, arguing that the district court erred in ruling that the *corpus delicti* rule precluded conviction solely on the basis of a confession. The State contends that the rule merely controls the admissibility of a confession and, thus, inadmissible evidence should be allowed to establish a confession's admissibility if such evidence, together with the confession, can establish the *corpus delicti*. The State also argues that it should have had the opportunity to submit the confession to the jury because it possessed evidence that can establish the *corpus delicti*. This argument incorrectly confuses two steps of determining whether a confession can be used at trial.

{2} We hold that the district court properly dismissed this case, as a conviction cannot be sustained when based solely on a confession unless other admissible evidence contributes to establishing the *corpus delicti*. In the absence of such evidence in this case, we affirm the district court's dismissal with prejudice.

I. BACKGROUND

{3} Defendant was indicted on two counts of first-degree CSPM. One alleged instance of sexual abuse occurred when Defendant's family was on vacation in Albuquerque. At an unspecified time, Victim apparently told her mother about the sexual abuse. In a 2004 statement to FBI Special Agent Nicholas Manns, the investigating officer, Victim revealed that Defendant "climbed on top of her, covered her mouth, and penetrated her with his penis." Around that same time, Defendant "relayed similar information regarding the incident" to Agent Manns. The acts that allegedly occurred in this case were charged as happening between 1989 and 1993.

{4} Despite her statements made four years prior to the indictment, Victim "was uncooperative with the prosecution. She was never interviewed by the defense, nor had she ever testified under oath or been subject to cross-examination by the defense." In fact, only two of the State's witnesses were ever provided by the State to be interviewed by the defense: Victim's mother and Agent Manns. Thus, Defendant moved to exclude the State's witnesses that were not interviewed. The district court granted the motion five days prior to trial, leaving only Special Agent Manns and Victim's mother as witnesses for the State. This order was not appealed.

{5} Shortly after these exclusions, Defendant moved to dismiss the charges, arguing that the State could not adduce the required admissible evidence to "establish the *corpus delicti* through Defendant's confession" and, therefore, could not prove its case. Defendant argued that "[n]o physical evidence, forensic evidence, documentary evidence, eyewitness testimony, or expert testimony existed in this case." Defendant contended that "the only evidence the State could present was the . . . testimony of Agent Manns and [Victim's mother]." Defendant argued that "Agent Manns' testimony would consist of a recitation of [Defendant's] confession and hearsay statements made to him by [Victim]." Similarly, Victim's mother's potential testimony also "consisted of hearsay" because she was expected only to "recite what [Victim] told her about the alleged [CSPM]." The State did not disagree with this characterization. Thus, because Victim was not interviewed, Defendant asserted that the admittance of testimony about anything Victim told to either Agent Manns or Victim's mother would have "violate[d Defendant's] right to confrontation under the state and federal constitutions," rendering both testimonies inadmissible.

{6} The district court dismissed the case with prejudice. The district court found that the State lacked the admissible evidence necessary to establish *corpus delicti*. The district court reasoned that, "because of . . . [V]ictim's unavailability, none of the statements . . . [V]ictim made to [either] her mother, or to . . . Agent . . . Manns, would be admissible." The State therefore could not use the testimony regarding Victim's statements to corroborate the confession. Consequently, the district court stated that the State could not establish the *corpus delicti* because it "would not have evidence of injury or loss."

II. DISCUSSION

{7} In light of the district court's finding that the State could not provide Victim's testimony or any other admissible evidence, direct or circumstantial, that Defendant had committed the alleged crime, Defendant's confession was critical to the prosecution of the case. However, the *corpus delicti* rule "has traditionally governed the admissibility of extrajudicial confessions." *State v. Weisser*, 2007-NMCA-015, ¶ 9, 141 N.M. 93, 150 P.3d 1043.

> The *corpus delicti* rule may be seen as a rule of evidence (in that it bars the admission of an extrajudicial confession until a predicate showing is made that the crime charged was committed by someone), and a rule of substantive criminal law (in that it requires a conviction based on a confession to be supported by the requisite degree of proof of the *corpus delicti*).

Thomas A. Mullen, *Rule Without Reason:*

Requiring Independent Proof of the Corpus Delicti as a Condition of Admitting an Extrajudicial Confession, 27 U.S.F. L. Rev. 385, 387 (1993) (emphasis added) (footnote omitted). Establishing the *corpus delicti* requires proving "that loss or harm occurred" and "that someone's criminal agency caused the loss or harm[.]" *Weisser*, 2007-NMCA-015, ¶ 10 (internal quotation marks and citation omitted). Thus, "unless the *corpus delicti* of the offense charged has been otherwise established, a conviction cannot be sustained *solely* on [the] extrajudicial confessions . . . of the accused." *Id.* (first emphasis added) (first alteration in original) (internal quotation marks and citation omitted).

{8} In New Mexico, we have adopted the *Paris* rule, which allows use of "an extrajudicial [confession] . . . to establish the *corpus delicti* where the [confession] is shown to be trustworthy and where there is some independent evidence to confirm the existence of the alleged loss or injury." *Id.* ¶ 18 (emphasis added). In other words, the confession itself can be used to help establish the *corpus delicti*, so long as independent evidence can corroborate both the confession's trustworthiness and the existence of the alleged harm. In contrast, under the traditional *corpus delicti* rule, only independent evidence may be used to establish the *corpus delicti*. Thus, compared to the traditional rule, New Mexico's modified trustworthiness approach presents less of a barrier to the admission of a confession for the purpose of sustaining a conviction. *See State v. Wilson*, 2011-NMSC-001, ¶ 20, 149 N.M. 273, 248 P.3d 315. In evaluating trustworthiness, we determine whether "the independent evidence presented by the [s]tate tends to establish the trustworthiness of [the d]efendant's extrajudicial statements." *Id.* ¶ 27 (alterations omitted) (internal quotation marks and citation omitted). "[T]he evidence used to establish the trustworthiness of [the d]efendant's statements must actually concern the content of his statements, not merely the circumstances surrounding them." *Id.* ¶ 30. "It is sufficient if the corroboration of [the defendant's statements] supports the essential facts admitted sufficiently to justify a jury inference of their truth." *Id.* (alteration in original) (internal quotation marks and citation omitted). Thus, the facts to which a defendant confesses, not their circumstantial matrix, require independent corroboration.

A. The Trustworthiness Doctrine Requires Independent Admissible Evidence to Corroborate a Confession

{9} The State contends that the district court erred in refusing to consider inadmissible evidence that would have established the *corpus delicti*. The State argued that the evidence it offered, combined with the confession, would have established the *corpus delicti*, thus, enabling it to "submit the confession to the jury as the sole basis [for] conviction." In response, Defendant asserted that even if "the confession comes in," he cannot be convicted under the *corpus delicti* rule. Defendant argues that only admissible evidence can be used at trial to establish the *corpus delicti* required to sustain a conviction based upon a confession. Whether the trustworthiness doctrine requires admissible evidence to corroborate the confession for the purposes of establishing the *corpus delicti* necessary for conviction is a question of law we review de novo. *See State v. Martinez*, 1999-NMSC-018, ¶ 15, 127 N.M. 207, 979 P.2d 718.

{10} The sufficiency of the independent corroborative evidence needed to sustain a

conviction is first evaluated at a preliminary hearing "without which no confession can go to a jury[.]" *State v. Armijo*, 18 N.M. 262, 268, 135 P. 555, 556 (1913) (internal quotation marks and citation omitted). Hearings on admissibility reflect a concern that only reliable evidence is introduced at trial. *See State v. Trujillo*, 2002-NMSC-005, ¶ 17, 131 N.M. 709, 42 P.3d 814. To this end, "[p]reliminary questions on the admissibility of evidence are determined by the trial judge." *State v . Roybal*, 107 N.M. 309, 311, 756 P.2d 1204, 1206 (Ct. App. 1988). Commonly, at the preliminary hearing stage, the trial judge will apply the *corpus delicti* rule to determine a confession's admissibility. *See People v. Herrera*, 39 Cal. Rptr. 3d 578, 585-86 (Ct. App. 2006) (refusing to hold that "the *corpus delicti* rule should not apply to preliminary hearings" because the court was "not willing to turn [its] back on a long and unbroken line of cases that have applied the rule to preliminary hearings") (emphasis added) (internal quotation marks and citation omitted); *see also Proof of the Corpus Delicti Aliunde the Defendant's Confession*, 103 U. Pa. L. Rev. 638, 677 (1955) (explaining that the rule's application to preliminary inquiries is due to the concern that confessions can prejudice "the jury's thinking on certain issues which it might otherwise have been able to decide objectively"). Thus, a district court should determine at a preliminary hearing whether the state has evidence that can support the "essential facts admitted" in a defendant's confession. First, the court assesses whether the confession's trustworthiness may be established. *Weisser*, 2007-NMCA-015, ¶ 30. Second, the court must ensure that the state has evidence that can corroborate the "existence of the alleged loss or injury." *Id.* ¶ 18. Without such evidence, the confession may not be presented at trial.

{11} Because the preliminary hearing involves a provisional question of admissibility that includes a preliminary matter of trustworthiness, this consideration of admissibility is governed by Rule 11-104 NMRA. Thus, "the judge is not bound by the rules of evidence, except those involving privileges and relevancy." *Roybal*, 107 N.M. at 311, 756 P.2d at 1206. Therefore, we hold that at this preliminary hearing, a judge can use inadmissible evidence to determine the trustworthiness of a confession.

{12} Trustworthiness, however, is a preliminary determination, provisionally conferred and subject to a more stringent standard of corroboration of the confession should it be put before the jury. Thus, authorities universally agree that admission at trial is always conditioned upon the state adducing independently admissible evidence at trial that can contribute to establishing the *corpus delicti*. *Proof of Corpus Delicti*, at 659; *see State v. Powers*, 99 P.3d 1262, 1262-63 (Wash. Ct. App. 2004) (holding that because erroneously admitted hearsay was the only evidence establishing the *corpus delicti*, the defendant's confession was inadmissible). Thus, the district court should further determine at a preliminary hearing whether the state can provide admissible evidence supporting the *corpus delicti*. Inadmissible evidence by itself is insufficient to admit a confession. If a confession that was provisionally admitted at a preliminary hearing is not coupled with admissible evidence establishing the *corpus delicti* at trial, a court may still exclude the confession at trial. *See Armijo*, 18 N.M. at 268, 135 P. at 556-57; *Commonwealth v. Turza*, 16 A.2d 401, 404 (Pa. 1940) (holding that inadmissible hearsay testimony may be introduced to establish the *corpus delicti*, so long as it appeared that the state could adduce

admissible evidence at trial). Thus, the preliminary admissibility based on trustworthiness alone only confers provisional status, subject to proof of the corpus delicti proven through admissible evidence. The success of the State establishing trustworthiness does not presume the confession's admissibility at trial.

{13} In the case at bar, the State contends that the district court should have admitted Defendant's confession corroborated with inadmissible evidence at trial, even though the confession would then have provided the sole basis for a conviction. Under this proposed rule, the State could avoid the requirement of corroborating the confession's trustworthiness and the actual existence of the alleged harm with admissible evidence. Thus, should this view prevail, the presentation of inadmissable evidence is in effect, bootstrapped by the very confession it must corroborate. The State's suggested approach is contrary to our well-established law concerning corroboration. The absence of any admissible evidence in this case to establish the fact that Victim was abused is squarely consistent with our long-standing requirement that some evidence of the harm charged be available for the jury's consideration. We therefore hold that where admissible evidence is not available to corroborate the confession, the confession is not admissible and, accordingly, no conviction can be sustained solely on the basis of the confession.

B. The State Failed to Establish the *Corpus Delicti*

{14} The district court found that the State could not provide sufficient admissible evidence to establish the *corpus delicti*. In reviewing this determination, we view the evidence in the light most favorable to the court's ruling, resolving all conflicts and indulging all reasonable inferences in favor of the ruling. *State v. Joe*, 2003-NMCA-071, ¶ 11, 133 N.M. 741, 69 P.3d 251. We conclude that the State failed to establish the *corpus delicti* because the evidence it provided was either inadmissible or insufficient. First and foremost, the State never argued that it had admissible evidence sufficient to establish the *corpus delicti*, choosing instead to rely upon inadmissible evidence. Thus, because the *corpus delicti* is needed to sustain a conviction based upon a confession, the district court properly dismissed the case with prejudice.

{15} The State made a proffer of the expected testimony of Victim's mother and Agent Manns that might corroborate the *corpus delicti*. However, the State does not question on appeal the district court's finding that "because of . . . [V]ictim's unavailability, none of the statements . . . [V]ictim made to [either of these witnesses] would be admissible." Thus, the State may not rely upon the statements Victim made to its two witnesses to establish the *corpus delicti*, as such evidence is uncontestedly inadmissible.

{16} Consequently, only the non-hearsay testimony of the two witnesses could have been used to establish the *corpus delicti* at trial. There would have been insufficient admissible and corroborative evidence even if the witnesses were available for trial. First, the State suggested that Victim's mother would testify that Victim underwent "behavioral changes," which were consistent with sexual abuse. However, Victim's mother had stated that "all of her children" changed when they encountered Defendant, irrespective of age or gender. Having no witness left to explain the relevance of any such changes, such changes could not tend to

prove the fact that Defendant did anything. "In the absence of physical evidence of the abuse, . . . the circumstantial evidence used to independently prove the loss or injury must be more than a small number of behavioral symptoms susceptible to different inferences." *Weisser*, 2007-NMCA-015, ¶ 34. Second, the State mentioned its expectation that "the fact that . . . [Victim] had identified . . . Defendant" as the perpetrator of the alleged CSPM to the State's two witnesses would be allowed. However, no ruling was invoked, and we do not pursue it here.

{17} Thus, the non-hearsay testimony offered by the State would have been either insufficient as a matter of law or inadmissible. Consequently, there is no evidence to view in support of establishing the *corpus delicti* for the purpose of sustaining a conviction. Therefore, the district court properly found that the State had insufficient admissible evidence to establish the *corpus delicti*.

{18} A motion to dismiss for failure to establish the *corpus delicti* involves the question of whether the State offered sufficient evidence to meet the burden of proof required for conviction. Thus, Defendant's motion is substantively a motion for directed verdict. *See Cnty. of Los Alamos v. Tapia*, 109 N.M. 736, 739, 790 P.2d 1017, 1020 (1990) (stating that a directed verdict occurs when "the plaintiff or the state fails to offer sufficient evidence to satisfy its burden of proof"); *State v. Williams*, 468 S.E.2d 656, 658 (S.C. 1996) (holding that when "the sole evidence of guilt is a confession, [and the *corpus delicti* is not established with independent evidence,] a directed verdict in favor of the defendant is required"). In the case at bar, the State failed to adduce sufficient evidence to meet its burden of proof as a matter of law because the failure to establish the *corpus delicti* precludes conviction. The district court therefore properly granted the motion to dismiss for failure to establish the *corpus delicti*.

III. CONCLUSION

{19} Because the State provided no admissible evidence to corroborate the *corpus delicti* of the alleged crime, Defendant is entitled to a directed verdict. The judgment is affirmed.

{20} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

JONATHAN B. SUTIN, Judge

Certiorari Granted January 6, 2012, No. 33,331

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-006

Filing Date: November 4, 2011

Docket No. 29,238

NINA R. STRAUSBERG,

Plaintiff-Appellant,

v.

LAUREL HEALTHCARE PROVIDERS, LLC, and ARBOR BROOK, LLC, d/b/a ARBOR BROOK HEALTHCARE,

Defendants-Appellees.

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for Appellees

OPINION

VIGIL, Judge.

{1} A party who seeks to compel arbitration has the burden to prove the existence of a valid agreement to arbitrate. In this case, however, the district court shifted the burden to Plaintiff to prove that the agreement is invalid, and granted Defendants' motion to compel arbitration under a nursing home mandatory arbitration agreement. We reverse and remand.

BACKGROUND

{2} Plaintiff was required to sign an arbitration agreement in order to be admitted into a nursing home, Arbor Brook Healthcare (Arbor Brook) to rehabilitate from back surgery. Notwithstanding the agreement to arbitrate, Plaintiff filed a complaint for damages in the district court against the operator of Arbor Brook, Arbor Brook LLC, d/b/a Arbor Brook Healthcare, and Laurel Healthcare Providers, LLC as its owner, operator, or manager (Defendants). Plaintiff alleged that during her stay at Arbor Brook, she developed painful and preventable decubitus ulcers at or near her surgical wound; that her surgical wound became infected; that the infection was ignored or not properly treated, leading to a staph infection; and that her care was negligent in several other respects.

{3} Defendants responded by filing a motion to dismiss the complaint and compel arbitration, alleging that under the arbitration agreement between Plaintiff and Arbor Brook, all of Plaintiff's claims are subject to arbitration. Plaintiff replied that the arbitration agreement is invalid because it is unconscionable. The district court first ruled

that the arbitration agreement is not substantively unconscionable and then held an evidentiary hearing to determine whether the arbitration agreement is procedurally unconscionable. At the hearing, Plaintiff and the nurse liaison who obtained Plaintiff's signature to the arbitration agreement testified what they recalled about the circumstances under which Plaintiff signed the arbitration agreement.

{4} The district court then issued a letter decision setting forth its ruling and reasoning. The district court said,

> the issue presented was difficult because of the credibility of the witnesses, not in the sense of their truthfulness, but in the sense of their ability to recall the events surrounding the signing of the contract. Only two witnesses testified, one for the Plaintiff and one for Defendant. Ultimately, however, it was Plaintiff's burden to establish the contract she signed is unenforceable.

The district court specifically noted that Plaintiff's testimony demonstrated she was confused about signing the arbitration agreement and attributed her confusion to the pain medication she was under at the time. The district court also ruled that the factors considered to determine the validity of the arbitration agreement "generally are evenly balanced[.]" One of the factors it considered was whether Plaintiff had the option of going to another nursing home facility. As to this factor, the district court found, "Plaintiff believed that her only option was to be discharged from the hospital to Defendant[s'] care, but did not testify whether she looked into other placement options, and it was her burden to prove the contract at issue is unenforceable." Ultimately, the district court ruled that the arbitration agreement was not procedurally unconscionable. A formal order was filed granting Defendants' motion to dismiss and to compel arbitration, and Plaintiff appeals.

{5} To place our holding in context, we first address our standard of review, followed by a discussion of: (1) the enforcement of a valid arbitration agreement; (2) the elements of substantive unconscionability in an arbitration agreement; and (3) the elements of procedural unconscionability in an arbitration agreement. Within this context we then address: (4) which party has the burden of proof when one party seeks dismissal of a suit to compel arbitration under an arbitration agreement, and the other party asserts it is unconscionable; and (5) whether shifting the burden of proof resulted in reversible error.

DISCUSSION

Standard of Review

{6} "Whether a contract provision is unconscionable and unenforceable is a question of law that we review de novo." *Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶ 42, 150 N.M. 398, 259 P.3d 803. Our review of a district court order granting or denying a motion to compel arbitration is also de novo. *Piano v. Premier Distrib. Co.*, 2005-NMCA-018, ¶ 4, 137 N.M. 57, 107 P.3d 11; *Heye v. Am. Golf Corp., Inc.*, 2003-NMCA-138, ¶ 4, 134 N.M. 558, 80 P.3d 495. Finally, our review of whether the district court applied the correct evidentiary rule or legal standard in deciding the claim before it is likewise de novo. *See Mayeux v. Winder*, 2006-NMCA-028, ¶ 14, 139 N.M. 235, 131 P.3d 85 (stating that the plaintiff's

argument that the district court erred in applying the wrong legal standard to their breach of fiduciary claim is reviewed de novo); *see also State v. Torres*, 1999-NMSC-010, ¶ 28, 127 N.M. 20, 976 P.2d 20 ("[T]he threshold question of whether the trial court applied the correct evidentiary rule or standard is subject to de novo review on appeal.").

The Enforcement of Arbitration Agreements

{7} Arbitration agreements are enforced under both New Mexico and federal law. *See Piano*, 2005-NMCA-018, ¶ 5; *see also* NMSA 1978, § 44-7A-7(a) (2001) ("An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract."); 9 U.S.C. § 2 (2006) ("[A] contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

{8} However, unconscionability is an equitable doctrine rooted in public policy under which an arbitration agreement may be deemed unenforceable. *Rivera*, 2011-NMSC-033, ¶ 43; *Cordova v. World Fin. Corp. of N.M.*, 2009-NMSC-021, ¶ 21, 146 N.M. 256, 208 P.3d 901. New Mexico recognizes both substantive unconscionability and procedural unconscionability under the doctrine of contractual unconscionability. *Rivera*, 2011-NMSC-033, ¶ 43; *Cordova*, 2009-NMSC-021, ¶ 21. While a mandatory arbitration clause may be invalidated for unconscionability when both substantive and procedural unconscionability are present, "there is no absolute requirement in our law that both must be present to the same degree or that they both be present at all." *Cordova*, 2009-NMSC-021, ¶ 24.

{9} When a contractual term is deemed to be unconscionable, two possible remedial actions can be taken.

> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

Id. ¶ 39 (internal quotation marks and citation omitted); *see also Smith v. Price's Creameries*, 98 N.M. 541, 545, 650 P.2d 825, 829 (1982) (setting forth the same options under Article II of the Uniform Commercial Code).

Substantive Unconscionability

{10} Contract terms themselves determine whether they are illegal, contrary to public policy, or grossly unfair, and therefore, substantively unconscionable. *Rivera*, 2011-NMSC-033, ¶ 45 ("Substantive unconscionability concerns the legality and fairness of the contract terms themselves." (quoting *Cordova*, 2009-NMSC-021, ¶ 22)); *Fiser v. Dell Computer Corp.*, 2008-NMSC-046, ¶ 20, 144 N.M. 464, 188 P.3d 1215 ("Substantive unconscionability relates to the content of the contract terms and whether they are illegal, contrary to public policy, or grossly unfair."); *Guthmann v. La Vida Llena*,

103 N.M. 506, 510, 709 P.2d 675, 679 (1985) ("Substantive unconscionability is concerned with contract terms that are illegal, contrary to public policy, or grossly unfair."); *State ex rel. State Highway & Transp. Dep't v. Garley*, 111 N.M. 383, 390, 806 P.2d 32, 39 (1991) (stating that the touchstone for substantive unconscionability is gross unfairness). In determining whether a contract suffers substantive unconscionability, the "analysis focuses on such issues as whether the contract terms are commercially reasonable and fair, the purpose and effect of the terms, the one-sidedness of the terms, and other similar public policy concerns." *Rivera*, 2011-NMSC-033, ¶ 45 (quoting *Cordova*, 2009-NMSC-021, ¶ 22).

{11} In New Mexico, a contract provision that unreasonably benefits one party over another is substantively unconscionable. *Rivera*, 2011-NMSC-033, ¶ 46; *Cordova*, 2009-NMSC-021, ¶ 25; *Guthmann*, 103 N.M. at 511, 709 P.2d at 680; *Monette v. Tinsley*, 1999-NMCA-040, ¶ 19, 126 N.M. 748, 975 P.2d 361. In making this determination, a New Mexico court no longer needs to find that the terms must be "'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."' *Cordova*, 2009-NMSC-021, ¶ 31 (quoting *Hume v. United States*, 132 U.S. 406, 411 (1889) (quoting *Earl of Chesterfield v. Janssen*, 2 Ves. Sen. 125, 155, 28 Eng. Rep. 82, 100 (Ch. 1750)). "It is sufficient if the provision is grossly unreasonable and against our public policy under the circumstances." *Id.*

Procedural Unconscionability

{12} A contract or provision therein is procedurally unconscionable where there is such gross inequality in bargaining power between the parties that one party's choice is effectively non-existent. *Guthmann*, 103 N.M. at 510, 709 P.2d at 679.

{13} While not a prerequisite, a contract of adhesion may result in a procedurally unconscionable agreement. *Rivera*, 2011-NMSC-033, ¶ 44. *But see Cordova*, 2009-NMSC-021, ¶ 34 (noting that a contract of adhesion may result in substantive unconscionability) ; *Fiser*, 2008-NMSC-046, ¶ 22 (same). To determine whether an adhesion contract exists, the court inquires into three factors: "(1) whether it was prepared entirely by one party for the acceptance of the other; (2) whether the party proffering the contract enjoyed superior bargaining power because the weaker party could not avoid doing business under the particular terms; and [(3)] whether the contract was offered to the weaker party without an opportunity for bargaining on a take-it-or-leave-it basis." *Fiser*, 2008-NMCA-046, ¶ 22; *Guthmann*, 103 N.M. at 509, 709 P.2d at 678; *Rivera v. Am. Gen. Fin. Servs., Inc.*, 2010-NMCA-046, ¶ 15, 148 N.M. 784, 242 P.3d 351, *rev'd by* 2011-NMSC-033. Accordingly, a contract of adhesion may result if all the competitors of the dominate party use essentially the same contract terms or when that dominate party has a monopoly on the relevant geographic market. *Guthmann*, 103 N.M. at 509, 709 P.2d at 678.

{14} Thus, to determine if a contractual provision has the stigma of procedural unconscionability, the circumstances surrounding the formation of the contract must be examined. *Cordova*, 2009-NMSC-021, ¶ 23; *Fiser*, 2008-NMSC-046, ¶ 20; *Guthmann*, 103 N.M. at 510, 709 P.2d at 679. Circumstances in the contract formation to be examined include whether sharp practices or high pressure tactics were used, the relative

sophistication, education, and wealth of the parties, a particular party's ability to understand the terms of the contract, the relative bargaining power of the parties, the relative scarcity of the subject matter of the contract, and the extent to which either party felt free to accept or decline the terms demanded by the other. *Cordova*, 2009-NMSC-021, ¶ 23; *Guthmann*, 103 N.M. at 510, 709 P.2d at 679.

Who Has the Burden of Proof

{15} A legally enforceable contract is a prerequisite to arbitration under the New Mexico Uniform Arbitration Act, and without such a contract, the parties will not be forced to arbitrate. *Piano*, 2005-NMCA-018, ¶ 5; *Heye*, 2003-NMCA-138, ¶ 8; *DeArmond v. Halliburton Energy Servs., Inc.*, 2003-NMCA-148, ¶ 9, 134 N.M. 630, 81 P.3d 573. The party who seeks to compel arbitration has the burden of proof to establish the existence of a valid agreement to arbitrate. *See Corum v. Roswell Senior Living, LLC*, 2010-NMCA-105, ¶¶ 3, 16, 149 N.M. 287, 248 P.3d 329 (stating that the party attempting to compel arbitration has the burden to demonstrate a valid agreement to arbitrate), *cert. denied*, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146; *DeArmond*, 2003-NMCA-148, ¶ 9 (stating that party relying on a contract has the burden to prove it is legally valid and enforceable). Moreover, when the parties dispute the existence of a valid arbitration agreement, any presumption in favor of arbitration disappears. *See DeArmond*, 2003-NMCA-148, ¶ 8; *see also Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1220 (10th Cir. 2002) ("The presumption in favor of arbitration . . . disappears when the parties dispute the existence of a valid arbitration agreement.").

{16} The foregoing rules are well embedded in New Mexico jurisprudence. For example, in *Shaw v. Kuhnel & Associates, Inc.*, 102 N.M. 607, 608, 698 P.2d 880, 881 (1985), *superceded by statute as stated in Aguilera v. Palm Harbor Homes, Inc.*, 2002-NMSC-029, ¶ 6, 132 N.M. 715, 54 P.3d 993, our Supreme Court repeats that parties are generally bound to resolve disputes by arbitration when they have contractually agreed to do so. "However, a motion to compel arbitration is essentially a suit for specific performance of an agreement to arbitrate." *Id.* Clearly, a party seeking specific performance has the burden of proving grounds for such relief. In this case, it is the existence of a legally valid and enforceable contractual agreement to arbitrate.

{17} We acknowledge and recognize that most courts that have considered the question, place the burden on the party seeking to set aside an arbitration agreement on unconscionability grounds.[1] However, these

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[1] *See, e.g., Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1158 (9th Cir. 2008) (holding that employees challenging the arbitration agreement in their employment contract failed to meet "their burden of establishing that the arbitration clause at issue in this case is unconscionable"); *Faber v. Menard, Inc.*, 367 F.3d 1048, 1053 (8th Cir. 2004) (noting that "[u]nder Iowa law, the burden of proof that a particular provision or contract is unconscionable rests on the party claiming it is unconscionable" and concluding that the employee failed to meet his burden of proving that the arbitrator's fees made the agreement unconscionable due to their prohibitive cost); *Parilla v. IAP Worldwide Servs. VI, Inc.*, 368 F.3d 269, 277 (3d Cir. 2004) (stating that "the burden of proving such unconscionability lies

cases all deal with commercial transactions, and we conclude that they are distinguishable and unpersuasive in the context before us.

{18} The case before us is not a mere commercial transaction. When individuals are dealing with admission into a nursing home, the health issue making nursing home care a necessity is often so grave, critical, or severe, that the only focus is on getting proper treatment, with everything else being secondary. In a nutshell, such individuals are often at their most vulnerable, emotionally or physically, or both. And this often includes immediate family members. Moreover, the context does not usually allow for measured consideration of what nursing homes are available, the terms required for admission, and the like. Thus, we have already noted that admission agreements and other admission-related documents such as mandatory arbitration agreements are often presented to aging and infirmed individuals and their families "when they are at their most vulnerable, in need of quick assistance, and potentially can easily be taken advantage of." *Barron v. The Evangelical Lutheran Good Samaritan Soc'y*, 2011-NMCA-094, ¶41, 150 N.M. 669, 265 P.3d 720.

{19} In recognition of these realities, the West Virginia Supreme Court has declared that all mandatory arbitration clauses in nursing home admission agreements are unconscionable and unenforceable. *Brown v. Genesis Healthcare Corp.*, No. 35494, 2011 WL 2611327 (W. Va. 2011). We have not been asked to, and therefore decline to adopt the holding of *Brown*. Nevertheless, we consider the following expressed reasons for treating nursing home contracts with mandatory arbitration agreements differently from mere commercial contracts very persuasive:

> Because of illness, incapacitation, or physical or mental impairment, people being admitted to a nursing home are usually quite vulnerable . . . .
>
> . . . .
>
> [I]n the 1980s, the government changed the way hospitals were paid for their Medicare patients; since the change, discharge planning occurs "quicker and sicker." The weakened physical and emotional condition of a person from an acute illness is one of the most significant factors that compels a decision to seek post-hospital nursing home

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with the party challenging the contract provision" in a case addressing whether the arbitration agreement in an employment contract is unconscionable) (citing E. Allen Farnsworth, *Farnsworth on Contracts* § 4.28 & n.14 (3d ed. 1999)); *Bess v. Check Express*, 294 F.3d 1298, 1306-07 (11th Cir. 2002) (stating that "[u]nder Alabama law, unconscionability is an affirmative defense to the enforcement of a contract, and the party asserting that defense bears the burden of proving it by substantial evidence" in a class action case for alleged violations of state and federal law arising out of "cash advances" or deferred payment transactions between the plaintiffs and the defendants); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181 (3d Cir. 1999) (applying Pennsylvania law in a suit where the plaintiffs claimed to be victims of a fraudulent home improvement scheme that the "party challenging a contract provision as unconscionable generally bears the burden of proving unconscionability").

placement. Compounding the dangers of this decision-making time, not only is the person being discharged "quicker and sicker," but the hospital treatment itself often further debilitates the person. A person's "decision" to enter a nursing home is, therefore, often made when the person's decision-making abilities are seriously impaired.

Unlike the situation that exists when a consumer signs a contract for a product or service, people entering a nursing home have to sign admissions contracts in the midst of a crisis, without time to comparison shop or to negotiate the best service and price combination. Put simply, there is usually little time to investigate options or to wait for an opening at a nursing home of choice. Time pressure during the hospital discharge process significantly impairs people's ability to seek and carefully consider alternatives.

. . . .

Ultimately, people being admitted to long-term care facilities and their families have to sign admission contracts without time to comparison shop or to negotiate the best service and price combination. The pressures of deciding placement at such a time, coupled with physical and/or mental infirmities, facing discharge from the hospital, financial limitations, and/or lack of knowledge about long-term care options make consumers vulnerable and dependent on full disclosure by facilities.

(internal quotation marks and footnotes omitted).

{20} We therefore hold that when a nursing home relies upon an arbitration agreement signed by a patient as a condition for admission to the nursing home, and the patient contends that the arbitration agreement is unconscionable, the nursing home has the burden of proving that the arbitration agreement is not unconscionable.

Shifting The Burden of Proof Resulted in Reversible Error

{21} Defendants had the burden of proving that the arbitration agreement is not unconscionable. However, the district court shifted the burden to Plaintiff to prove that the arbitration agreement is not unconscionable. We conclude this was reversible error.

{22} We have demonstrated that many factual issues must be decided by a district court in determining whether an arbitration agreement is unconscionable. In determining whether the contract is procedurally unconscionable, the district court said the issues were difficult to decide because neither Plaintiff nor the nurse who obtained her signature on the arbitration agreement had clear recollections of the factual circumstances, and that the factors it considered to determine whether the arbitration agreement is unconscionable "generally are evenly balanced[.]" The district court said that the "deciding factor" in its mind was Plaintiff's understanding of the arbitration agreement at the time she signed it. However, we have no way of assessing what weight the court would have given this evidence, or whether the district court would have come to the same conclusion if the burden of proof had been properly allocated to

Defendants. In addition, we have no way of determining whether the district court applied the correct burden of proof in ruling that the mandatory arbitration agreement is not substantively unconscionable. Moreover, when the issue of substantive unconscionability was first considered, the parties and the district court did not have the benefit of our Supreme Court's opinion in *Rivera*, 2011-NMSC-033. We therefore reverse the order of the district court. *See State v. Fernandez*, 128 N.M. 111, ¶ 36, 990 P.2d 224 (Ct. App. 1999) (reversing and remanding for a new suppression hearing where trial court applied incorrect standard in reviewing alleged falsehoods and omissions in a search warrant affidavit); *see also State v. Young*, 117 N.M. 688, 692, 875 P.2d 1119, 1123 (Ct. App. 1994) (remanding because the district court applied the wrong legal standard in deciding whether voluntary intoxication was relevant to a waiver of *Miranda* rights).

{23} On remand, we encourage the district court to enter findings of fact and conclusions of law pursuant to Rule 1-052 NMRA to facilitate appellate review of its factual determinations relating to unconscionability and its legal ruling on whether the arbitration is legally unconscionable.

CONCLUSION

{24} We reverse and remand for further proceedings in accordance with this Opinion.

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

MICHAEL E. VIGIL, Judge

I CONCUR:

MICHAEL D. BUSTAMANTE, Judge

JAMES J. WECHSLER, Judge (dissenting).

WECHSLER, Judge (dissenting).

{26} Our Supreme Court has stated the "fundamental principle that arbitration is a matter of contract." *Rivera*, 2011-NMSC-033, ¶ 16 (internal quotation marks and citation omitted). To this end, "courts must place arbitration agreements on an equal footing with other contracts[.]" *Id.* (internal quotation marks and citation omitted). I therefore do not agree with shifting the burden to the party seeking to enforce an arbitration agreement to prove that an arbitration agreement is not unconscionable, because this position does not have a basis in well-established contract law. As a result, I respectfully dissent.

{27} The majority correctly states that "[t]he party who seeks to compel arbitration has the burden of proof to establish the existence of a valid agreement to arbitration." Majority Opinion ¶ 15. However, the cases cited by the majority indicate that this burden applies to contract formation issues, not to defenses by a party seeking to stop the enforcement of an otherwise valid contract. For example, in *DeArmond*, 2003-NMCA-148, ¶¶ 11-14, the issues addressed by this Court were whether a party to an arbitration agreement had knowledge of a change in his employment contract that included a mandatory arbitration clause and therefore accepted the modification and, alternatively, whether mutuality existed to form a binding contract. *Corum*, 2010-NMCA-105, ¶ 16, similarly addresses contract formation issues. In particular, the issue in *Corum* was whether the individual who entered into an arbitration agreement on behalf of a nursing home patient had statutory authority to enter into the agreement. *Id.*

{28} Unconscionability, on the other hand, is an equitable doctrine that is a defense or "exception" to enforcing an otherwise valid contract. *See Montano v. N.M. Real Estate Appraiser's Bd.*, 2009-NMCA-009, ¶ 12, 145 N.M. 494, 200 P.3d 544 ("We will allow equity to interfere with enforcing clear contractual obligations only when well-defined equitable exceptions, such as unconscionability, mistake, fraud, or illegality justify deviation from the parties' contract." (internal quotation marks and citation omitted)); *see also Fidelity Nat'l Bank v. Tommy L. Goff, Inc.*, 92 N.M. 106, 107, 583 P.2d 470, 471 (1978) (stating that the answer to a complaint contained the "affirmative defense" of unconscionability). Generally, a party seeking to set aside enforcement of a contract based on a defense or exception, such as unconscionability, has the burden of proof. *See Mason v. Salomon*, 62 N.M. 425, 429, 311 P.2d 652, 654 (1957) (holding that the party seeking to set a contract aside for fraud has the burden of proof); *see also W. Commerce Bank v. Gillespie*, 108 N.M. 535, 538, 775 P.2d 737, 740 (1989) (declining to shift the burden of persuasion to the party challenging a contract because the action was "a simple contract issue" requiring the court to determine whether the "making of the contract" satisfied the "condition[s] precedent" as opposed to an action seeking to set aside a contract on a ground such as fraud, mistake, misrepresentation, or undue influence). Similarly, *Farmington Police Officers Ass'n Commc'n Workers of Am. Local 7911 v. City of Farmington*, 2006-NMCA-077, ¶ 16, 139 N.M. 750, 137 P.3d 1204, addressed the burden of proof in an arbitration case and concluded that the party seeking to enforce an arbitration clause in a collective bargaining agreement had the burden of persuasion as to whether the clause applied to the dispute. In *Farmington Police Officers Ass'n*, this Court stated that

> we believe that where the meaning of a material contract term is in dispute a party seeking affirmative relief based upon its interpretation necessarily bears the burden of establishing that its interpretation controls. This approach is consistent with the general default rule allocating the burden of persuasion in civil cases to the party who invokes the authority of a court to alter the extrajudicial status quo.

Id. (citation omitted).

{29} As the majority acknowledges, most courts that have addressed the issue have placed the burden on the party seeking to set aside an arbitration agreement on unconscionability grounds. Majority Opinion ¶ 17 n.1. Consistent with these other courts, this Court has recently clarified that the party challenging a provision of an arbitration agreement that banned class action claims on unconscionability grounds has the burden of proof. *See Felts v. CLK Mgmt., Inc.*, 2011-NMCA-062, ¶¶ 34, 37, 149 N.M. 681, 254 P.3d 124, *cert. granted*, 2011-NMCERT-006, 150 N.M. 763, 266 P.3d 632 (Nos. 33,011 and 33,013, June 8, 2011).

{30} The majority distinguishes *Felts* and cases from other jurisdictions because the cases involve "commercial transactions." Majority Opinion ¶ 17. However, even cases in other jurisdictions specifically involving challenges to arbitration agreements in nursing home admission documents impose the burden of proof upon the party challenging the agreement. *See, e.g., Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661, 665 (Ala. 2004) ("The burden of proving

unconscionability of an arbitration agreement rests with the party challenging the agreement." (internal quotation marks and citation omitted)); *Estate of Perez v. Life Care Ctrs. of Am. Inc.*, 23 So. 3d 741, 742 (Fla. Dist. Ct. App. 2009) ("The party seeking to avoid the arbitration provision has the burden to establish unconscionability."); *Hayes v. Oakridge Home*, 122 Ohio St. 3d 63, 2009-Ohio-2054, 908 N.E.2d 408, at ¶ 20 ("The party asserting unconscionability of a contract bears the burden of proving that the agreement is both procedurally and substantively unconscionable.").

{31} I also note that in *Brown*, 2011 WL 2611327, the West Virginia Supreme Court stated the policy considerations quoted in Paragraph 19 of the majority opinion as background to establish the context of the agreements in the case, rather than as the basis for its holding that mandatory arbitration clauses in nursing home admission documents adopted prior to the negligent incident at issue are unconscionable. West Virginia recognizes, as a matter of public policy, a "public service" exception to the enforcement of pre-injury contracts that either absolves a public service provider of liability for personal injuries or wrongful death or that allows a public service provider to escape public scrutiny in the courtroom. *Id. Brown* invalidated the arbitration agreements based on the public service exception because a nursing home is a public service provider and the arbitration agreements prevented the nursing homes from "courtroom scrutiny of their negligent conduct that caused a personal injury or wrongful death[.]" *Id.*

{32} Although I share the majority's concern that "individuals are often at their most vulnerable, emotionally or physically, or both" when seeking admission to a nursing home, I do not believe this concern justifies a sweeping exception to well-established law for nursing home patients that the majority creates. Majority Opinion ¶ 18. I would therefore treat an arbitration agreement signed by a patient as a condition for nursing home admission the same as any other arbitration agreement and would hold that, generally, a party seeking to set aside the arbitration agreement has the burden of proving that the arbitration agreement is unconscionable. A party's vulnerability is a fact for the court to consider in determining the issue of procedural unconscionability.

{33} Moreover, even assuming that there may be appropriate cases for a district court to shift the burden of proof to a party seeking to set aside an arbitration agreement when the facts of the case indicate that the party seeking to enforce the arbitration agreement would be in a better position to prove whether an arbitration agreement is unconscionable, this is not such a case. The district court found that upon admission to the nursing home on April 11, 2007, Plaintiff was confused as the result of pain medication, that she had ten minutes to complete forty minutes of paperwork during the admission process, and that she did not have her glasses. However, the district court further found that Plaintiff signed the arbitration agreement on April 10, 2007, before the transfer to the nursing home; and Plaintiff presented no testimony regarding her state of mind or condition on that date. Additionally, the district court stated that the "deciding factor" in determining that the arbitration agreement was not unconscionable was Plaintiff's understanding of the agreement at the time she signed it. Importantly, Plaintiff admitted that she understood that the arbitration agreement "significantly limited her rights," even though she was medicated. Under these circumstances, the district court

did not err in determining that Plaintiff had the burden to prove that the arbitration agreement was unconscionable, and I respectfully dissent.

JAMES J. WECHSLER, Judge

Certiorari Denied, December 16, 2011, No. 33,314

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-007

Filing Date: November 7, 2011

Docket No. 29,976

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

RAYMOND ARCHULETA,

Defendant-Appellant.

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Santa Fe, NM

for Appellee

Jacqueline L. Cooper, Acting Chief Public Defender
B. Douglas Wood III, Assistant Appellate Defender
Santa Fe, NM

for Appellant

OPINION

GARCIA, Judge.

{1} On or about February 14, 2009, Defendant was found in possession of property which the State alleged had been stolen from the home of Phillip Baca and Denise Velarde. Defendant ran from police officers, depositing a stolen watch and a syringe in a garbage bin. He was charged with burglary, possession of stolen property with a value in excess of $500, possession of drug paraphernalia, tampering with evidence, and resisting arrest. Defendant was ultimately acquitted of both burglary and possession of drug paraphernalia, but convicted of all other charges. On appeal, Defendant contends that: (1) the district court erred in denying his motions for a continuance and to reappoint

counsel after Defendant waived his right to counsel and moved to represent himself; (2) there was insufficient evidence that Defendant possessed stolen property with a value in excess of $500, a fourth-degree felony and, thus, there was also insufficient evidence to support Defendant's conviction for tampering with evidence of a fourth-degree felony; (3) the admission of certain statements by one of the State's witnesses constituted fundamental error and violated Defendant's confrontation clause rights; and (4) cumulative error deprived Defendant of his right to a fair trial. For the reasons that follow, we find no error and affirm.

DISCUSSION

I. Defendant's Motions for a Continuance and to Reappoint Counsel

{2} Defendant argues that the district court erred in denying his motions for a continuance and to reappoint counsel. At trial, Defendant was initially represented by counsel but, on June 23, 2009, Defendant requested that he be allowed to represent himself. The court conducted an extensive inquiry, advising Defendant of the potential consequences of choosing to proceed *pro se*. Throughout the inquiry, Defendant continually maintained that he understood the risks and that he still wished to represent himself. The district court granted his motion, finding that Defendant had knowingly, voluntarily, and intelligently waived his right to counsel and relieved Defendant's counsel from his representation. On the same date, Defendant was informed that the matter was scheduled for trial on September 10, 2009.

{3} On September 9, 2009, the day before trial, Defendant moved to continue the trial, asserting that he was unprepared because he had not been able to physically see some of the stolen items to prepare his case and because he had been able to spend only approximately one hour in the detention center library since receiving additional discovery from the State approximately two weeks earlier. The court asked Defendant what specific items he needed to see, and he identified a cell phone, sunglasses, and an earring, all being items which ultimately were not used in securing Defendant's convictions. The court asked Defendant why the inventory list and photographs that were in his possession were not sufficient, and Defendant merely maintained that he was not given full discovery because he was not able to personally see all actual items. The district court denied Defendant's motion for a continuance and found that Defendant had not provided sufficient reasons why he was unable to be prepared for trial the next day.

{4} Immediately after Defendant's motion to continue was denied, Defendant made a motion to have counsel reappointed. Defendant asserted the same arguments he made regarding his motion for a continuance, arguing that he had not had adequate time to prepare his case and that he had not received full discovery. The district court denied Defendant's motion, stressing that Defendant was making the request the day before trial when he had already waived his right to counsel and requested to represent himself.

A. Defendant's Motion for a Continuance

{5} The grant or denial of a motion for a continuance rests within the sound discretion of the trial court, and the burden of establishing an abuse of discretion rests with the defendant. *State v. Sanchez*, 120 N.M. 247, 253, 901 P.2d 178, 184 (1995); *see State v. Perez*, 95 N.M. 262, 264, 620 P.2d 1287,

1289 (1980) ("[I]n the absence of demonstrated abuse resulting in prejudice to the defendant there is no ground for reversal."). "Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons." *State v. Brazeal*, 109 N.M. 752, 756, 790 P.2d 1033, 1037 (Ct. App. 1990) (internal quotation marks and citation omitted).

{6} Factors that a court considers when weighing the merits of a continuance request are (1) the length of the delay, (2) the likelihood that a delay would accomplish the movant's objectives, (3) the existence of previous continuances in the same matter, (4) the degree of inconvenience to the parties and the court, (5) the legitimacy of the motives in requesting the delay, (6) the fault of the movant in causing a need for the delay, and (7) the prejudice to the movant in denying the motion. *State v. Torres*, 1999-NMSC-010, ¶ 10, 127 N.M. 20, 976 P.2d 20. While this was Defendant's first request for a continuance, there were various additional reasons justifying the court's denial of Defendant's motion. Defendant's request came the day before trial, after he had been previously informed and reminded on multiple occasions of the upcoming trial date. The granting of Defendant's eleventh-hour motion would have likely caused significant inconvenience to the court and the State, both of which had prepared for Defendant's trial the following day. Additionally, the factors regarding the likelihood that a delay would accomplish the movant's objectives and the prejudice to the movant hold relatively little or no weight in this circumstance. The evidence Defendant requested to physically inspect after it was viewed in the pre-trial photographs was never offered or used against him. In addition, Defendant failed to articulate how waiting one day to view the physical evidence rather than the photographs of the evidence caused him any prejudice. Finally, Defendant's reasons for a continuance failed to identify a legitimate motive that justified postponing the trial. As a result, Defendant did not meet his burden by sufficiently explaining why Defendant's limited time in the detention center library and the allegedly missing and late discovery provided compelling reasons for a continuance. Under these circumstances, we cannot say that the district court abused its discretion in denying Defendant's motion to continue.

B. Defendant's Motion to Reappoint Counsel

{7} Defendant also challenges the court's denial of his motion to reappoint counsel. In *State v. Vincent*, we followed the lead of multiple out-of-state jurisdictions to hold that once a defendant has validly waived his right to counsel, he may not later demand the assistance of counsel as a matter of right. 2005-NMCA-064, ¶ 48, 137 N.M. 462, 112 P.3d 1119; *see State v. Canedo-Astorga*, 903 P.2d 500, 504 (Wash. Ct. App. 1995) ("After a competent defendant has made a valid waiver, reappointment is a matter for the discretion of the trial court."); *State v. Gallegos*, 2006 UT App 404, ¶ 10, 147 P.3d 473 (Utah Ct. App. 2006) ("A trial court's denial of a motion to reappoint counsel, where the motion follows a proper waiver of the right to counsel, will be overturned only for an abuse of discretion."); *People v. Cruz*, 147 Cal. Rptr. 740, 747 (Ct. App. 1978) ("The decision whether to reappoint counsel after a waiver of that right appears to be a matter within the discretion of the trial court.").

However, in exercising discretion, a trial court should consider all the facts and circumstances of the case.

> Because [s]elf-representation is a grave undertaking, one not to be encouraged, the request for reappointment should be granted absent reasons to deny. In some cases, however, there will be reasons to deny—for example, that the request comes on the eve of or during trial, and will delay or interrupt the trial if granted.

Canedo-Astorga, 903 P.2d at 504 (alteration in original) (footnote omitted) (internal quotation marks omitted). We must review whether the district court abused its discretion when it denied Defendant's motion to reappoint counsel on the eve of trial.

{8} First, we now adopt the approach taken by the California Supreme Court in *People v. Lawrence* to provide guidance to the trial court when determining whether to grant a *pro se* defendant's motion to reappoint counsel. 205 P.3d 1062, 1066-67 (Cal. 2009) (citing *People v. Elliot,* 139 Cal. Rptr. 205, 210-11 (Ct. App. 1977)). There, the court suggested that a trial court should apply the following factors when faced with a defendant's request to reappoint counsel: (1) the defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation, (2) the reasons set forth for the request, (3) the length and stage of the proceedings, (4) disruption or delay which reasonably might be expected to ensue from the granting of such motion, and (5) the likelihood of the defendant's effectiveness in defending against the charges if required to continue to act as his own attorney. *Id.*

{9} After considering the totality of the circumstances surrounding Defendant's request for reappointment of counsel, we conclude the district court did not abuse its discretion in denying the request. Here, we note that Defendant had the benefits of previously appointed counsel who assisted with his case before he moved to represent himself. Defendant was thoroughly and adequately apprised by the district court of the inherent risks involved in self-representation before he made a valid waiver of his right to counsel. Months later, he moved to reappoint counsel on the day before trial was set to begin.

{10} The district court found that Defendant's offered reasons to reappoint counsel were insufficient, and we agree. It was unclear what additional assistance Defendant needed and why he felt the inventory list and photographs of the items in his possession were inadequate to allow him to prepare his defense. He did not explain or articulate why such a personal inspection of certain physical evidence seized from him at the time of arrest was needed to prepare his defense versus viewing the evidence personally the following day at trial. Further, granting Defendant's motion would clearly have caused substantial delay to the proceedings, as the request came on the eve of trial and would have required last minute rescheduling for the court, witnesses, and jurors who had been secured to attend the following day. The case itself was a relatively routine stolen property matter and Defendant never expressed any concern regarding its nature or complexity. The dismissal of one of the original charges and the not guilty verdict rendered on one other charge further attest to Defendant's ability to represent himself in an adequate manner. Under these circumstances,

we find no abuse of discretion in the denial of Defendant's request for reappointment of counsel.

{11} Defendant alternatively asks the Court to adopt the approach taken by the state of Washington in *State v. Silva*, 27 P.3d 663, 673 (Wash. Ct. App. 2001) (holding that the Washington Constitution affords a pretrial detainee who has exercised his constitutional right to represent himself a right of reasonable access to state-provided resources that will enable him to prepare a meaningful pro se defense). We decline to do so. Because Defendant failed to advise the district court that he was either requesting or asserting an expanded right under the New Mexico Constitution, this issue is not properly before this Court. *State v. Gomez*, 1997-NMSC-006, ¶¶ 19, 22, 122 N.M. 777, 932 P.2d 1 (where the provision has never before been addressed under our interstitial analysis, trial counsel additionally must argue that the state constitutional provision should provide greater protection, and suggest reasons as to why, for example, "a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics").

II. Denise Velarde's Statements Regarding the Value of the Stolen Property

{12} At trial, the State called Denise Velarde, who resided in the burglarized home with her husband, Phillip Baca. Ms. Velarde testified to the items stolen from their home and the value of those items, including an iPod valued at $150, tennis shoes valued at $110, an internet card valued at $220, three cellular phone chargers valued at $25 each, and a watch valued at $100. The State also entered into evidence photographs of the stolen items which were taken by Phillip Baca prior to the burglary. When testifying about the watch, Ms. Velarde stated that she knew how much it was worth because her husband told her the value. Defendant argues on appeal that the admission of Ms. Velarde's testimony violated Defendant's confrontation clause rights because Ms. Velarde's statement regarding the watch's value constituted inadmissible hearsay, and she otherwise did not indicate how she had personal knowledge of the other items' values.

{13} We note that Defendant failed to preserve the confrontation and personal knowledge issues in the district court. Because Defendant never objected to the admission of the statements below, we only review the statements to determine whether their admission created fundamental error. *State v. Cunningham*, 2000-NMSC-009, ¶ 8, 128 N.M. 711, 998 P.2d 176; *see State v. Martinez*, 2007-NMSC-025, ¶ 25, 141 N.M. 713, 160 P.3d 894 (reviewing a defendant's Confrontation Clause claim for fundamental error even though the issue was not preserved); *State v. Aguilar*, 117 N.M. 501, 507, 873 P.2d 247, 253 (1994) (reviewing for fundamental error based upon improper statements and arguments presented to the jury). Fundamental error occurs only in "cases with defendants who are indisputably innocent, and cases in which a mistake in the process makes a conviction fundamentally unfair notwithstanding the apparent guilt of the accused." *State v. Barber*, 2004-NMSC-019, ¶ 17, 135 N.M. 621, 92 P.3d 633. It applies "in exceptional circumstances when guilt is so doubtful that it would shock the judicial conscience to allow the conviction to stand." *State v. Baca*, 1997-NMSC-045, ¶ 41, 124 N.M. 55, 946 P.2d 1066, *overruled on other grounds by State v. Belanger*, 2009-NMSC-025, 146 N.M. 357, 210 P.3d 783. Defendant argues that the statements amounted to fundamental error at trial because

Defendant was never able to cross-examine Mr. Baca. We disagree.

{14} In this case, the admission of Ms. Velarde's testimony was not fundamental error. We note that even if Ms. Velarde's statement regarding the watch's value should have been excluded as hearsay, the value of the other items admitted into evidence still totaled more than the $500 threshold amount. Because there was sufficient additional evidence for a jury to find Defendant guilty, we find no fundamental error. *See State v. Rodriguez*, 81 N.M. 503, 505, 469 P.2d 148, 150 (1970) ("If there is substantial evidence . . . to support the verdict of the jury, we will not resort to fundamental error.").

III. Sufficiency of the Evidence of the Value of Stolen Property

{15} Defendant argues that the evidence presented at trial was insufficient to result in his conviction for fourth-degree receiving stolen property and for tampering with evidence. Our review of a sufficiency of the evidence question involves a two-step process. *See State v. Apodaca*, 118 N.M. 762, 766, 887 P.2d 756, 760 (1994). Initially, we view the evidence in the light most favorable to the verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict, and then we must "make a legal determination of whether the evidence viewed in this manner could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt." *Id.* (internal quotation marks and citation omitted). The question is whether the district court's "decision is supported by substantial evidence, not whether the [district] court could have reached a different conclusion." *In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 15, 121 N.M. 562, 915 P.2d 318. "The reviewing court does not weigh the evidence or substitute its judgment for that of the fact finder as long as there is sufficient evidence to support the verdict." *State v. Mora*, 1997-NMSC-060, ¶ 27, 124 N.M. 346, 950 P.2d 789, *abrogated on other grounds by Kersey v. Hatch*, 2010-NMSC-020, 148 N.M. 381, 237 P.3d 683.

{16} To convict Defendant of fourth-degree receiving stolen property, the State was required to prove that: (1) the iPod, wireless internet card, Pittsburgh Steelers watch, Jordan tennis shoes, and phone chargers had been stolen; (2) Defendant kept this property; (3) at the time Defendant kept the property, he knew or believed it had been stolen; (4) the property had a market value of over $500; and (5) this happened in New Mexico on or about February 14, 2009. The jury was further instructed that market value means the price at which the property could ordinarily be bought or sold at the time of the alleged receipt of stolen goods. Defendant challenges only whether the State sufficiently proved that the market value of the items possessed exceeded $500.

{17} We find no basis in the record to support Defendant's argument that Ms. Velarde only testified to the purchase price of the items, not their market value. Ms. Velarde did, in reference to the tennis shoes and wireless internet card, indicate that she knew the value of the items because she and her husband "bought them." Ms. Velarde testified that the tennis shoes were purchased only a week and a half prior to the burglary, and that the internet card was purchased from her husband's workplace. As to the other items, Ms. Velarde was questioned, without objection, as to the "value" of the items. The relationship between the market value and purchase price of these items was never disputed by Defendant or explored further with Ms. Velarde. In the light most favorable

to the verdict, Ms. Velarde's testimony of the value of the stolen items, particularly when coupled with photographic and physical exhibits of the items entered into evidence at trial, was sufficient to allow the jury to conclude that the market value of the items possessed by Defendant exceeded $500. It is well settled that an owner of personal property may testify concerning the value of the property and that such testimony is sufficient to support a jury's determination of value. *State v. Dominguez*, 91 N.M. 296, 299-300, 573 P.2d 230, 233-34 (Ct. App. 1977); *State v. Zarafonetis*, 81 N.M. 674, 677, 472 P.2d 388, 391 (Ct. App. 1970). "The reason for this rule is that the owner necessarily knows something about the quality, cost, and condition of his or her property and consequently knows approximately what it is worth." *State v. Hughes*, 108 N.M. 143, 146, 767 P.2d 382, 385 (Ct. App. 1988). Based on Ms. Velarde's testimony valuing the stolen items and exhibits depicting the items stolen, the jury could reasonably infer that the market value of the stolen items exceeded $500. Because substantial evidence supports the jury's determination that Defendant possessed property valued over $500, we affirm Defendant's conviction for fourth-degree receiving stolen property.

{18} Defendant also argues that because there was insufficient evidence to convict Defendant of fourth-degree receiving stolen property, there is also insufficient evidence to convict Defendant of tampering with evidence, another fourth-degree felony. Because we have rejected Defendant's argument holding that there was sufficient evidence to support Defendant's conviction for possession of stolen property, we also reject Defendant's identical arguments that there was insufficient evidence of tampering with evidence.

IV. Cumulative Error

{19} Defendant argues that the cumulative effect of the various alleged errors outlined above, including Ms. Velarde's testimony regarding the value of the stolen property and the court's denial of his motions to continue and to reappoint counsel, denied Defendant a fair trial. "The doctrine of cumulative error requires reversal when a series of lesser improprieties throughout a trial are found; in aggregate, to be so prejudicial that the defendant was deprived of the constitutional right to a fair trial." *State v. Duffy*, 1998-NMSC-014, ¶ 29, 126 N.M. 132, 967 P.2d 807, *modified on other grounds by State v. Gallegos*, 2007-NMSC-007, ¶ 17, 141 N.M. 185, 152 P.3d 828. The cumulative error doctrine is strictly applied and may not be successfully invoked if "the record as a whole demonstrates that the defendant received a fair trial." *State v. Trujillo*, 2002-NMSC-005, ¶ 63, 131 N.M. 709, 42 P.3d 814 (internal quotation marks and citation omitted). We recognize the doctrine of cumulative error in the State of New Mexico; however, it has no application if no errors are committed and if the defendant has received a fair trial. *State v. Seaton*, 86 N.M. 498, 501, 525 P.2d 858, 861 (1974); *State v. Carr*, 95 N.M. 755, 769, 626 P.2d 292, 306 (Ct. App. 1981), *overruled on other grounds as recognized by State v. Olguin*, 120 N.M. 740, 906 P.2d 731. Because we have held that there was no error, we conclude that the cumulative error doctrine does not apply. *See State v. Aragon*, 1999-NMCA-060, ¶ 19, 127 N.M. 393, 981 P.2d 1211 (holding that when there is no error, "there is no cumulative error").

CONCLUSION

{20} For the foregoing reasons, we affirm Defendant's convictions.

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

TIMOTHY L. GARCIA, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

RODERICK T. KENNEDY, Judge

Certiorari Granted, January 17, 2012, No. 33,362

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-008

Filing Date: November 15, 2011

Docket No. 30,100

IN RE RESCUE ECOVERSITY PETITION

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for Appellees Santa Fe County and Santa Fe County Clerk

Claude D. Convisser
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for Appellants

OPINION

KENNEDY, Judge.

{1} In this case, we are asked to construe Article II, Section 14 of the New Mexico Constitution, which requires a district judge to convene a grand jury "upon the filing of a petition therefor signed by not less than . . . two percent of the registered voters of the county[.]" Petitioner filed a handwritten "Citizens' Petition Pursuant to Article II, Section 14 of the New Mexico Constitution to Convene a Grand Jury Investigation" in the district court, seeking a grand jury investigation of whether fraud was committed in connection with two non-profit corporations, EcoVersity and Prajna Foundation. Attached to the Petition were 339 identical petitions entitled, "Rescue EcoVersity," stating, "We petition the First Judicial District Court to convene a grand jury to investigate [the] matters [set forth], pursuant to Article II, [S]ection 14 of the New Mexico Constitution." Each sheet has two columns, one for the person's signature and

one for the person's printed name, directly below a heading which reads: "Registered voters of Santa Fe City and County."

{2} Prior to filing the Petition, Petitioner asked the County Clerk to verify that the Petition had the required number of signatures of registered voters in Santa Fe County to convene a grand jury. The County Clerk confirmed that two percent of the number of registered voters in Santa Fe County is 1,770. The County Clerk stated that the process used by her office to verify voter registration in Santa Fe County requires the address of each signatory to be provided. Specifically, for various types of petitions, not including a petition to convene a grand jury, the applicable statute *requires* an address in the petition, and the Clerk uses that address to verify that the person is a registered voter of Santa Fe County. The address is used to ensure that a signatory on a petition is not (1) mistaken for another voter with the same name, (2) a voter with the same name who may have been removed from the file as ineligible, (3) an individual with the same name who is registered to vote in another county, or (4) an individual with the same name who is not registered to vote. Since the Petition to convene the grand jury did not contain addresses, the County Clerk stated that, while she was able to "confirm that the [P]etition contains 1808 names of individuals matching the names of registered voters in Santa Fe County[,]" she could "not verify that any of the individuals who signed the [P]etition are indeed registered voters in Santa Fe County." (Emphasis omitted.)

{3} Before the Petition was filed, the district court received a letter from the County Clerk addressing her concern that the Petition did not have addresses, as well as objections to the convening of the grand jury from an attorney who apparently represented one or more of the proposed targets of the investigation. After the Petition was filed, the district court noted that these were received, and it entered an order allowing the County Clerk and other interested parties to file a response to the Petition. The County Clerk, EcoVersity, Prajna Foundation, and Jeffrey Harbour, as an officer and director of EcoVersity and Prajna Foundation, filed responses. Following a hearing, the district court entered its order making the following findings:

1. Article II, Section 14 of the New Mexico Constitution requires a petition for the convening of a grand jury to investigate the subject of the petition to be signed by not less than the greater of two hundred registered voters or two . . . percent of the registered voters of the county.

2. The . . . County Clerk and the [district c]ourt cannot verify that any of the signers of the subject [P]etition are registered voters of Santa Fe County because the [P]etition signers did not provide sufficient information to determine if any signer is a qualified voter in Santa Fe County.

3. The [P]etition in this cause does not meet the [c]onstitutional requirement for convening a grand jury by petition of two . . . percent of the registered voters of Santa Fe County.

In accordance with these findings, the district court denied the Petition to convene a grand jury and dismissed the cause with prejudice. Petitioner appeals.

{4} We hold that Article II, Section 14 of the New Mexico Constitution requires only that the requisite number of signatures that can be matched to the voter rolls as those of registered voters be submitted in support of a petition for a grand jury investigation. There is no requirement imposed by the Constitution to produce voters' addresses. Once the County Clerk determines that the requisite number of persons purporting to be registered voters in the county have provided their names and signatures, and those names correspond to names of registered voters within the county, the Constitution has been satisfied. We therefore reverse the district court.

I. DISCUSSION

A. Addresses Are Not Constitutionally Required

{5} Under Article II, Section 14 of the New Mexico Constitution, members of the public can petition the district court to convene a grand jury. To do so, the petitioners must obtain signatures from two percent or more of registered voters within the county. At issue here is whether addresses must accompany the signatures, so that the County Clerk may verify that the signatories are registered voters. Petitioners contend that addresses are not constitutionally required. New Mexico's appellate courts have yet to address this issue, as the three cases that have discussed public petitions to convene grand juries under Article II, Section 14 dealt with the attributes of the investigation sought to be instituted by the citizen petition, not the petition's signatures. *See Pino v. Rich*, 118 N.M. 426, 428, 882 P.2d 17, 19 (1994); *Dist. Ct. of Second Jud. Dist. v. McKenna*, 118 N.M. 402, 405, 881 P.2d 1387, 1390 (1994); *Cook v. Smith*, 114 N.M. 41, 43, 834 P.2d 418, 420 (1992).

{6} Matters involving the interpretation of the Constitution or a statute are legal questions to be reviewed de novo. *State v. Lucero*, 2007-NMSC-041, ¶ 8, 142 N.M. 102, 163 P.3d 489. When interpreting the Constitution, we follow the plain meaning rule. *State ex rel. Gomez v. Campbell*, 75 N.M. 86, 101, 400 P.2d 956, 966 (1965). Therefore, "[i]t is presumed that words appearing in [the C]onstitution have been used according to their plain, natural, and usual signification and import, and the courts are not at liberty to disregard the plain meaning of words of [the C]onstitution in order to search for some other conjectured intent." *Id.* (internal quotation marks and citation omitted). We will not read into the Constitution "language which is not there, especially when it makes sense as it is written." *Reule Sun Corp. v. Valles*, 2010-NMSC-004, ¶ 15, 147 N.M. 512, 226 P.3d 611 (internal quotation marks and citation omitted).

{7} Here, the pertinent portion of Article II, Section 14 of the New Mexico Constitution reads as follows:

> A grand jury shall be convened upon order of a judge of a court empowered to try and determine cases of capital, felonious or infamous crimes at such times as to him shall be deemed necessary, or a grand jury shall be ordered to convene by such judge upon the filing of a petition therefor signed by not less than the greater of two hundred registered voters or two percent of the registered voters of the county, or a grand jury may be convened in any additional manner as may be prescribed by law.

Thus, the pertinent constitutional conditions for a petition convening a grand jury in this case are two: "whether the petition contains

the requisite number of signatures and whether the signatories are registered voters of the county." *Cook*, 114 N.M. at 43, 834 P.2d at 420.

{8} Article II, Section 14 does not state that addresses are required to support ascertaining the identity of persons signing the petition. It only requires signatures from two percent or more of registered voters. We apply the plain meaning rule in this instance to indicate that no more is constitutionally required of Petitioners in their petition for a grand jury investigation. We will not read language which is not there into the Constitution in order to require petitioners to include addresses of signatories in their petition.

{9} This interpretation of Section 14 is supported by our case law. In *McKenna*, our Supreme Court stated that the inquiry as to whether a petition is valid "is quite minimal." 118 N.M. at 409, 881 P.2d at 1394. As our Supreme Court explained in *Cook*, "Section 14 reflects populist values." *Cook*, 114 N.M. at 43, 834 P.2d at 420. *Cook* explicitly reminds us that by enacting Section 14, the people of New Mexico kept for themselves direct access to the criminal prosecutorial system by enacting "a mechanism for convening a grand jury that is directly responsive to the public." *Cook*, 114 N.M. at 43, 834 P.2d at 420. *Cook* points out that, in so doing, the people of New Mexico have retained the right unto themselves to convene a grand jury in instances apart from the other constitutional provision that conveys such power to the judiciary. *Id.* The grand jury has been recognized since colonial times to act "in the nature of local assemblies[—]making known the wishes of the people, proposing new laws, protesting against abuses in government, performing administrative tasks, and looking after the welfare of their communities." Richard D. Younger, *THE PEOPLE'S PANEL: The Grand Jury in the United States, 1634-1941*, at 2 (Am. Hist. Res. Ctr., Brown Univ. Press) (2d ed. 1965). Because there is great importance in providing the public with an avenue specifically to inquire "into matters that for reasons of political acquiescence, oversight, or impasse evade traditional means of inquiry[,]" we will not read further requirements for the petition, such as verification of signatures by comparing addresses, into the Constitution. *Cook*, 114 N.M. at 43, 834 P.2d at 420. This informs our decision to maintain the simplicity and accessibility of the petitioning process and reject Appellees' argument that addresses must be included on the Petition.

B. Challengers of the Petition Carry the Burden of Production Once Petitioners Have Presented a Petition With a Sufficient Number of Signatures Purporting to be Those of Registered Voters

{10} Although the petitioner always has "the burden of persuasion, which never shifts, he may produce sufficient evidence that his opponent's failure to adduce contradictory proof either may lead to a decision for [the petitioner], or must lead to such a ruling." *Duke City Lumber Co. v. N.M. Envtl. Improvement Bd.*, 95 N.M. 401, 403, 622 P.2d 709, 711 (Ct. App. 1980) (internal quotation marks and citation omitted). Thus, once the petitioner produces sufficient evidence, the burden of production falls upon the opponent of the petition to produce contradictory evidence.

{11} We hold that once petitions are submitted, which demonstrate on their face that the signatories purport to be registered voters within the county and that they contain the names and signatures corresponding to the greater of two percent of registered voters or

two hundred registered voters in the county, the petitioners have met their initial burden. Those who oppose the petition then have the burden to produce evidence demonstrating that the signatures on the petition are not those of registered voters within the county. Nonetheless, the ultimate burden of proof still generally rests with the petitioners whose evidence must be sufficient to overcome those objections raised by the opposition when the district court reviews the petition's sufficiency. *See Sonntag v. Shaw*, 2001-NMSC-015, ¶ 27, 130 N.M. 238, 22 P.3d 1188 (stating that the burden of production shifts to the defendant only after the plaintiff has made a prima facie showing); *Chavez v. Manville Prods. Corp.*, 108 N.M. 643, 648, 777 P.2d 371, 376 (1989) (holding that when the "plaintiff has introduced evidence that . . . provides adequate support for all of the essential elements of his claim, *it is for the jury to weigh that evidence against contradictory evidence introduced by the defense and determine if the plaintiff has met the burden of proof required in the case*").

{12} In this case, Petitioners demonstrated that they had signatures from two percent or more of registered voters within the county. The signatories identified themselves as registered voters of the county by signing the petitions under the heading that read: "Registered voters of Santa Fe City and County[.]" Petitioners thus met their burden of production upon presenting the names and signatures of a sufficient number of registered voters as confirmed by the County Clerk.

{13} Nonetheless, the court dismissed the Petition, stating that "[it] rel[ies] on the County Clerk for these verifications and without that . . . the [P]etition is not proper and, therefore, the court is not going to convene a grand jury to investigate the matters set out in that [P]etition." Here, the district court misconstrued the role of the County Clerk. To the extent Petitioner presented the [P]etition to the County Clerk prior to filing, the County Clerk's role, though constitutionally superfluous at that point, ended when the County Clerk certified that a sufficient number of signatures matched names on the County's voter rolls. Nothing was required of the County Clerk or Petitioners for the Petition to be sufficient on its face at the time it was filed with the district court. The district court erred by imposing the additional requirement of further verification.

{14} Once the facial validity of the Petition was established, Appellees should have had an opportunity to present evidence showing that the Petition failed to meet constitutional requirements. It appears as though Appellees desired to present evidence of withdrawn signatures—the type of evidence which would be useful to oppose this grand jury petition. Yet, the district court, rather than weighing the evidence offered by each side, abused its discretion by imposing requirements beyond what was required by Article II, Section 14. *See Cook*, 114 N.M. at 43, 834 P.2d at 420 ("[T]he sole issue committed to the discretion of the court appears to be verification that the petition meets the constitutional conditions, namely whether the petition contains the requisite number of signatures and whether the signatories are registered voters of the county.").

{15} We reverse, as Petitioners met their burden of production, and we remand for further proceedings in accordance with this Opinion. As Petitioners' remaining arguments, regarding the procedure to withdraw signatures and the scope of grand jury inquiries, involve weighing of evidence and matters upon which the district court

never made a ruling, we do not address these issues. *See In re Termination of Parental Rights of Wayne R.N.*, 107 N.M. 341, 345, 757 P.2d 1333, 1337 (Ct. App. 1988) ("It is for the trial court to weigh the evidence, resolve conflicts in the testimony, and determine where the truth lies. On appeal, this [C]ourt may not substitute its judgment for that of the trial court."); *see also* Rule 12-216(A) NMRA ("To preserve a question for review[,] it must appear that a ruling or decision by the district court was fairly invoked[.]").

II. CONCLUSION

{16} Petitioners have successfully met their burden of production and the constitutional requirements for a grand jury petition. In meeting this burden, Petitioners need not present the addresses of signatories on the Petition. Thus, we reverse the district court and remand for further proceedings.

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

RODERICK T. KENNEDY, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

MICHAEL E. VIGIL, Judge

Certiorari Granted, January 17, 2012, No. 33,353

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-009

Filing Date: November 17, 2011

Docket No. 29,933

EDWARD R. FLEMMA,

Plaintiff-Appellee,

v.

HALLIBURTON ENERGY SERVICES, INC., RICK GRISINGER, RICHARD MONTMAN, and KARL E. MADDEN,

Defendants-Appellants.

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OPINION

SUTIN, Judge.

{1} Edward R. Flemma, an employee of Defendant Halliburton Energy Services, Inc. (Halliburton), was terminated allegedly for voicing opposition to a proposed location for a new Halliburton facility, and he sued Halliburton and three of its employees claiming wrongful and retaliatory discharge. Defendants appeal the district court's refusal to compel arbitration. We reverse, holding that (1) under Texas law there was sufficient evidence of Flemma's acceptance of and assent to a contractual arbitration program when Halliburton mailed the terms to Flemma, and Flemma accepted the terms by continuing employment with Halliburton; (2) the differences between Texas and New Mexico in terms of the evidence required to prove acceptance and assent are insufficient to overcome application of the place-of-contract-formation rule on public policy grounds and, thus the arbitration agreement should be enforced under Texas law, which was the state where the contract was formed; and (3) under Texas law the arbitration agreement was not illusory and was therefore supported by consideration.

BACKGROUND

{2} Flemma was hired by Halliburton in 1982 in Louisiana. During his twenty-six years of employment with Halliburton, Flemma received numerous promotions, including his latest promotion, in 2006, to district manager for the company in Farmington, New Mexico. Flemma was involved in evaluating the move of three Halliburton facilities from established locations in Farmington to a more suitable, consolidated location. Halliburton considered two locations for the consolidated facility—Troy King, within Farmington's city limits, and Crouch Mesa, outside the city limits. For various reasons, Flemma opposed the Troy King location.

{3} The facts surrounding Flemma's termination are undisputed. In August 2006, Flemma and Defendant Karl Madden, a district sales manager for Halliburton, received a warning from Defendant Richard Montman, Flemma's supervisor, that "if you value your career, you will keep your mouth shut about the Troy King property." The day after this warning, Defendant Rick Grisinger, a vice president of Halliburton, told Flemma to stop making "negative comments" regarding Troy King. According to Flemma's complaint, Madden complied with Montman's and Grisinger's directives to "keep his mouth shut," while Flemma continued to voice his concerns regarding the Troy King facility. In

July 2007, Flemma prepared an executive summary in which he compared the two separate locations and indicated that he favored the Crouch Mesa location.

{4} In April 2008, Montman told Flemma, "Today is your last day with the company, you are not meeting my expectations." Flemma was given the option of signing a resignation, general release, and settlement agreement, as well as accepting twelve weeks of base salary, or being fired. He refused to sign the documents and was fired. He stated in an affidavit filed in this action that he was terminated in retaliation for not keeping his mouth shut about his concerns related to the Troy King facility. Madden was promoted to Flemma's position with the company after Flemma was fired.

{5} In response to these events, Flemma filed a complaint in the district court for wrongful and retaliatory discharge against Halliburton, Grisinger, Montman, and Madden (collectively, Defendants). Defendants responded by filing a motion to compel arbitration. As part of their motion, Defendants provided evidence to the court of four separate mailings by which Halliburton notified Flemma that continued employment with the company constituted his acceptance of the terms of Halliburton's Dispute Resolution Program (the Program), which included binding arbitration of all employment-related disputes. Each of the mailings was sent to Flemma while he was working for Halliburton either in Texas or in Louisiana. Halliburton maintained a record of all the Program packets that were returned to Halliburton by the post office as undeliverable. None of the packets sent to Flemma was returned as undeliverable.

{6} In December 1997, while Flemma was working for Halliburton in Texas, the corporation notified him in writing of its adoption of the Program, effective January 2, 1998, and of the fact that continuing employment with Halliburton indicated agreement to be bound by the Program. The Program offered various alternatives that employees could use to resolve disputes with Halliburton, including a hotline, trained professionals who could assist in various ways confidentially and neutrally, known as Ombudsmen, and a legal consultation plan. The Program included, as a final step, arbitration of all disputes in accordance with the "Halliburton Dispute Resolution Plan" (the Plan). The notification packet included a copy of the Plan and its Rules (the Rules), a brochure describing the Program's basic components, a trifold summary of the Program, and a transmittal letter. The packet was mailed to Flemma's address of record in Tomball, Texas. The second mailing also went to Flemma's address of record in Tomball in the spring of 1998. The 1998 mailing included a transmittal letter, and a revised edition of the Plan and the Rules that again stated that continuing employment with Halliburton constituted consent to be bound by the Plan.

{7} In the summer of 1999, Flemma was working for Halliburton in Louisiana when it mailed a package to his address of record in Belle Chasse, Louisiana, an updated version of the brochure describing the Program's components, which became effective in August 1999, along with a current edition of the Plan and the Rules, and a transmittal letter. This package was mailed to all employees of Halliburton-related companies, again notifying them of the binding effect of the Program. And in October 2001, when Flemma was working for Halliburton, again in Texas, the corporation mailed to his address of record,

which was then the address of his business office in Bellaire, Texas, another copy of the Plan and the Rules, a descriptive brochure of the Program, again stating that continuing employment with Halliburton constituted consent to be bound by the Program, and a transmittal letter reminding him that each employee in the United States has agreed to utilize the Program.

{8} On November 4, 2003, Flemma signed a Secondment Agreement in which Halliburton agreed to "second" Flemma to Halliburton International Inc. By the terms of the agreement, Flemma would remain employed by Halliburton, pursuant to an international assignment, which was contained in a separate document also dated November 4, 2003, effective January 1, 2004. The Secondment Agreement permitted Flemma to work for Halliburton International in accordance with a set of conditions described therein. Among those conditions in the Secondment Agreement was a provision that incorporated the terms of the Program. The Secondment Agreement stated that the Program applied to all Halliburton employees "from or working in the [United States]."

{9} Under the Rules, Halliburton reserved the right to amend the Plan at any time by giving at least ten days notice to current employees. The Rules further provided that no amendment would apply to a dispute for which a proceeding had been initiated. A rule governing termination of the Plan was identical to the foregoing rule governing amendment and allowed Halliburton to terminate the Plan at any time, provided that ten days notice had been given to current employees, and provided that the termination would not apply to any proceeding that had already been initiated.

{10} In an affidavit, Flemma stated that he did not remember ever seeing the dispute resolution material while working in Texas and Louisiana from 1997 to 2001. He also stated that he did not "recall receiving, opening[,] or reading this material, or being conscious of the fact that by remaining on the job with Halliburton . . . in the United States, [he] would be accepting an agreement to arbitrate any disputes [he] had with the company." Flemma stated that the materials may have been disposed of by his ex-wife, with whom he was living during 1997 to 2000.

{11} The district court denied Defendants' motion to compel arbitration on two grounds. First, the district court held that the agreement to arbitrate was unenforceable because it would be viewed as illusory under New Mexico law. The court's holding was based on the premise that Halliburton would have "unfettered discretion to [modify the Plan] after a claim accrue[d], but before the claim [was] filed." The district court was also not persuaded that the ten-day rule that restricted Halliburton from modifying the Plan was sufficient to overcome its illusory nature, in part, because it was only applicable to current employees. Thus, someone in Flemma's circumstances, whose claim had already accrued and who would not be considered a current employee would not receive a ten-day notice. Second, the district court applied the public-policy exception that pertains to the application of foreign law and held that "enforcing an agreement solely on the basis of mailing, without affirmative evidence of acceptance or mutual assent, particularly when it relates to the surrender of a right to a jury trial, would be contrary to public policy."

DISCUSSION

{12} Defendants contend that the district

court erred in holding that Flemma did not agree to arbitrate disputes with Halliburton. Defendants argue that Texas and Louisiana law applied and that, under either state's applicable law, Flemma accepted and assented to the Program as a condition of his employment with Halliburton; thus, the district court erred in refusing to determine the validity of Flemma's agreement to arbitrate under the law of either state. In this Opinion, only Texas law need be addressed. In addition, Defendants argue that in signing the Secondment Agreement, Flemma was on notice that the Program as it applied to employees working in the United States would continue to apply to employees while on assignment outside the United States. Finally, Defendants contend that the agreement to arbitrate was not illusory and was therefore supported by consideration.

Standard of Review

{13} We review de novo a district court's denial of a motion to compel arbitration. *Piano v. Premier Distrib. Co.*, 2005-NMCA-018, ¶ 4, 137 N.M. 57, 107 P.3d 11; *Heye v. Am. Golf Corp.*, 2003-NMCA-138, ¶ 4, 134 N.M. 558, 80 P.3d 495. Likewise, "[w]hether the parties have agreed to arbitrate is a question of law; we review the applicability and construction of a provision requiring arbitration de novo." *Santa Fe Techs., Inc. v. Argus Networks, Inc.*, 2002-NMCA-030, ¶ 51, 131 N.M. 772, 42 P.3d 1221. We also review choice-of-law analyses, as well as the interpretation of New Mexico law, under a de novo standard. *Nat'l Bank of Ariz. v. Moore*, 2005-NMCA-122, ¶ 7, 138 N.M. 496, 122 P.3d 1265.

Under Texas Law Flemma Accepted and Assented to the Program and Application of Texas Law Does Not Violate New Mexico Public Policy

{14} Under Texas law, there is a presumption of receipt that applies to mail which has been properly addressed, stamped, and sent through a postal service. *Wesco Distribution, Inc. v. Westport Group, Inc.*, 150 S.W.3d 553, 561 (Tex. Ct. App. 2004). The presumption that materials sent through the mail have been received may be rebutted by affirmative denial of receipt. *See Wembley Inv. Co. v. Herrera*, 11 S.W.3d 924, 927 (Tex. 1999) (per curiam). In the context of changes to an employment agreement, once an employer has provided unequivocal notice of a change in the terms of the agreement, an employee who continues working is deemed to have accepted the new terms. *In re Halliburton Co.*, 80 S.W.3d 566, 568-69 (Tex. 2002). "Generally, when [an] employer notifies an employee of changes in employment terms, the employee must accept the new terms or quit. If the employee continues working with knowledge of the changes, he has accepted the changes as a matter of law." *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 229 (Tex. 1986).

{15} It appears that the district court assumed, without deciding, that under Texas law Flemma would be deemed to have accepted the terms of the Program. We agree with Defendants that, under Texas law, mutual assent and acceptance of the Program and hence an agreement to arbitrate existed between Halliburton and Flemma. Flemma does not argue otherwise.

{16} As a Halliburton employee living and working in Texas when notice of the Program was initially sent to his address, Flemma's continued employment constituted acceptance of the terms of the Program, including the arbitration requirement under Texas law. *See In re Halliburton Co.*, 80 S.W.3d at 568-69 (holding that an employee accepted, as a matter of law, changes to an employment

agreement by continuing employment with the company after he received notice of the changes). Halliburton subsequently reaffirmed the offer by sending the Program materials to Flemma in Texas, once at his home address, and once at his office within Halliburton. Flemma did not affirmatively deny receiving the materials. In light of these mailings, which would be considered unequivocal notice of changes to his employment agreement by Texas courts and which, under Texas law, are presumed to have been received, Flemma's continued employment with Halliburton constituted acceptance of the terms of the Program under the law of that state.

{17} Defendants argue and we agree that, as an agreement was formed in Texas, "allowing Flemma to escape his obligations under the agreement simply because he was working in New Mexico when his claim arose would be inconsistent with contractual expectations of the parties[.]" *See Shope v. State Farm Ins. Co.*, 1996-NMSC-052, ¶ 7, 122 N.M. 398, 925 P.2d 515 (stating that "as Virginia residents . . ., [the plaintiffs] should have expected that the laws of Virginia would be applied to their various transactions"). Moreover, as the plain language of the Program states, once the parties agreed to be bound by the Program, they intended to be bound by their agreement at all times during and after the employment relationship. Insofar as the terms here included agreeing to arbitrate all employment-related disputes with Halliburton, Texas law would bind Flemma to that agreement.[1]

{18} In evaluating whether an enforceable agreement to arbitrate existed, the district court held that applying Texas law and "enforcing an agreement solely on the basis of mailing, without affirmative evidence of acceptance or mutual assent, particularly when it relates to the surrender of a right to a jury trial, would be contrary to [New Mexico] public policy." In reaching this conclusion, the court followed *Reagan v. McGee Drilling Corp.*, 1997-NMCA-014, ¶ 8, 123 N.M. 68, 933 P.2d 867, which stated that under the conflict-of-laws rules, New Mexico "may decline to apply the out-of-state law if it offends New Mexico public policy."

{19} According to Defendants, the district court's invocation of the public-policy exception was erroneous under the facts of this case. Defendants argue that the underlying policies of Texas and New Mexico strongly favor freedom of contract and require enforcement of contracts. *See United Wholesale Liquor Co. v. Brown-Forman Distillers Corp.*, 108 N.M. 467, 471, 775 P.2d 233, 237 (1989) (stating that New Mexico "has a strong public policy of freedom to contract that requires enforcement of contracts unless they clearly contravene some law or rule of public morals"); *Merry Homes, Inc. v. Chi Hung Luu*, 312 S.W.3d 938, 950 (Tex. Ct. App. 2010) (stating that "[t]he Texas Supreme Court has long recognized Texas' strong public policy in favor of preserving the freedom of contract" (internal quotation marks

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[1] *See, e.g.*, *In re Halliburton Co.*, No. 01-09-00150-CV, 2009 WL 1886659, at *2, 4-5 (Tex. Ct. App. July 2, 2009) (mem.) (holding that the plaintiff, a former Halliburton employee, was bound to arbitrate disputes in compliance with the program in spite of his contention that he never received the program materials by mail because "Halliburton provided uncontroverted evidence that copies of the . . . [program] materials were sent to [the plaintiff] in a properly addressed packet" and receipt of the materials was therefore presumed).

and citation omitted)). Defendants also point to the fact that in both states the elements of a contract are the same: offer, acceptance, consideration, and mutual assent. *Garcia v. Middle Rio Grande Conservancy Dist.*, 1996-NMSC-029, ¶ 9, 121 N.M. 728, 918 P.2d 7; *Turner-Bass Assocs. of Tyler v. Williamson*, 932 S.W.2d 219, 222 (Tex. Ct. App. 1996). The only difference between Texas and New Mexico law, Defendants contend, is the evidentiary showing that a party must make to establish certain elements of acceptance and mutual assent.

{20} Again, Texas courts presume receipt of materials that have been sent through the mail provided they are sent with proper postage and addressed correctly. *Wesco Distribution, Inc.*, 150 S.W.3d at 561. And this presumption applies in the context of changes to an employment agreement where an employee continues working after notice of the changes was mailed. *In re Halliburton Co.*, 80 S.W.3d at 568-69. This Court, however, has taken a more restrictive view.

{21} In *DeArmond v. Halliburton Energy Servs., Inc.*, 2003-NMCA-148, ¶ 15, 134 N.M. 630, 81 P.3d 573, although we recognized the general presumption that materials mailed to a correct address have been received, we declined to apply that presumption in the context of changes to an at-will employment agreement. We determined that proof of conscious assent is "particularly crucial in the at-will employment context, where acceptance may be manifested by continuing in a routine activity" such as continuing to go to work. *Id.* ¶ 18. Consequently, we held that an employer is required to prove that an employee had actual knowledge of an offer and actual knowledge that continued employment with the company constituted acceptance of that offer. *Id.* ¶ 23. *DeArmond* does not require rejection of Texas law in this case.

{22} "As a general proposition of law, it is settled that the validity of a contract must be determined by the law of the state in which it was made." *Boggs v. Anderson*, 72 N.M. 136, 140, 381 P.2d 419, 422 (1963). New Mexico has "a strong public policy in favor of freedom to contract which requires enforcement of contracts unless they clearly contravene some law or rule of public morals or violate some fundamental principle of justice." *Reagan*, 1997-NMCA-014, ¶ 15 (internal quotation marks and citation omitted). Yet, "[s]imple differences in laws among states [do] not rise to this level." *Id.* Instead, "[t]o overcome the rule favoring the place where a contract is executed, there must be a countervailing interest that is fundamental and separate from general policies of contract interpretation." *State Farm Mut. Auto. Ins. Co. v. Ballard*, 2002-NMSC-030, ¶ 9, 132 N.M. 696, 54 P.3d 537 (internal quotation marks and citation omitted).

{23} In order to prevent the exception from swallowing the rule, "courts should invoke [the] public policy exception only in extremely limited circumstances." *Reagan*, 1997-NMCA-014, ¶ 9 (internal quotation marks and citation omitted). "Mere differences among state laws should not be enough to invoke the public policy exception." *Id.* "Otherwise, since every law is an expression of a state's public policy, the forum law would always prevail unless the foreign law were identical, and the exception would swallow the rule." *Id.* The threshold question "is whether giving effect to another state's policies would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal of the forum state." *Id.* (internal quotation marks and citation omitted).

{24} Our issue, then, is whether the district court correctly applied the public-policy

exception in refusing to apply Texas law on the acceptance and assent issue when the sole conflict between Texas and New Mexico law involves only evidentiary requirements of contract formation. We ask whether *DeArmond*'s requirement of affirmative evidence of acceptance or mutual assent in contract formation is a fundamental public policy such that the application of Texas law, which does not impose such a requirement, would violate some "fundamental principle of justice, some prevalent conception of good morals, [or] some deep-rooted tradition of the common weal" of New Mexico. *Reagan*,1997-NMCA-014, ¶ 9 (internal quotation marks and citation omitted).

{25} Flemma directs our attention to cases in which New Mexico courts have determined that the application of the law of another state would offend a fundamental New Mexico public policy. Flemma relies on *Ballard*, 2002-NMSC-030, and on *Demir v. Farmers Texas County Mutual Ins. Co.*, 2006-NMCA-091, 140 N.M. 162, 140 P.3d 1111. These cases identified the protection of innocent automobile accident victims as a fundamental New Mexico public policy that required the application of New Mexico law, rather than the law of the state in which the contract had been formed. *Ballard*, 2002-NMSC-030, ¶¶ 10, 13-14, 19; *Demir*, 2006-NMCA-091, ¶¶ 15, 20, 22-23. In *Ballard*, a Georgia insurance policy excluded household family members from bodily injury coverage. 2002-NMSC-030, ¶ 4. In determining that it would not apply Georgia law to the contract, our Supreme Court held that "the reduction in coverage for a discrete group of individuals . . . based solely on their familial relationship to the insured, implicate[d] a fundamental principle of justice" and violated New Mexico statutory and common law. *Id.* ¶¶ 10-11. This Court followed suit in *Demir* when we declined to enforce an uninsured motorist exclusion found in an insurance policy purchased in Texas. 2006-NMCA-091, ¶ 15. As *Ballard* and *Demir* indicate, New Mexico courts will apply New Mexico law to automobile insurance contracts that were formed in other states if innocent accident victims would be otherwise unprotected.

{26} In *Piña v. Gruy Petroleum Mgmt. Co.*, 2006-NMCA-063, ¶ 1, 139 N.M. 619, 136 P.3d 1029, a third case on which Flemma relies, this Court identified a statutory provision known as the Oilfield Anti-Indemnity Statute, NMSA 1978, § 56-7-2 (1999) (amended 2003), as an expression of a fundamental principle of justice that insures the safety of persons and property at oil-well sites in New Mexico. *Piña* held that a Texas anti-indemnity statute that "allowed indemnity agreements indemnifying a party against its own negligence where the indemnitor's obligation [was] covered by liability insurance" was "fundamentally inconsistent with important New Mexico public policy[.]" 2006-NMCA-063, ¶¶ 12, 21. And this Court therefore determined that any agreement that invoked foreign law that was contrary to the Oilfield Anti-Indemnity Statute would be considered "void and unenforceable in New Mexico courts." *Id.* ¶ 22.

{27} Flemma's final authority is *Fiser v. Dell Computer Corp.*, 2008-NMSC-046, 144 N.M. 464, 188 P.3d 1215. At issue in *Fiser* was a set of agreed-upon terms and conditions that contained, among other things, a choice-of-law provision that declared Texas law controlled. *Id.* ¶ 4. The terms and conditions also included a clause that banned class action law suits. *Id.* Our Supreme Court employed a choice-of-law analysis and determined that application of Texas law under the facts of that case would violate New Mexico public policy. *Id.* ¶¶ 6-18. Specifically, the Court held that "in the context of small consumer

claims that would be prohibitively costly to bring on an individual basis, contractual prohibitions on class relief are contrary to New Mexico's fundamental public policy of encouraging the resolution of small consumer claims and are therefore unenforceable in this state." *Id.* ¶ 1.

{28} The cases upon which Flemma relies did not, as here, involve the application of the public-policy exception to evidentiary proof requirements of contract formation. And, unlike *Ballard*, *Piña*, or *Demir*, in which the law of another state would effectively favor the protection of insurance companies over the safety of people in New Mexico, here, there is a mere difference in state law requirements of proof regarding elements of contract formation. Texas law on this matter does not affront or offend a fundamental New Mexico public policy. *Cf. Shope*, 1996-NMSC-052, ¶ 9 (applying Virginia law to an insurance contract that allowed stacking of uninsured motorist coverage in spite of a New Mexico law which prohibited it because the difference was a matter of contract interpretation that did not rise to the level of a fundamental principle of justice). As well, unlike the plaintiff in *Fiser*, application of Texas law to the agreement before us would not foreclose Flemma from pursuing his claim; rather, he will have the opportunity do so in arbitration.

{29} We think there is little question that Texas courts would determine the assent and mutuality issue in favor of Defendants. Further, the facts surrounding Flemma's direct and express agreement in the Secondment Agreement relating to the Program cements Flemma's knowledge of the Program's application to him while he was working both in the United States and abroad.

{30} On a final note, we are unpersuaded by Flemma's argument that because he gave up the right to a trial by jury enforcement of his agreement to be bound by the Program, without proof of his actual knowledge of the offer or of an affirmative showing of mutual assent and acceptance, would be contrary to fundamental New Mexico policy. We see no reason why an employee cannot agree to arbitration and thereby give up his right to a jury through the constructive mail-receipt process allowed under Texas law. The fundamental public policy at issue is not that of a right to and waiver of a jury trial. The issue is whether a person should be bound by a valid contract agreeing to arbitration instead of a jury trial under the evidentiary proof permitted by Texas law but arguably inadequate under New Mexico law.[2] Where parties have agreed to it, "New Mexico has a strong public policy in favor of arbitration as a form of dispute resolution[.]" *Durham v. Guest*, 2009-NMSC-007, ¶ 32, 145 N.M. 694, 204 P.3d 19. New Mexico law is indisputable that "controversies should be resolved by arbitration where contracts or other documents so provide[,]" and "[w]hen a party agrees to a non-judicial forum for dispute resolution, the party should be held to that agreement." *Lisanti v. Alamo Title Ins. of Tex.*, 2002-NMSC-032, ¶ 17, 132 N.M. 750, 55 P.3d 962 (internal quotation marks and citation omitted).

{31} We conclude that Texas law applies and that the public-policy exception should not have been invoked on the contract formation issue. The mere differences between Texas and New Mexico in terms of the evidence required to prove acceptance of and assent to an agreement are not sufficient

[2] Our holding is not meant to indicate whether New Mexico law would allow a presumption that Flemma received the Program materials by mail.

to overcome the place-of-formation rule on public-policy grounds. Thus, we hold that the arbitration agreement should be enforced under Texas law rather than that of New Mexico and, under Texas law, Defendants presented sufficient proof of Flemma's acceptance of and assent to the agreement to bind him to arbitration.

The Arbitration Agreement was not Illusory

{32} The district court did not make any findings with regard to whether the arbitration agreement was illusory under Texas law. Nor did the court address or attempt to determine whether Texas law on this issue was contrary to a fundamental New Mexico policy. Also noteworthy, Flemma did not attack the agreement on the ground that it was unconscionable. Flemma's position below and on appeal is that the agreement lacked consideration because it was illusory. The court thought that the circumstances fell "nicely between" *Salazar v. Citadel Commc'ns Corp.*, 2004-NMSC-013, 135 N.M. 447, 90 P.3d 466, and *Sisneros v. Citadel Broad. Co.*, 2006-NMCA-102, 140 N.M. 266, 142 P.3d 34, and held that it was illusory under New Mexico law because, contrary to *Salazar*, the arbitration agreement allowed Halliburton unfettered discretion to modify the Plan after a claim accrued, but before a proceeding had been initiated. Without addressing Texas law, Flemma encourages this Court to affirm the district court's ruling that the arbitration agreement was illusory.

{33} The holdings in *Salazar* and *Sisneros* differentiate two versions of an arbitration agreement between the defendant and the respective employees. *Salazar*, 2004-NMSC-013, ¶ 1; *Sisneros*, 2006-NMCA-102, ¶¶ 1, 32-33. In *Salazar*, our Supreme Court determined that an arbitration agreement was illusory because the employer retained unfettered discretion to modify the agreement. 2004-NMSC-013, ¶¶ 1, 11. In *Sisneros*, however, this Court determined that the arbitration agreement at issue was supported by consideration because it restricted the defendant's right to amend or terminate the agreement once an employee's claim had accrued. *Sisneros*, 2006-NMCA-102, ¶ 35. Thus, in *Sisneros*, the restriction on the defendant's right to amend provided consideration for the agreement making it "in no way illusory[.]" *Id.*

{34} Defendants argue that under both Texas and New Mexico law the agreement was not illusory and was therefore supported by consideration. Having determined that Flemma's agreement to arbitrate pursuant to the Program should be construed under Texas law, we limit our discussion of the issue to the law of Texas. Under Texas law, mutuality of obligation is sufficient consideration for a contract. *See In re Halliburton Co.*, 80 S.W.3d at 569 (holding that the agreement was not illusory because it was supported by consideration insofar as the employee and employer were equally bound by a promise to arbitrate disputes). So long as the right is restricted, one party to an agreement may reserve the right to unilaterally amend or terminate the agreement. *See id.* at 569-70 (rejecting the assertion that the arbitration agreement was illusory based, among other reasons, on the fact that a ten-day notice was required before amendments could be made and that modifications would only apply prospectively). Thus, a "[m]utual agreement to arbitrate claims provides sufficient consideration to support an arbitration agreement" and arbitration clauses will not be held illusory "unless one party can avoid its promise to arbitrate by amending the provision or terminating it altogether." *In re 24R, Inc.*,

324 S.W.3d 564, 566-67 (Tex. 2010).

{35} Defendants argue that Halliburton's promise to arbitrate disputes was not illusory because the company was restricted from amending the Program in two important ways. First, Defendants note, Halliburton must provide its employees with a ten-day notice before it modifies or terminates the Plan. Second, no modification of the Plan or the Rules can apply to a proceeding that has already been initiated pursuant to the Rules. The relevant provisions read as follows:

> 6. Amendment
>
> A. This Plan may be amended by [Halliburton] at any time by giving at least 10 days notice to current Employees. However, no amendment shall apply to a Dispute for which a proceeding has been initiated pursuant to the Rules.
>
> B. [Halliburton] may amend the Rules at any time. . . . However, no amendment of the Rules shall apply to a Dispute for which a proceeding has been initiated pursuant to the Rules.

{36} In support of their proposition that Halliburton's promise to arbitrate disputes in accordance with the Program was not illusory, Defendants rely on four cases: *Dodds v. Halliburton Energy Servs., Inc.*, 273 F.3d 1094 (5th Cir. 2001) (per curiam), *Pierce v. Kellogg, Brown & Root, Inc.*, 245 F. Supp. 2d 1212 (E.D. Okla. 2003), *In re Halliburton Co.*, 80 S.W.3d 566, and *In re Champion Techs, Inc.*, 222 S.W.3d 127 (Tex. Ct. App. 2006). *Dodds*, 273 F.3d 1094, is an unpublished summary calendar decision and would not be considered by Texas courts. *See Ditto v. State*, 898 S.W.2d 383, 384 n.1 (Tex. Ct. App. 1995) (stating that "[u]npublished opinions are not to be cited as authority").

{37} In *In re Champion Techs*, a Texas appellate court considered facts and arguments similar to those made by the parties in this case. 222 S.W.3d at 129-34. There, three former employees filed a lawsuit against their former employer alleging wrongful termination. *Id.* at 129. The employer filed a motion to compel arbitration pursuant to an agreement known as the "Champion Technologies Dispute Resolution Program." *Id.* (internal quotation marks omitted). The trial court ruled that the dispute resolution program was illusory based on its amendment and termination sections. *Id.* at 131. The employer appealed. *Id.* at 129-30.

{38} In *In re Champion Techs*, the amendment section read as follows: "This Program may be amended by [the employer] at any time by giving at least 30 days' notice to current [e]mployees. However, no amendment shall apply to a [d]ispute for which a proceeding has been initiated pursuant to the [r]ules, unless otherwise agreed." *Id.* at 131. The termination section read:

> This Program may be terminated by [the employer] at any time by giving at least 30 days' notice of termination to current [e]mployees. However, termination shall not be effective as to [d]isputes for which a proceeding has been initiated pursuant to the [r]ules prior to the

date of termination unless otherwise agreed.

Id. Relying on the language of these two provisions, the plaintiffs argued that the agreement was illusory as it applied to them because the employer was not required to give notice to former employees of amendments to or termination of the program. *Id.* at 132.

{39} The Texas Court of Appeals rejected the plaintiffs' argument that the agreement was illusory. The appellate court concluded that the employer did not have the contractual right to amend or terminate the program or its rules after an arbitration was initiated under the program, regardless of the status of the plaintiffs as "former employees." *Id.* This was significant, the court explained, because the plaintiffs were required by the terms of the program to initiate arbitration in order to resolve their dispute with the employer. *Id.* If they had done so, the court reasoned, the employer "could not have avoided its promise to arbitrate by either amending or terminating the [p]rogram itself or the [r]ules." *Id.* (internal quotation marks omitted). In so concluding, the appellate court relied on the reasoning of *In re AdvancePCS Health L.P.*, 172 S.W.3d 603 (Tex. 2005) (per curiam). *In re Champion Techs.*, 222 S.W.3d at 132-33.

{40} In *In re AdvancePCS*, the owners of several pharmacies sued a company that processed and adjudicated claims for reimbursement between member pharmacies and customers' health care providers. 172 S.W.3d at 605. The plaintiffs, by virtue of enrolling in the company's network, agreed to arbitrate all disputes that arose between them and the company. *Id.* at 605-06. When the plaintiffs brought a claim in court alleging that they had been underpaid by the company for over a decade, the company filed a motion to compel arbitration. *Id.* at 605. The case went to the Texas Supreme Court, where the plaintiffs argued, among other things, that the arbitration agreement was illusory because the company reserved the right to cancel the arbitration agreement at will. *Id.* at 607. The Texas Supreme Court noted a provision in the agreement that prevented the agreement from being terminated without the company first providing a thirty-day notice to the network members. *Id.* The court thus held that, "[h]ad the [plaintiffs] invoked arbitration rather than filing suit, [the company] could not have avoided arbitration by terminating the [p]rovider [a]greement" and, therefore, the agreement was not illusory. *Id.* at 607-08.

{41} In *In re Halliburton Co.*, an employee, who was demoted but was still a "current employee," argued on appeal, among other claims, that the plan was illusory.[3] 80 S.W.3d at 567-68. The court held that the ten-day-notice provision sufficiently restricted the company's right to unilaterally amend or terminate the program. *Id.* at 569-70. Therefore, the plan was held not to be illusory. *Id.* at 570.

{42} In *Pierce*, the court held with regard to the plan[4] that the "prospective application of the amendment or termination provisions, when combined with the ten-day notice provision, constitute[d] a significant limitation on [the company's] right to modify, amend, or cancel such that the agreement to arbitrate [was] not an illusory one." *Id.* at 1215.

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[3] The Plan at issue in the present case is the same plan that was at issue in *In re Halliburton Co.*, 80 S.W.3d at 568, n.1.

[4] In *Pierce*, the defendant was a subsidiary of Halliburton, and the plan at issue in the present case is the same plan that was at issue in *Pierce*. 245 F. Supp. 2d at 1213 n.1.

There, although the plaintiffs were former employees of the company, it does not appear that the court specifically considered whether, as it applied to former employees who would not receive notice of modifications, the plan was illusory. The court based its holding on the fact that the contract generally imposed limitations on the company's right to modify or amend the agreement and, therefore, it was not illusory. *Id.* In our view, Texas courts would not view the agreement at issue in the present case to be illusory as it pertained to Flemma.

{43} As in *In re Champion Techs*, Halliburton's right to amend or terminate the Plan was restricted by a notice requirement and by the condition that no amendment to or termination of the Plan would apply to disputes for which a proceeding had been initiated pursuant to the Rules. *See* 222 S.W.3d at 132. Flemma was required by the terms of the Plan to submit his claim to arbitration. As explained in *In re AdvancePCS*, 172 S.W.3d at 607-08, and in *In re Champion Techs*, 222 S.W.3d at 132, had Flemma submitted his wrongful and retaliatory discharge claim to arbitration, as he was contractually obligated to do, Halliburton could not have avoided its promise to arbitrate. While we recognize that *In re Halliburton Co.*'s facts are different because the plaintiff in that case was a current employee and, in *Pierce*, the court did not specifically address the issue that Flemma argues regarding former employees. Nevertheless, these cases provide support for our view that the arbitration agreement in this case was not illusory.

{44} Finally, and importantly, Flemma's claim accrued at the time he was fired, and Halliburton certainly had notice of a possible claim at that time, given the background leading up to, and the circumstances of, the firing. Halliburton's right to amend any aspect of the Plan or the Rules as they existed in the Flemma-Halliburton agreement ended the moment Flemma was fired because the contractual relationship in terms of continuing employment was severed at that time. Flemma could have filed his arbitration, and Halliburton could have done nothing by way of amendment or termination of the Plan or the Rules that would have affected Flemma's right to arbitrate under the agreement as it existed at the time he was fired. The district court's view that Halliburton's discretion to amend or terminate the Plan or the Rules, as they existed at the time of Flemma's firing, was "unfettered" has no legal or factual support, and the district court erred in that regard. We hold that under Texas law, the arbitration agreement was not illusory as it pertained to Flemma.

The Dissent

{45} The dissent appears to misinterpret the majority opinion in two significant respects. First, the majority opinion is not about interpretation of a contract. It is about *evidence to prove* the formation of a contract. Second, the majority opinion does not rely only on Flemma's continuation of employment for its analysis of proof. Nor does the opinion rely on Flemma's continuation of employment as a substitute for proof of the formation of the contract. The evidence and proof consist of the mailings and the Secondment Agreement as detailed in the opinion together with Flemma's continued employment.

{46} Further, as we next discuss, a study of *DeArmond* shows that it does not control the present case and, aside from the fact that neither party cited to or relied on any Restatement of Contracts provision in their appellate briefs, as we also discuss here, we see nothing in the Restatement that requires a

result different than that in the majority opinion.

{47} The Program provided for arbitration pursuant to the Federal Arbitration Act (FAA). The FAA is applicable to state courts. *DeArmond*, 2003-NMCA-148, ¶ 7. A principal purpose of the FAA is to require courts to compel arbitration where the parties agree to arbitrate. *Id.* It was "enacted to reverse the longstanding judicial hostility to arbitration agreements that had existed . . . and to place arbitration agreements upon the same footing as other contracts." *Id.* (internal quotation marks and citation omitted); *AT&T Mobility, LLC v. Conception*, 131 S. Ct. 1740, 1745 (2011) ("The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements. . . . [C]ourts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms."). And the FAA constitutes a "declaration of a liberal federal policy favoring arbitration agreements." *DeArmond*, 2003-NMCA-148, ¶ 7 (alteration omitted) (internal quotation marks and citation omitted); *Conception*, 131 S. Ct. at 1745 ("We have described [Section 2, 'the primary substantive provision of the Act'] as reflecting . . . 'a liberal federal policy favoring arbitration[.]'"). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *DeArmond*, 2003-NMCA-148, ¶ 7 (alteration omitted) (internal quotation marks and citation omitted).

{48} We do not disagree with our statements in *DeArmond*, that "a legally enforceable contract is still a prerequisite for arbitration" and "[w]hether a valid contract to arbitrate exists is a question of state contract law." *Id.* ¶¶ 8-9. Nevertheless, in this case, applying conflict-of-laws rules, under Texas law and even under New Mexico law, there exists no defect in and the evidence supports the formation of the agreement. *DeArmond*, 2003-NMCA-148, ¶ 9 ("States may not subject an arbitration agreement to requirements that are more stringent than those governing the formation of other contracts."). Further, as pointed out in Justice Thomas's concurring opinion in *Conception*, the FAA does not contemplate public policy as a defense to the validity and enforcement of an arbitration agreement. *See Conception*, 131 S. Ct. at 1755 & n.* (Thomas, J., concurring) (interpreting Sections 2 and 4 of the FAA, and stating that "[c]ontract defenses unrelated to the making of the agreement —such as public policy—[cannot] be the basis for declining to enforce an arbitration clause"); *see also Conception*, 131 S. Ct. at 1748 ("Although [Section] 2's savings clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives.").

{49} The dissent's view that enforcement of the agreement would violate New Mexico public policy seems primarily driven by *DeArmond*. But even were a public policy defense permissible, New Mexico's general-contract law and conflict-of-laws rules do not support its application here. In *DeArmond*, the district court did not hold an evidentiary hearing, and it made no findings or conclusions. *Id.* ¶ 4. This Court remanded the case to the district court for Halliburton to prove that the plaintiff had actual knowledge of the offer made in a single, mailed notification to arbitrate and actual knowledge of Halliburton's invitation in that notification to accept the offer by continued employment. *Id.* ¶¶ 1, 23.

{50} Here, significantly different than in *DeArmond*, Halliburton presented substantial

evidence to support its contention that Flemma certainly had constructive knowledge and must have had actual knowledge of the offer to arbitrate and of Halliburton's invitation to accept the offer by continued employment. Unlike the plaintiff in *DeArmond*, who may or may not have received the single, mailed notification, Halliburton presented undisputed proof here that (1) the documents were twice mailed to his home address and twice mailed to his office within Halliburton; (2) none were returned as undeliverable; (3) Flemma did not deny receiving the documents, claiming only that his wife may have thrown them away and that he did not "recall" seeing them; and (4) Flemma never affirmatively denied knowledge of the Program or its terms. Based on the evidence in this case, to hold that Flemma "was never aware of" the arbitration agreement is to turn a blind eye to the evidence.

{51} In *DeArmond*, this Court stated that "we are unwilling under the facts of the case to equate presumed receipt with actual knowledge of the offer." *Id.* ¶ 15. But the Court carefully limited the breadth of the statement to "the facts of the case[.]" *Id.* Underlying the *DeArmond* Court's remand was the dearth of evidence of the plaintiff's knowledge. Here, not only did Halliburton present the unchallenged evidence we have discussed in regard to the four mailings, evidence going far beyond that in *DeArmond*, Flemma signed the Secondment Agreement. That agreement indicated that Flemma was seconded by Halliburton to Halliburton International, Inc., for international assignments on the basis of the terms and conditions decided in the Secondment Agreement. Among the terms and conditions was the following:

> Secondee understands and agrees to be bound by and accepts as a condition of Secondee's employment in the [U.S.] the terms of the . . . Program applicable to all employees from or working in the [U.S.], which is herein incorporated by reference. Secondee understands that the . . . Program requires, as its last step, binding Arbitration to resolve any and all claims or disputes. Secondee understands that any and all claims or disputes that Secondee might have against [Halliburton] or its benefit plans for benefits or employment related matters including termination and/or any or all personal injury claims arising in the workplace but not already covered by workers compensation insurance, must be submitted to and are therefore subject to binding Arbitration instead of any local or federal court system in the [U.S.]

Explicit incorporation of the Program by reference as applicable "to all employees from or working in the [U.S.]" firmly placed Flemma on notice of the contents of the Program that had been and would be applicable to him while he worked in the United States. Upon his return from his overseas assignment, Flemma continued working in the United States. Application of general-contract law does not require a decision in this case that as a matter of law Halliburton failed to present sufficient evidence of Flemma's knowledge.

{52} Further, and important, if not critical, is that *DeArmond* did not involve application of foreign law under conflict-of-laws rules. *DeArmond* looked to general New Mexico contract law. Application of the law to the particular facts of a case requires proof of facts relating to knowledge and awareness to

prove the formation of a contract. Texas and New Mexico require different proof requirements for contract formation when it comes to mailings under circumstances of at-will employment with an offer of arbitration and an employer's invitation for the employee to accept the invitation by continued employment.

{53} It does not seem at all necessary to elevate the circumstances here to a level that overrides the priority of established conflict-of-laws rules just because the circumstances involve proof of the formation of a contract. It seems more appropriate to settle here on the stability of conflict-of-laws rules and analyses over the expansion of the concept of a public policy violation. There exists no New Mexico public policy that forbids the type of employer/at-will employee relationship together with the type of arbitration offer and acceptance at issue here. Texas law permits its formation based on evidentiary requirements different from those in *DeArmond*. What is the persuasive rationale supporting the view that circumstances of at-will employment arbitration selection over jury trial should override conflict-of-laws rules? The breadth of the district court's ruling seems to essentially move us back into the era of disfavoring arbitration.

{54} Nothing in *DeArmond* indicates that its evidentiary requirement cannot be proved by the circumstantial evidence presented in this case. Nothing in *DeArmond* indicates that we cannot, under well-established conflict-of-laws rules, turn to the law of Texas. And nothing in *DeArmond* indicates that its evidentiary requirements must, based on public policy, be applied instead of the different evidentiary requirements that are appropriately applied under established conflict-of-laws rules.

{55} Additionally, the dissent suggests that we should adopt the approach of the Restatement (Second) of Conflict of Laws that the dissent concludes favors New Mexico law. Even were we to apply a Restatement (Second) approach, we would hold that the law of Texas should be applied. First, with regard to the relevant policy of the forum, for reasons stated earlier in this response, we are not persuaded that our holding conflicts with the public policy concerns raised by *DeArmond*, nor do we find any persuasive justification for basing a holding on the premise that Flemma was not aware of his contractual agreement to arbitrate. Second, the justified expectations of both parties are at issue here. Based on the evidence discussed earlier, Halliburton's expectation of Flemma's acceptance of the terms of the Program was justified insofar as the formation of the contract conformed with Texas law. *See* Restatement (Second) of Conflict of Laws § 6, cmt. g (stating that "it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state"). Likewise, for the same reason, Flemma had an equally justifiable expectation that the agreement was enforceable. With regard to the basic policies underlying contract law, as indicated earlier in this response, we are not convinced that our holding in *DeArmond* would preclude a finding of mutual assent under the circumstances of this case where there was substantial undisputed proof of Flemma's receipt of the Program materials and his signature on the Secondment Agreement.

{56} Further, application of the contract-specific factors of the Restatement (Second) does not weigh in favor of the application of New Mexico law over that of Texas. First, Texas was the place of contracting. *See* Restatement (Second) of Conflict of Laws §

188, cmt. e (stating that "the place of contracting is the place where occurred the last act necessary, under the forum's rules of offer and acceptance, to give the contract binding effect"). As to the place of negotiation, because there was no negotiation, we determine that this factor is neutral. Lastly, we agree with the dissent that the place of performance and the location of the subject matter both weigh neutrally. *See id.* (stating that the place of performance bears little weight in the choice-of-law analysis when, at the time of contracting, it is either uncertain or unknown; and also stating that the location of the subject matter of the contract is important when it deals with something in a fixed location). Of these factors, the single non-neutral factor, place of contracting, weighs in favor of applying Texas law. Thus, the Restatement (Second) of Conflict of Laws, far from militating in favor of the application of New Mexico law, supports our holding.

CONCLUSION

{57} We reverse the district court's denial of the motion to compel arbitration. On remand to the district court, Defendants' motion to compel arbitration should be granted.

{58} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

I CONCUR:

RODERICK T. KENNEDY, Judge

MICHAEL D. BUSTAMANTE, Judge (dissenting).

BUSTAMANTE, Judge (dissenting).

{59} The majority decides the issue before us today based on its view that "the sole conflict between Texas and New Mexico law [at issue in this case] involves only evidentiary requirements of contract formation." Majority Op. ¶ 24. Unlike Texas, New Mexico requires proof of actual knowledge and conscious assent in order to change the terms of an at-will employment contract. *DeArmond*, 2003-NMCA-148, ¶¶ 18-20. Because I believe that this is not merely an evidentiary requirement, but instead a reflection of New Mexico public policy protecting workers from contractual obligations they are not aware of and to which they never agreed, I respectfully dissent.

{60} We have previously considered Halliburton's adoption of the Program. In *DeArmond*, a former employee sued Halliburton after he was discharged. Halliburton argued that it had mailed the details of the Program to the employee and that the mailing specified that continued employment constituted acceptance of the Program. Halliburton won its motion to compel arbitration. This Court reversed, noting that "a legally enforceable contract is still a prerequisite for arbitration." *Id.* ¶ 8. We reasoned that "the principle of conscious assent is particularly crucial in the at-will employment context, where acceptance may be manifested by continuing in a routine activity." *Id.* ¶ 18. If the employee did not have knowledge of the modified terms of employment, no new contract was formed. *Id.*

{61} *DeArmond* did not include a choice-of-law analysis, and we assume that the plaintiff in *DeArmond* lived in New Mexico when he received the mailing from Halliburton and that New Mexico law therefore applied. I agree with the majority that the application of Texas law would achieve a result opposite to the result we reached in *DeArmond*. The outcome in this case therefore depends on the choice of law.

{62} We review choice-of-law analyses de novo. *Nat'l Bank of Arizona*, 2005-NMCA-122, ¶ 7. "As a general proposition of law, it is settled that the validity of a contract must be determined by the law of the state in which it was made." *Boggs*, 72 N.M. at 140, 381 P.2d at 422. "To overcome the rule favoring the place where a contract is executed, there must be a countervailing interest that is fundamental and separate from general policies of contract interpretation." *Shope*, 1996-NMSC-052, ¶ 9. "Application of the rule must result in a violation of 'fundamental principles of justice' in order to apply New Mexico law rather than the law of the jurisdiction where the contract was signed." *Ballard*, 2002-NMSC-030, ¶ 9 (quoting *Shope*, 1996-NMSC-052, ¶ 7). "Simple differences in laws among states do not rise to this level." *Reagan*, 1997-NMCA-014, ¶ 15.

{63} In my view, the question of whether a contract was made is not merely a question of contract interpretation. It is a preliminary question that comes before interpretation. It goes to the very foundation of contract law: whether the circumstances are such that the mechanisms of the state may be invoked to enforce the terms of an agreement. In the context of the law of contracts, it is difficult to imagine a more fundamental principle of justice.

{64} New Mexico has a strong public policy in favor of the enforcement of contracts. In the context of at-will employment agreements, this has typically meant that an employee can accept a contract by continuing to work if he knew of the contract. *See Hartbarger v. Frank Paxton Co.*, 115 N.M. 665, 672, 857 P.2d 776, 783 (1993); *Stieber v. Journal Publ'g Co.*, 120 N.M. 270, 273, 901 P.2d 201, 204 (Ct. App. 1995). In those cases, it was the employee that sought to enforce the contract. This required the employee to show that the employer had made an offer and that the employee was aware of it. In contrast, in this case and in *DeArmond*, Halliburton sought to enforce a contract it had mailed to an employee. In *DeArmond*, we distinguished *Stieber* on the grounds that Halliburton had not shown that the employee was aware of the offer of changed conditions of employment. *DeArmond*, 2003-NMCA-148, ¶¶ 13-14. We noted that the problem could easily have been avoided by requiring a signature or other proof. *Id.* ¶ 14. Absent some indication that the employee was aware of the offer, however, we declined to conclude that simply continuing the "routine activity" of going to work was proof that the employee had consciously assented to the contract. *Id.* ¶ 18.

{65} Taking *DeArmond* one step further, I believe that a law allowing the continued routine activity of going to work to substitute for proof that an employee was aware of proposed changes to the terms of his employment is contrary to public policy. More specifically, the judicial enforcement of an agreement that an employee was never aware of exemplifies the "violation of fundamental principles of justice" and justifies the use of the public-policy exception to the rule that we apply the law of the place where the contract was made. *Ballard*, 2002-NMSC-030, ¶ 9 (internal quotation marks and citation omitted). Freedom of contract necessarily implies freedom from obligations to which a party did not assent or was not even aware of.

{66} The application of New Mexico law also finds support in the Restatement (Second) of Conflict of Laws. New Mexico is one of only twelve states that still adheres to the older standard from the First Restatement that the validity of the contract is judged by the law of the place of contracting. *See* Hay, Borchers & Symeonides, *Conflict of Laws* § 18.21, at

1171-72 (5th ed. 2010). The Second Restatement adopted a different approach, weighing various factors when the parties or statutes do not dictate the choice of law. *See* Restatement (Second) of Conflict of Laws §§ 6, 188 (1971). In general, those factors include

> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability[,] and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.

Restatement § 6(2). For contracts, additional factors to consider include "(a) the place of contracting, (b) the place of negotiation of the contract, (C) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation[,] and place of business of the parties." Restatement § 188(2).

{67} I first look to the general factors of Section 6, *see* Restatement § 188(1), and concludes that these factors weigh in favor of the application of New Mexico law. The relevant policy of the forum, of course, is New Mexico's policy in favor of freedom to contract, which I have stated encompasses the freedom from obligations where no enforceable agreement exists. Similarly, absent assent, I believe Halliburton has no justified expectation that the contract is valid, and Flemma's justified expectation is that he is not subject to a contract he is not aware of. Similarly, the basic principles of contract law—that an agreement is not enforceable unless there is mutual assent—counsel in favor of application of New Mexico law in this case. I recognize that Texas law would indicate otherwise; however, I distinguish between matters of interpretation, in which deference should be accorded to Texas law, and matters of validity, in which, under the circumstances of this case, I believe it should not.

{68} The contract-specific factors from Section 188 of the Second Restatement also weigh in favor of the application of New Mexico law. Of these factors, the place of contracting, place of performance, and the location of the subject matter of the contract are neutral. Halliburton mailed the proposed contract to Flemma in at least two states and appears to have sent it to its employees in every state in which they reside, including New Mexico. Furthermore, Flemma's duties were not restricted to Texas, but took him to various states. The place of negotiation weighs either neutrally or against Halliburton, as no negotiation took place. Flemma lived in New Mexico and worked at Halliburton's facilities in New Mexico when he was terminated. Both the general and contract-specific factors of the Second Restatement militate in favor of the application of New Mexico law.

{69} I do not mean to suggest that New Mexico's policy in favor of freedom of contract requires that New Mexico law should always apply to determine whether a contract was validly formed prior to enforcing that contract under the law of the state in which it was created. First, my reasoning is limited to the use of a presumption that continued employment, absent proof that an employee knew of a change in employment conditions, can raise a presumption of assent in the at-will

employment context. Second, such a rule could encourage forum shopping, at least until employers adopted adequate procedures to show that employees were aware of contract changes. I believe the balancing approach of the Second Restatement avoids these problems. It would no doubt be easier to condone the application of Texas law had this case had a closer connection with Texas, for example, if Flemma had continued to live or work in Texas, or if the alleged tortious behavior took place in Texas. But here, where the alleged behavior took place in New Mexico, the result reached by the majority's application of the First Restatement's approach is inequitable and, in my view, against the public policy of New Mexico.

{70} Finally, I recognize that New Mexico has a strong policy in favor of arbitration. However, this policy is not implicated if no agreement to arbitrate exists. Because I believe that public policy precludes us from recognizing and enforcing the agreement at issue in this case, New Mexico's policy in favor of arbitration does not affect my analysis.

{71} For the foregoing reasons, I believe it is improper to apply the Texas case law creating a presumption that Flemma was aware of the contract. The majority having concluded otherwise, I respectfully dissent.

MICHAEL D. BUSTAMANTE, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-010

Filing Date: December 8, 2011

Docket No. 30,790

GEA INTEGRATED COOLING TECHNOLOGY,

Plaintiff-Appellant,

v.

STATE OF NEW MEXICO TAXATION AND REVENUE DEPARTMENT,

Defendant-Appellee.

IN THE MATTER OF THE PROTEST OF GEA INTEGRATED COOLING TECHNOLOGY.

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OPINION

VANZI, Judge.

{1} This case requires us to decide whether a statutory increase in the civil penalty for failure to pay a tax should be imposed on a taxpayer whose tax liability arose prior to the effective date of the amendment that increased the cap on the penalty amount. GEA Integrated Cooling Technology (Taxpayer) failed to pay gross receipts taxes for tax periods between June 1, 2006, and July 1, 2007. At that time, the maximum statutory penalty for failure to pay was ten percent of the amount of the unpaid tax. On January 1, 2008, the Legislature increased the maximum statutory penalty to twenty percent of the amount of the unpaid tax. The New Mexico Taxation and Revenue Department (the Department) assessed Taxpayer in 2009 and imposed the twenty percent penalty. Taxpayer protested the imposition of the new statutory penalty on the tax liability that arose for tax periods occurring prior to 2008. The hearing officer denied Taxpayer's protest, ruling that the new statutory penalty in effect at the time the penalty was assessed was the applicable maximum penalty. We affirm.

BACKGROUND

{2} Taxpayer is a Colorado-based company that was engaged in work projects in New Mexico. Taxpayer was required to pay gross receipts pursuant to the Gross Receipts and Compensating Tax Act. NMSA 1978, § 7-9-4 (1990) (amended 2010). In July 2008, the Department began an audit of Taxpayer. The Department determined that Taxpayer owed $490,802.60 in tax liability that arose between June 1, 2006, and July 1, 2007. The liability reflected the gross receipts taxes that Taxpayer failed to pay. On September 21, 2009, the Department issued Taxpayer a notice of assessment for taxes, penalty, and interest, demanding payment pursuant to NMSA 1978, Section 7-1-17 (2007). The notice of assessment informed Taxpayer that the penalty for failure to pay was calculated at a rate of two percent per month or partial month to a maximum of twenty percent of the amount of tax due. Taxpayer timely filed a written protest of the assessment.

{3} The penalty assessed by the Department was based on NMSA 1978, Section 7-1-69 (2007), the civil penalty for failure to pay a tax or file a return. Section 7-1-69 provides in pertinent part,

> [I]n the case of failure due to negligence or disregard of [D]epartment rules and regulations, but without intent to evade or defeat a tax, to pay when due the amount of tax required to be paid, to pay in accordance with the provisions of Section 7-1-13.1 NMSA 1978 when required to do so or to file by the date required a return regardless of whether a tax is due, there shall be added to the amount assessed a penalty in an amount equal to the greater of:
>
> (1) two percent per month or any fraction of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed twenty percent of the tax due but not paid;
>
> (2) two percent per month or

> any fraction of a month from the date the return was required to be filed multiplied by the tax liability established in the late return[.]

A prior version of the statute set the maximum statutory penalty at ten percent of the unpaid tax. NMSA 1978, § 7-1-69 (2003) (amended 2007). The Legislature amended Section 7-1-69 to increase the maximum statutory penalty, effective January 1, 2008. 2007 N.M. Laws, ch. 45, §§ 4, 16. Taxpayer argued that ten percent was the maximum penalty the Department could assess because it was the law in effect when Taxpayer first failed to pay the taxes it owed. Taxpayer further asserted that applying the new statutory penalty to its tax liability gave the legislative amendment improper retroactive effect.

{4} The Department requested a hearing to determine whether the new statutory penalty was properly applied to Taxpayer's tax liability that arose for tax periods occurring prior to January 1, 2008, but assessed after the legislative amendment took effect. The parties entered a joint stipulation of facts, filed briefs, and submitted the matter for determination by the hearing officer. The hearing officer determined that Section 7-1-69, as amended, applied to the calculation of Taxpayer's penalty because the penalty was assessed after the effective date of the amendment. The hearing officer also concluded the application of the new statutory penalty was not retroactive under the circumstances of Taxpayer's case. This appeal timely followed.

DISCUSSION

Standard of Review

{5} The questions presented in this appeal are (1) whether the 2007 amendment to Section 7-1-69 applies to tax liabilities that arose for tax periods occurring prior to January 1, 2008, but were assessed after the effective date of the amendment; and (2) whether the application of the new statutory penalty to these earlier tax periods gives Section 7-1-69 improper retroactive effect. These questions present us with issues of statutory interpretation and the application of the law, thus, our review is de novo. *Hess Corp. v. N.M. Taxation & Revenue Dep't*, 2011-NMCA-043, ¶ 11, 149 N.M. 527, 252 P.3d 751, *cert. denied*, 2011-NMCERT-003, 150 N.M. 619, 264 P.3d 520; *N.M. Taxation & Revenue Dep't v. Dean Baldwin Painting, Inc.*, 2007-NMCA-153, ¶ 7, 143 N.M. 189, 174 P.3d 525. This Court can only set aside the hearing officer's decision if it was arbitrary and capricious, not supported by substantial evidence, or not in accordance with the law. NMSA 1978, § 7-1-25(C)(1)-(3) (1989); *Kewanee Indus., Inc. v. Reese*, 114 N.M. 784, 786, 845 P.2d 1238, 1240 (1993). Though our review is de novo, we give some deference to the hearing officer's reasonable interpretation and application of the statute. *Jicarilla Apache Nation v. Rodarte*, 2004-NMSC-035, ¶ 25, 136 N.M. 630, 103 P.3d 554 ("[W]e are not bound by an agency's interpretation of the law, but we do give deference to an agency's reasonable interpretation or application of law.").

{6} When construing a statute, our task is to determine and give effect to the Legislature's intent and to interpret the statute in a way that will not render its application absurd, unreasonable, or unjust. *Hess Corp.*, 2011-NMCA-043, ¶ 12. In discerning legislative intent, New Mexico courts adhere to a classic rule of statutory construction: We are required to look at the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicated that a different meaning is intended. *Delfino v. Griffo*, 2011-NMSC-015, ¶ 12, 150 N.M. 97,

257 P.3d 917; *see also* NMSA 1978, § 12-2A-19 (1997) ("The text of a statute . . . is the primary, essential source of its meaning."). "When statutory language is clear and unambiguous, this Court must give effect to that language and refrain from further statutory interpretation." *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.3d 135 (alteration, internal quotation marks, and citation omitted).

{7} We follow the plain language rule closely here, particularly in light of the fact that "[s]tatutes imposing taxes and providing means for the collection of the same should be construed strictly in so far as they may operate . . . to impose penalties . . . upon [the taxpayer.]" *N B S Corp. v. Valdez*, 75 N.M. 379, 383, 405 P.2d 224, 226-27 (1965) (internal quotation marks and citation omitted); *Colfax Cnty. v. Angel Fire Corp.*, 115 N.M. 146, 148, 848 P.2d 532, 534 (Ct. App. 1993) (internal quotation marks and citation omitted). Consequently, because Section 7-1-69 imposes a penalty on the taxpayer, we strictly construe the statute.

Section 7-1-69 Applies to Taxes Assessed After January 1, 2008

{8} Taxpayer argues that it is subject to the ten percent statutory penalty that was in effect when it first failed to pay its taxes, as opposed to the twenty percent penalty imposed by the Department under the 2007 amendment. Taxpayer asserts that the plain language of Section 7-1-69 requires this Court to reverse the hearing officer's decision. Specifically, it is Taxpayer's position that the State's right to a penalty from a delinquent taxpayer comes into existence when the due date for filing the return occurred and the tax liability remained unpaid. We disagree.

{9} Under an ordinary reading of the plain language of the statute, we find the meaning of the words clear and unambiguous. The statute states that a penalty "shall be added to the amount assessed." Section 7-1-69(A). Accordingly, assessment is the specific point in time that the statutory penalty is triggered and thereby applied. Our reading is in accordance with the general principle that "[t]he amendment of a taxing statute by the addition or change of penalty . . . is commonly regarded as prescribing the amount to be paid in respect of all taxes, whether levied before or after the date of the [amendment]." *Retroactive Effect of Statutes Relating to Interest on or Penalties in Respect of Delinquent Taxes*, 77 A.L.R. 1034 (2011). Absent language to the contrary, we presume the Legislature so intended the new statutory penalty to apply here. In this case, because Taxpayer's outstanding taxes were assessed on September 21, 2009, and the new statutory amendment was the law in effect at that time, the Department applied the correct maximum penalty to this tax liability.

{10} Section 7-1-69(A) directs the Department to look at the date of assessment to calculate the penalty to be applied. Section 7-1-69(A)(1), (2) contains the formula that the Department must use to calculate the penalty. The statute directs the Department to calculate the penalty at "two percent per month . . . from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed twenty percent of the tax due but not paid[.]" Section 7-1-69(A)(1). We read the phrase "from the date the tax was due" to indicate that when assessing the tax penalty, the Department must start calculating the two percent per month penalty rate from that tax due date, counting forward continuously until the maximum penalty percentage is reached. Section 7-1-69(A)(1), (2). The "date the tax was due" provision is a necessity for

mathematical purposes and provides the Department with a fixed date to calculate the amount of the actual penalty assessed upon a taxpayer. There is no language in the statute allowing for a different method of calculating the actual amount of the penalty. Accordingly, we conclude that the maximum statutory penalty is determined at the time of assessment, and the penalty is calculated beginning on the "date the tax was due."

{11} We emphasize the fact that the Legislature did not include any statutory provisions directing that the pre-amendment version of Section 7-1-69 be applied to tax liabilities arising prior to January 1, 2008. We also recognize that the Legislature has previously changed statutory tax penalties but has also simultaneously enacted legislation explicitly excepting tax liabilities arising before the change from the imposition of the amended penalty. In *Tomson v. County of Dona Ana*, 93 N.M. 173, 174, 598 P.2d 216, 217 (Ct. App. 1979), we considered the Legislature's 1974 repeal of a portion of the tax code, including a section imposing a five-percent penalty on taxpayers who failed to disclose their properties to be taxed. The effective date of the repeal was January 1, 1975. *Id.* at 173, 598 P.2d at 216. Importantly, the new tax code did not provide for the same penalty. *Id.* In the same legislative session as the repeal, the Legislature enacted a proviso excepting from the repeal taxes imposed in years prior to the 1975 tax year. *Id.* We held that this proviso required prior tax law to govern whether or not a taxpayer was subject to the imposition of the pre-repeal penalty when taxpayer's tax delinquencies occurred prior to the 1975 tax year. *Id.* at 174, 598 P.2d at 217. In contrast, the Legislature has included no such proviso or special language in the statutory amendment in this case. Presuming the Legislature is aware of our case law, prior statutes, and canons of construction, we conclude that in the absence of such a provision, the Legislature understood and intended that the law in place at the time of assessment would govern the penalty to be imposed. *See Albuquerque Commons P'ship v. City Council of City of Albuquerque*, 2011-NMSC-002, ¶ 15, 149 N.M. 308, 248 P.3d 856 ("When the Legislature enacts a statute we presume that it is aware of existing statutes." (internal quotation marks and citation omitted)); *V.P. Clarence Co. v. Colgate*, 115 N.M. 471, 474, 853 P.2d 722, 725 ("[T]he [L]egislature is presumed to act with knowledge of relevant case law[.]").

Applying the Penalty Cap in Place at the Time of Assessment Is Consistent With the Purpose of the Penalty

{12} Section 7-1-69 penalizes a taxpayer's failure to file taxes when due and failure to pay in full amount of the tax due. Taxpayer contends that the hearing officer's interpretation of Section 7-1-69 conflicts with the purposes of imposing the penalty and argues that this application unequally penalizes a taxpayer's failure to file and failure to pay. To address Taxpayer's concerns, we discuss the purpose of the penalty imposed by Section 7-1-69.

{13} As Taxpayer acknowledges, the purpose of any penalty is both to punish and deter. *In re Consol. Vista Hills Retaining Wall Litig.*, 119 N.M. 542, 553, 893 P.2d 438, 449 (1995). The purpose of Section 7-1-69 is specifically to penalize a taxpayer's unintentional failure to pay or report taxes. *El Centro Villa Nursing Ctr. v. Taxation & Revenue Dep't*, 108 N.M. 795, 797, 779 P.2d 982, 984 (Ct. App. 1989). The Legislature directs that the penalty to be added to the amount assessed should be in the "amount equal to the greater of" the total resulting from

two possible calculations. Section 7-1-69(A). This language makes plain the Legislature's goal of imposing the greatest monetary penalty allowable under law at the time of assessment. Additionally, the goal of penalizing at the highest amount is reinforced by the amendment to Section 7-1-69, the purpose of which is to penalize a taxpayer's unintentional failure to pay or report taxes at a higher percentage than previously imposed. Here, we conclude that the Legislature provided clear and unambiguous language concerning the purpose of Section 7-1-69. Our application of the new statutory penalty to a tax liability assessed on or after January 1, 2008, is consistent with the purpose of punishing at the highest monetary amount allowable under law.

{14} As to the deterrent effect, Section 7-1-69 also serves the legislative purpose of encouraging taxpayers to file and pay taxes on time. *See N. Slope Borough v. Sohio Petroleum Corp.*, 585 P.2d 534, 546 (Alaska 1978). Section 7-1-69 imposes a graduated penalty on taxpayers' unpaid taxes. And Section 7-1-69, like other statutes establishing a penalty, does not create a right or obligation in the taxpayer or the state, it is merely a statutory provision that is always subject to change. *Bradbury & Stamm Constr. Co. v. Bureau of Revenue*, 70 N.M 226, 239, 372 P.2d 808, 817-18 (1962); *Pierce v. State*, 1996-NMSC-001, ¶ 47, 121 N.M. 212, 910 P.2d 288 ("The law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the [L]egislature shall ordain otherwise." (internal quotation marks and citation omitted)). The fact that the Legislature may change the maximum penalty while a taxpayer's liability remains outstanding is congruent with the Legislature's purpose of requiring the taxpayer to pay a higher penalty the longer it fails to pay its outstanding tax liability. The possibility that the Legislature may increase the maximum penalty to which a taxpayer is subject simply encourages timely payment. Therefore, penalizing the taxpayer under the statutory penalty in effect at the time the Department assesses a tax liability may be utilized to further both legislative purposes. It would deter taxpayers from failing to pay or file on time, and it would also punish these failures at a rate that the Legislature can increase up until the time of assessment. *Rutherford v. Chaves Cnty.*, 2003-NMSC-010, ¶ 24, 133 N.M. 756, 69 P.3d 1199 ("Statutes are to be read in a way that facilitates their operation and the achievement of their goals.").

{15} Here, the Legislature amended Section 7-1-69 with the purpose of encouraging taxpayers to file and pay their outstanding taxes, not just by increasing the maximum statutory penalty, but by providing ample time for the taxpayers to come into compliance prior to the effective date of the amendment. The amendment to Section 7-1-69 was approved by the Legislature in March 2007, but the effective date was delayed until January 1, 2008, more than nine months after its passage. 2007 N.M. Laws, ch. 45, § 16(A). Much of the rest of the statute relating to taxation, of which the amendment was a part, was effective July 1, 2007, and applied to taxable years beginning on or after January 1, 2007. 2007 N.M. Laws, ch. 45, §§ 15-16. By giving this extended period for compliance, we recognize that the Legislature's intent was to encourage taxpayers to file and pay their outstanding taxes prior to January 1, 2008, in order to avoid the imposition of the newly increased statutory penalty. We hold that the hearing officer's decision to impose the new maximum statutory penalty of twenty percent on any tax liability assessed on or after January 1, 2008, was proper and in accordance with the law.

The Application of the New Twenty Percent Statutory Penalty at the Time of Assessment Does Not Give Section 7-1-69 Improper Retroactive Effect

{16} Taxpayer also argues that the application of the new statutory penalty in place at the time of assessment to tax liabilities that arose for tax periods occurring prior to the effective date of the amendment gives Section 7-1-69 impermissible retroactive effect.

{17} Our courts follow the general rule that a statutory amendment applies prospectively unless the Legislature clearly intends to give the amendment retroactive effect. *State v. Morales*, 2010-NMSC-026, ¶ 8, 148 N.M. 305, 236 P.3d 24; *Swink v. Fingado*, 115 N.M. 275, 278-79, 850 P.2d 978, 981-82 (1993); *Bradbury & Stamm*, 70 N.M. at 240, 372 P.2d at 818; *Crane v. Cox*, 18 N.M. 377, 381-82, 137 P. 589, 590 (1913). We apply this rule of construction here as well. Because Section 7-1-69 does not contain an express statement declaring the Legislature's intent for it to apply retroactively, we must interpret the statute to apply prospectively and ensure that there is no retroactive effect. NMSA 1978, § 12-2A-8 (1997) ("A statute . . . operates prospectively only unless the statute . . . expressly provides otherwise or its context requires that it operate retrospectively."). For the reasons that follow, however, we hold that the application of the new statutory penalty in place at the time of the assessment to tax liabilities that arose for tax periods occurring prior to the effective date of the amendment gives the amendment proper prospective effect.

{18} Though the presumption against the retrospective application of a statute may seem straightforward, "confusion often arises as to what retroactivity means in particular contexts." *Morales*, 2010-NMSC-026, ¶ 9 (internal quotation marks and citation omitted). Generally, "[a] statute . . . is considered retroactive if it impairs vested rights . . . or requires new obligations, imposes new duties, or affixes new disabilities to past transactions." *Id.* (internal quotation marks and citation omitted). However, a statute does not operate retroactively just because it is applied to facts and conditions existing on its effective date, even though the condition results from events that occurred prior to its enactment. *Id.*; *see Howell v. Heim*, 118 N.M. 500, 506, 882 P.2d 541, 547 (1994) (holding that a new regulation limiting the number of consecutive months an individual could receive general disability benefits did not have retroactive effect even when it took into account months prior to the promulgation of the regulation); *Hansman v. Bernalillo Cnty. Assessor*, 95 N.M. 697, 702, 625 P.2d 1214, 1219 (Ct. App. 1980) (holding that a new tax assessment formula enacted after the beginning of the period of assessment but applied to the entire tax year was "a clear instance of a statute acting prospectively on facts or conditions in existence prior to its enactment"); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 283-84 (1994) (declining to impose a newly created action for damages on past events because the new right to damages undoubtedly imposed a new disability on a past transaction). Following this precedent, we conclude that the hearing officer's interpretation and application of Section 7-1-69 gave it proper prospective effect.

{19} We recognize our Supreme Court's holding in *Crane* as dispositive. In *Crane*, the issue was whether a newly enacted law providing for the sale of property as the new procedure for the collection of delinquent taxes also applied to delinquent taxes that remained unpaid for tax periods that arose

prior to the enactment of the statute. 18 N.M. at 380-81, 137 P. at 589-90. The statute at issue stated that it applied to "each parcel of property upon which any taxes are delinquent, as shown by the tax rolls." *Id.* at 381, 137 P. at 590 (internal quotation marks omitted). Like the language in Section 7-1-69, this language was broad enough to include tax liabilities arising before and after the effective date of the legislation. *Crane*, 18 N.M. at 381, 137 P. at 590. In addition, as in Section 7-1-69, the new legislation in *Crane* did not contain a clear statement that the Legislature intended for the law to apply to tax years prior to the enactment. 18 N.M. at 381-82, 137 P. at 590.

{20} Our Supreme Court acknowledged the strong presumption against the retroactive application of a statute in *Crane*, *id.* at 381-82, 137 P. 590, but nevertheless held that the application of the new law to tax liabilities arising before its enactment did not give the statute retroactive effect. *Id.* at 386, 137 P. at 591. The Court reasoned that "[a] statute does not operate retroactively from the mere fact that it relates to antecedent events. A retrospective law [is] intended to affect transactions which occurred . . . before it became operative . . . and which ascribes to them affects not inherent in their nature in view of the law in force at the time of their occurrence." *Id.* at 382, 137 P. at 590 (internal quotation marks and citation omitted). The Court held that the new act providing for the sale of property for delinquent taxes did not operate retroactively because the operation of the statute did not affect any right the taxpayer possessed under prior law, did not change the taxpayer's status, and did not impose a consequence that was not already anticipated. *Id.* at 386, 137 P. at 591.

{21} In this case, we conclude that the application of the amended penalty to tax liabilities that arose for tax periods occurring prior to January 1, 2008, likewise does not ascribe to those outstanding taxes any affect that was not inherent in their nature under Section 7-1-69 before the amendment. Both before and after January 1, 2008, a taxpayer who fails to file or pay tax is subject to the highest penalty allowable under the statute, and the longer the taxpayer failed to file and pay taxes the more penalty it would have to pay up to a percentage defined by statute. Section 7-1-69 defines who the Department may impose the penalty statute upon; therefore, failing to pay one's taxes subjects a taxpayer to the imposition of the penalty. As in *Crane*, the failure to pay the required taxes is the condition antecedent on which the amendment operates in this case. The application of the new statutory penalty to Taxpayer's outstanding tax liability does not affect any right Taxpayer possessed under prior law. Taxpayer's status was already subject to the assessment of the penalty. Because the Legislature may amend the penalty statute at any time, and the prior statute creates no right to a certain rate in either Taxpayer or the Department, the application of the increased statutory penalty also does not impose a consequence that could not be anticipated. Therefore, the hearing officer's interpretation and application of Section 7-1-69 does not give the amended statute impermissible retroactive effect.

{22} Taxpayer disagrees with the proposition in *Crane* and asserts that the imposition of the amended penalty rate is retroactive because it requires new obligations, imposes new duties, and affixes new disabilities to past transactions. Taxpayer cites to *Howell* as the basis for this assertion. However, viewing *Howell* in light of *Crane*, in order for a new penalty to be a new obligation, impose a new duty, or affix a new disability to a past transaction, it must be of a type

ascribing to the transaction something not in existence at law at the given time.

{23} To the extent that both the Department and Taxpayer cite to *Bradbury & Stamm* as authority for how the penalty cap should be calculated, we note that *Bradbury & Stamm* is a case about the change in an interest rate, not a penalty. Interest and penalties have distinct purposes, and our Legislature has recognized this distinction by enacting separate statutes governing the imposition of penalties and interest. *See* NMSA 1978, § 7-1-67 (2007); § 7-1-69; *see also N. Slope Borough*, 585 P.2d at 546 (stating that the purpose of a penalty provision is to encourage timely payment of taxes and punish those who do not pay on time, while the assessment of interest for late payment is designed to compensate and has no punitive element). Because a penalty is distinct from interest, *Bradbury & Stamm* does not control how to apply the penalty statute here. *Grygorwicz v. Trujillo*, 2006-NMCA-089, ¶ 15, 140 N.M. 129, 140 P.3d 550 ("Cases are not authority for propositions not considered."(alteration, internal quotation marks, and citation omitted)).

{24} We recognize that our courts find impermissible retroactive effect when a change in a statute imposes a consequence on the taxpayer that was not already anticipated. For example, in *Kewanee*, 114 N.M. at 790-91, 845 P.2d at 1244-45, the department promulgated a new regulation defining the meaning of "negligence" within the context of Section 7-1-69 and assessed a taxpayer a penalty for conduct occurring prior to the promulgation of the regulation. Our Supreme Court held that the new regulation could not be applied to taxpayers whose liabilities arose in years prior to the promulgation of the regulation. *Kewanee*, 114 N.M. at 790-91, 845 P.2d 1244-45. In *Kewanee*, at the time the taxpayers' conduct occurred, that conduct was not negligent within the meaning of Section 7-1-69. *Kewanee*, 114 N.M. at 790-91, 845 P.2d at 1244-45. Our Supreme Court reasoned that the application of the new regulation to prior tax years would be impermissibly retroactive because at the time the taxpayers' liabilities arose, the taxpayer was not included in the group of taxpayers on whom the Department could impose the penalty. *Id.* Accordingly, the Court applied the standard for negligence in effect during the tax years at issue, rather than the definition in place at the time of assessment, holding that to do otherwise would be to expand the universe of taxpayers subject to the imposition of the penalty after their conduct occurred, and thus give the new regulation retroactive effect. *Id.* at 790, 845 P.2d at 1244; *see also Phelps Dodge Corp. v. Revenue Div. of the Dep't of Taxation & Revenue*, 103 N.M. 20, 24, 702 P.2d 10, 14 (Ct. App. 1985) (holding that where a legislative amendment changed the exemption provisions of a tax statute defining those eligible for certain exemptions and refunds, the amendment could only be applied to tax years after its effective date, even where the Legislature expressly stated the amendment should have retroactive effect and looked to the law in place during the taxable events to determine if the taxpayer was eligible for a refund).

{25} In this case, the imposition of the new statutory penalty under Section 7-1-69 is distinguishable from the facts in *Kewanee*. As we have noted, in *Kewanee*, the new regulation defined who the penalty could be imposed upon and, if applied to tax liabilities arising prior to the promulgation of the regulation, would have allowed the department to impose a new obligation to pay a penalty on someone who previously had no such obligation. *Kewanee*, 114 N.M. 790-91, 845 P.3d at 1244-45. Here, on the other hand,

the penalty has not been expanded to any new taxpayer who was not previously subject to the penalty assessment. The imposition of a penalty on Taxpayer was permissible when it failed to pay its gross receipts taxes negligently or in disregard to departmental rules, and the increased penalty did not alter either the Department's or Taxpayer's duties or obligations. Taxpayer's case is an example of a statute applying prospectively to conditions in existence at the time of its effective date. Therefore, the new statutory penalty may be applied to tax periods occurring prior to the 2007 enactment of Section 7-1-69. Accordingly, we conclude the hearing officer's decision was in accordance with the law when he prospectively applied the new statutory penalty to Taxpayer's liability that arose for tax periods occurring prior to January 1, 2008.

CONCLUSION

{26} We hold that (1) the new statutory penalty to apply is the applicable law in place at the time of Taxpayer's assessment, and (2) applying the new statutory penalty to a tax liability that arose during tax periods occurring prior to January 1, 2008, but assessed by the Department on or after January 1, 2008, is in accordance with the Legislature's intent and purpose and does not give Section 7-1-69 a retroactive effect. We affirm the decision of the hearing officer to impose the new statutory penalty against Taxpayer.

{27} IT IS SO ORDERED.

LINDA M. VANZI, Judge

I CONCUR:

JAMES J. WECHSLER, Judge

TIMOTHY L. GARCIA, Judge (specially concurring)

GARCIA, Judge (specially concurring)

{28} I concur in the result reached in this case based upon the available authority from our Supreme Court. I write this special concurrence in the hopes that our Supreme Court will provide more clarification regarding the issue of retroactivity as it applies to legislative changes that are made to our tax statutes. Although the *Crane* decision has remained good law for nearly a century, it is difficult to reconcile its application with the more recent decision in *Bradbury & Stamm* and this Court's decision in *Phelps Dodge*. In both of these more recent cases, changes to the tax statute were deemed substantive and could only be applied prospectively. *Bradbury & Stamm*, 70 N.M. at 240, 372 P.2d at 818; *Phelps Dodge*, 103 N.M. at 23-24, 702 P.2d at 13-14. Neither case mentions *Crane* or attempts to distinguish the analysis set forth in *Crane* when determining whether a statutory change is retroactive. Similar discrepancies arise when comparisons are made to the non-tax decision set forth in *Howell*. *See* 118 N.M. 500, 882 P.2d 541. As a result, there appear to be two separate and distinct analyses being applied to address retroactivity issues. More guidance from our highest Court should help resolve this dilemma.

TIMOTHY L. GARCIA, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMSC-003

Filing Date: January 5, 2012

Docket No. 32,677

STATE OF NEW MEXICO,

Plaintiff-Respondent,

v.

ZIRACHUEN RIVERA,

Defendant-Petitioner.

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Mary Ruth Griego
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OPINION

BOSSON, Justice.

{1} In this opinion, we clarify our rules and judicial precedent that pertain to the authorized practice of law in all courts of this state. Specifically, the practice of law in any court is limited to duly licensed attorneys who are members of the State Bar or otherwise authorized by this Court's rules in specific, limited circumstances. Because the Court of Appeals relied on statutory expressions that appear to permit the unauthorized practice of law in our magistrate courts, we reverse the Court of Appeals while affirming the conviction below.

BACKGROUND

{2} Zirachuen Rivera (Defendant) drove through a DWI checkpoint in Bernalillo County, New Mexico, and an officer suspected he had been drinking alcohol. Defendant showed signs of impairment on the standard field sobriety tests and was arrested on suspicion of driving while intoxicated.

{3} Defendant's bench trial began in Bernalillo County Metropolitan Court (metro

court), where assistant district attorney Rachel Bayless entered an appearance for both herself and Chris Mills, a purported attorney, on behalf of the State. At the conclusion of trial, Defendant was found guilty of driving while intoxicated. Upon leaving the courtroom, defense counsel overheard Mills telling Bayless that he had decided not to take the New Mexico bar exam. Upon learning that Mills was not a licensed New Mexico attorney, Defendant filed a motion for a mistrial and a new trial. In that motion, Defendant declared, "[u]pon information and belief, Mr. Mills is a law student . . . ." Defendant later attached a certificate from Kathleen Jo Gibson, Chief Clerk of the New Mexico Supreme Court, affirming that Mills was not on the official roll of New Mexico attorneys.

{4} Defendant then appealed to the district court because the motion for a new trial was denied by operation of law when it was not granted within twenty days. *See* Rule 7-611(B) NMRA. Defendant then appealed to the district court arguing that his conviction must be vacated because the State was represented at trial by a person not licensed to practice law. After a hearing, the district court concluded that "Mills' participation appears impermissible, or at the least not explicitly provided for." The court affirmed the conviction nonetheless, noting that Defendant "cites no particular actual prejudice that he suffered at his trial which resulted from Mills' participation."

{5} Defendant then appealed to the Court of Appeals. In a formal opinion, *State v. Rivera*, 2010-NMCA-109, ¶ 9, 149 N.M. 406, 249 P.3d 944, the court focused on NMSA 1978, Section 36-2-27 (1999), which states, "[n]o person shall practice law in a court of this state, *except a magistrate court*, . . . unless he has been granted a certificate of admission to the bar under the provision of Chapter 36 NMSA 1978." (Emphasis added.) The Court of Appeals reasoned that Section 36-2-27 allows lay persons to practice law in "a magistrate court." *Id.* Since, according to NMSA 1978, Section 34-8A-2 (1980), metro court is a particular kind of magistrate court for Bernalillo County, the Court concluded that "our Legislature has expressly granted non-lawyers the ability to practice law in metropolitan court." *Rivera*, 2010-NMCA-109, ¶ 9.

{6} Accordingly, the Court of Appeals "affirm[ed] the denial of Defendant's motion for mistrial and for a new trial." *Id.* ¶ 12. We granted certiorari to clarify the important question of who may practice law in our lower courts. We also discuss the consequences of practicing law when unauthorized in the context of a criminal prosecution like this one.

DISCUSSION

{7} Section 36-2-27 limits the practice of law "in a court of this state" to duly licensed attorneys, "except [in] a magistrate court," an exception that appears to pre-date magistrate courts back to the time of justices of the peace. *See* NMSA 1953, § 18-1-26 (1957). Notwithstanding this legislative expression, the ultimate authority "to regulate all pleading, practice and procedure" resides in the judicial branch of government, and specifically in the Supreme Court. *State ex rel. Anaya v. McBride*, 88 N.M. 244, 246, 539 P.2d 1006, 1008 (1975). The authority "to define and regulate the practice of law is inherently contained in the grant of judicial power to the courts by the Constitution." *State Bar v. Guardian Abstract & Title Co.*, 91 N.M. 434, 439, 575 P.2d 943, 948 (1978); *see also State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.*, 85 N.M. 521, 528, 514

P.2d 40, 47 (1973) ("[T]he regulation of the practice of law is the exclusive constitutional prerogative of this court.").

{8} With regards to rule-making, however, judicial authority is not necessarily exclusive; we have previously recognized legislative statutes that regulate procedure. *See Sw. Cmty. Health Servs. v. Smith,* 107 N.M. 196, 198, 755 P.2d 40, 42 (1988) (discussing the judiciary having "shared procedural rule-making with the legislature"). But, whether such a statute is ultimately given effect depends on the degree to which it conflicts with the rules of this Court. *See Albuquerque Rape Crisis Ctr. v. Blackmer,* 2005-NMSC-032, ¶ 13, 138 N.M. 398, 120 P.3d 820 ("The question in this case is whether the [legislatively created privilege] conflicts with, or rather is consistent with, rules promulgated by this Court.").

{9} In 1987, this Court saw fit to limit Section 36-2-27 by just such a rule. We declared in Rule 24-101(A) NMRA that "[e]xcept as otherwise provided by the rule adopted by the Supreme Court, no person shall practice law in this state or hold himself or herself out as one who may practice law in this state unless such person is an active member of the state bar." Our rule applies to *all* courts of this state, without exception. We have never promulgated a rule that would permit the practice of law by non-attorneys in magistrate court.

{10} Even before our express rule, this Court had limited Section 36-2-27 by judicial decision. In *Norvell,* 85 N.M. at 528-31, 514 P.2d at 48-51, we interpreted the predecessor statute to Section 36-2-27, materially identical, and held that the Credit Bureau of Albuquerque was engaged in the unauthorized practice of law *in magistrate court* by using non-attorney employees to present collection cases against debtors. Whenever a debtor responded without legal counsel to a collection case in magistrate court, "the Credit Bureau's collection manager appear[ed] at the trial on the merits to litigate the case." *Norvell,* 85 N.M. at 525, 514 P.2d at 44.

{11} Ultimately, *Norvell* limited the magistrate court exception in Section 36-2-27 to those few occasions when a non-attorney might appear only "on a casual and non-recurring basis without the contaminating aspects of solicitation and charging of fees." *Norvell,* 85 N.M. at 529, 514 P.2d at 48. We emphasized that "[w]e will not permit the practice of law by unlicensed magistrate courts' lawyers who are unfettered by the strictures which apply to the rest of the legal profession." *Id.*

{12} Our holding in *Norvell,* later supplemented by rule, could not be clearer. Only attorneys properly admitted to the Bar may practice law in any court of this state, subject to those few exceptions provided in our rules, such as clinical law students under prescribed circumstances. Accordingly, we reverse the Court of Appeals to the extent that its opinion relied on state statute to allow non-attorneys to practice law in magistrate court.

{13} This holding, however, does not end our inquiry. By rule, we have created limited exceptions that allow certain individuals without a bar license to practice law in New Mexico courts. For example, under Rule 24-106 NMRA, a member in good standing of the bar of another state may participate in New Mexico courts under certain circumstances. Also, Rules 1-094, 1-094.1, 5-110, and 5-110.1 NMRA allow clinical law students to practice in our courts and administrative agencies. While the requirements for out-of-state attorneys and law students differ, the rules share one condition; namely, that a

proper authority must be notified in writing of their non-licensed status—the State Bar in the case of an out-of-state attorney and the judge presiding over the proceeding in the case of a clinical law student. *See* Rules 24-106 and 1-094.

{14} Finally, Rule 7-108 NMRA explicitly provides for non-attorney criminal prosecutions in metro court under certain circumstances. The current version of this rule allows both peace officers and employees of governmental entities acting on behalf of that entity to prosecute certain criminal actions. *Id.* In addition, at the time of the trial in this case, Rule 7-108 allowed for prosecutions by "individual citizens acting on their own behalf," a provision since withdrawn by this Court.

{15} Returning now to Mills, the only evidence in the record regarding Mills' status is the letter from our clerk, Ms. Gibson, confirming that as of the time of trial he was not on the official roll of attorneys. There is no evidence in the record that Mills was licensed in another state, was an employee of a governmental entity, or was a peace officer. He could not have been a citizen prosecuting on his own behalf, as Defendant was charged with DWI, a crime against society as a whole, and generally not directed against an individual citizen "acting on their own behalf." *Id.* Even though defense counsel at some point thought Mills was a clinical law student, the court never entered an order approving such an appearance pursuant to Rule 1-094. We simply do not know from the record what Mills' status was; we only know what he was not. As a result, we agree with the district court that Mills' participation in Defendant's trial was unauthorized, in violation of our rules, and therefore "impermissible."

Error Does Not Warrant Reversal

{16} We assume, without deciding, that Mills' participation at trial as a purported prosecutor constituted judicial error. We now determine what effect, if any, this had on Defendant's conviction.

{17} With the exception of structural error, we require that an error prejudice the accused in some way before we will consider reversal. *See State v. Dominguez*, 2007-NMSC-060, ¶ 13, 142 N.M. 811, 171 P.3d 750 ("[J]udicial error by itself is not necessarily grounds for reversal in the absence of actual prejudice."); *State v. Gallegos*, 2007-NMSC-007, ¶ 18, 141 N.M. 185, 152 P.3d 828 ("Even when the trial court abuses its discretion in failing to sever charges, appellate courts will not reverse unless the error actually prejudiced the defendant."); *State v. Gonzales*, 2000-NMSC-028, ¶ 32, 129 N.M. 556, 11 P.3d 131 ("In order to warrant reversal, the erroneous admission of evidence must cause prejudice to a defendant.").

{18} Before we can assess the effect of Mills' unauthorized trial participation, we must examine what Mills actually did at trial. The trial transcript shows that Bayless, a duly licensed assistant district attorney, was present for the entire trial and personally conducted most of it, including witness examinations, evidentiary objections, and sentencing. Over the course of the two-day trial, Bayless appeared to step aside only twice. First, she allowed Mills to examine the State's first witness, whose testimony helped establish the constitutionality of the DWI checkpoint. Second, Bayless did not make the State's closing argument, but neither did Mills; closing was given by another assistant district attorney. In short, it does not appear from the record that Mills did much at trial, and even

what little he did was uneventful and subject to the direct supervision of the lead prosecutor, Bayless.

{19} As a result, Defendant has not claimed any actual prejudice from Mills' participation at trial. The trial transcript shows no irregularity in Mills' questioning of his sole witness. Moreover, even if Mills had done more, Mills was not Defendant's attorney, he represented the State. As a general rule, defense counsel's duties and obligations remain unchanged, whether opposing counsel is the attorney general, a district attorney, or a clinical law student. In any case, defense counsel must zealously advocate on behalf of the client, which counsel appeared to do here. Because Defendant was not prejudiced by Mills' impermissible participation at trial, we conclude that the conviction in this case is not "inconsistent with substantial justice" and does not warrant reversal. Rule 7-704(A) NMRA.

{20} Notwithstanding the lack of prejudice, Defendant argues additional grounds for reversal. First, Defendant urges us to assume prejudice, essentially arguing that the unauthorized practice of law by a representative of the State is structural error that warrants automatic reversal. This argument, however, fails to persuade us. Structural error exists "only in a very limited class of cases." *State v. Padilla*, 2002-NMSC-016, ¶ 16, 132 N.M. 247, 46 P.3d 1247 (internal quotation marks and citation omitted). "Such errors infect the entire trial process, and necessarily render a trial fundamentally unfair." *Neder v. United States*, 527 U.S. 1, 8 (1999) (internal quotation marks and citations omitted). Structural errors include such pervasive defects as racial discrimination in the selection of a grand jury, complete denial of the right to counsel, a significant defect in the reasonable-doubt instruction, and denial of the right to a public trial. *Padilla*, 2002-NMSC-016, ¶ 16. We are not persuaded to expand this limited class of cases to include Mills' participation under the circumstances of this case.

{21} Defendant maintains that lack of prejudice is immaterial because an unauthorized prosecution deprives the trial court of jurisdiction. Defendant relies on *State v. Hollenbeck*, 112 N.M. 275, 814 P.2d 143 (Ct. App. 1991) and *State v. Baca*, 101 N.M. 716, 688 P.2d 34 (Ct. App. 1984) for this proposition. In both *Hollenbeck* and *Baca*, the accused was prosecuted by a *private* attorney who the district attorney had failed to properly appoint or otherwise authorize to conduct the prosecution. *Hollenbeck*, 112 N.M. at 276, 814 P.2d at 144; *Baca*, 101 N.M. at 717, 688 P.2d at 35. Once it was established that the private attorney lacked authority to prosecute, our Court of Appeals concluded in each case that the trial court lacked subject matter jurisdiction, thereby reversing the convictions. *Hollenbeck*, 112 N.M. at 277-78, 814 P.2d at 145-46; *Baca*, 101 N.M. at 718, 688 P.2d at 36.

{22} *Hollenbeck* and *Baca* are vastly different from what took place in Defendant's prosecution. Defendant was prosecuted by a properly-appointed assistant district attorney, Bayless, who—it is clear from the trial transcript—was in charge of the prosecution and personally conducted most of it. In contrast with both *Hollenbeck* and *Baca*, Defendant was lawfully prosecuted. The authority to prosecute was vested in Bayless, an assistant district attorney, and that authority provided the court with the very jurisdiction over Defendant's case that the court lacked in both *Hollenback* and *Baca*. *See* NMSA 1978, § 36-1-2 (1984).

Clinical Law Program

{23} While there is nothing in the record to confirm it, even defense counsel believed that Mills was a law student, and under the circumstances he likely was. This Court created Rule 1-094 to allow the University of New Mexico School of Law to administer clinical law programs. We are pleased with the success of such programs and believe the experience they afford law students is invaluable. However, this case should serve as a cautionary tale to those participating in clinical programs—students, faculty, and supervising attorneys alike. The issue in this appeal could likely have been avoided with a minimal amount of care and supervision.

{24} Rule 1-094(B) requires "written approval of the judge presiding over the case." We specifically created Form 4-821 to use with Rule 1-094. If Mills was in fact a law student, all that was needed was the presiding judge's approval, evidenced by a signature on Form 4-821 and documented in the case file. We recognize that metro court is the busiest court in the state. Bayless could have introduced Mills as a clinical law student, requested oral approval on the record, and later filed the written approval. Metro court is also an excellent place for law students to gain valuable experience. Mindful of the benefits of that experience, we urge those responsible to redouble their efforts and function within the rules provided.

CONCLUSION

{25} We affirm Defendant's conviction and reverse the opinion of the Court of Appeals to the extent it is inconsistent herewith.

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

RICHARD C. BOSSON, Justice

WE CONCUR:

CHARLES W. DANIELS, Chief Justice

PATRICIO M. SERNA, Justice

PETRA JIMENEZ MAES, Justice

EDWARD L. CHÁVEZ, Justice

Certiorari Denied, December 21, 2011, No. 33,321

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-011

Filing Date: September 27, 2011

Docket No. 30,988

KIM AUDETTE and SOPHIA PERON,

Petitioners-Appellants,

v.

CITY OF TRUTH OR CONSEQUENCES COMMISSIONERS LORI MONTGOMERY, FRED TORRES, EVELYN RENFRO, JERRY STAGNER, STEVE GREEN; HOT SPRINGS LAND DEVELOPMENT, LLC; and HOT SPRINGS MOTORPLEX DEVELOPMENT, LLC,

Respondents-Appellees.

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Truth or Consequences, NM

Pro Se Appellant

Sophia Peron
Truth or Consequences, NM

Pro Se Appellant

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OPINION

VANZI, Judge.

{1} Kim Audette and Sophia Peron seek appellate review of two district court orders in an administrative appeal from the decision of a city zoning commission. Rather than filing a petition for writ of certiorari in this Court as required by the relevant statutes and Rule 12-505 NMRA, Audette and Peron filed a notice of appeal and a docketing statement. Because the docketing statement substantially complies with the content requirements of Rule 12-505(D)(2), we accept their docketing statement as a non-conforming petition. Also, because they requested an extension of time to file their docketing statement within the thirty-day deadline of Rule 12-505(C), and this Court granted the extension, we conclude that their non-conforming petition was timely. However, as the non-conforming petition does not demonstrate that discretionary review is warranted, we deny the petition.

BACKGROUND

{2} The commissioners of the City of Truth or Consequences (Commissioners) passed an ordinance granting Hot Springs Land Development, LLC, a/k/a Hot Springs Motorplex Development, LLC, (Hot Springs) a zoning change for 8,200 acres near the municipal airport. Audette and Peron appealed to the district court in accordance with NMSA 1978, Section 3-21-9 (1999), and NMSA 1978, Section 39-3-1.1(C) (1999), which permit a person aggrieved by a decision of a municipal zoning agency to appeal as of right to the district court.

{3} The district court issued a non-final decision containing its findings of fact and conclusions of law and explaining its reasoning for concluding that the appeal was

without merit. *See Curbello v. Vaughn*, 76 N.M. 687, 687, 417 P.2d 881, 882 (1966) (stating that where the district court had entered findings and conclusions but had not entered an order or judgment carrying out the findings and conclusions, no final order had been entered in the case for purposes of appeal); *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 119 N.M. 29, 37, 888 P.2d 475, 483 (Ct. App. 1994) (stating that a final order must contain decretal language). Audette filed a motion for reconsideration of the district court's decision. On May 10, 2010, the district court filed a final order affirming the zoning decision, as well as an order denying Audette's motion for reconsideration. Later that afternoon, the Commissioners and Hot Springs filed a motion to sanction Audette for the frivolous filing of her motion for reconsideration. The Commissioners and Hot Springs sought reasonable attorney fees for defending the motion. On December 10, 2010, the district court entered an order granting the motion for sanctions but postponed a decision on the amount of attorney fees to be awarded pending submission of a cost bill and any objections to the bill.

{4} On December 13, 2010, Audette and Peron filed a notice of appeal with the district court clerk. Audette and Peron then filed a docketing statement on February 18, 2011, raising claims of error directed at both the order affirming the underlying zoning decision and the order for sanctions. The Commissioners and Hot Springs moved to dismiss that portion of the appeal directed at the order affirming the zoning decision. The motion asserted that Audette and Peron were not entitled to an appeal as of right from the zoning decision since Section 39-3-1.1(E) only permits a party who has appealed as of right to the district court to seek discretionary review in this Court by way of a petition for writ of certiorari. We requested supplemental briefing on the question whether the notice of appeal and docketing statement should be accepted in lieu of a petition for writ of certiorari.

DISCUSSION

Audette's and Peron's Non-Conforming Document Will Be Accepted as a Petition for Writ of Certiorari

{5} Although Audette and Peron failed to file a petition for writ of certiorari, we have held that a docketing statement that substantially complies with the content requirements for a petition for writ of certiorari will be accepted as a petition despite the fact that its form and content do not precisely comply with the requirements of Rule 12-505. *See Wakeland v. N.M. Dep't of Workforce Solutions*, 2012-NMCA-021, ¶ 16, 274 P.3d 766 (No. 31,031, Sept. 27, 2011). Because Audette's and Peron's docketing statement contains information sufficient to determine whether the issues they raise meet the requirements for granting a petition for writ of certiorari, we construe their docketing statement as a petition. *See id.*

Audette's and Peron's Non-Conforming Petition Was Timely Because They Sought an Extension of Time to File the Document Prior to the Expiration of the Thirty Days for Filing a Petition and the Extension Was Granted

{6} Audette's and Peron's non-conforming petition was not filed within thirty days of the district court's order as required by Rule 12-505(C). In such circumstances, this Court would generally only excuse the late filing if it was due to unusual circumstances

beyond Audette's and Peron's control. *See Gulf Oil Corp. v. Rota-Cone Field Operating Co.*, 85 N.M. 636, 636, 515 P.2d 640, 640 (1973) (per curiam) (holding that, as with the time requirement for a notice of appeal, the timely filing of a petition for writ of certiorari is a mandatory precondition to the exercise of an appellate court's jurisdiction that will not be excused absent unusual circumstances). Here, however, Audette and Peron requested an extension of time to file the docketing statement and, because they did so on January 7, 2011, prior to the thirty-day deadline imposed by Rule 12-505(C), we conclude that their non-conforming petition was timely.

{7} In previous cases, we have held that a showing of unusual circumstances is required in order to warrant an extension of time to file a petition for a writ of certiorari. *See Cassidy-Baca v. Bd. of Cnty. Comm'rs of Cnty. of Sandoval*, 2004-NMCA-108, ¶ 3, 136 N.M. 307, 98 P.3d 316 (declining to grant an extension of time to file a petition for writ of certiorari where there was no showing of unusual circumstances); *Hyden v. N.M. Human Servs. Dep't*, 2000-NMCA-002, ¶ 17, 128 N.M. 423, 993 P.2d 740 (requiring a showing of unusual circumstances in order to grant an extension). However, in those cases, the extension was sought after the mandatory time for filing such that, in essence, the parties were asking the Court to excuse their failure to file the petition by the mandatory date. We do not believe that the rule requiring unusual circumstances is intended to apply when a party seeks an extension of time to file a petition for writ of certiorari prior to the expiration of the deadline. In fact, this Court routinely grants such requests for extensions when the motion demonstrates good cause.

{8} Because this Court often grants extensions of time to file petitions for writ of certiorari when the request for the extension is made prior to the date that the petition is due, the same rule should be applicable to non-conforming petitions such as the docketing statement filed here. Therefore, because Audette and Peron sought an extension of time to file their docketing statement before their petition was due under Rule 12-505(C) and because this Court granted the extension, we conclude that their petition is timely.

{9} We emphasize, however, that when a party mistakenly files a notice of appeal and, after the time for filing a petition has passed, the party seeks an extension of time to file the docketing statement, an order from this Court extending the time to file the docketing statement will not automatically excuse the untimely filing of the non-conforming document that is to be construed as a petition. Extensions of time to file the docketing statement in this Court are routinely granted, as the timely filing of a docketing statement is not a mandatory precondition to the exercise of this Court's jurisdiction. Although the party may not realize that they have employed the wrong procedures in bringing an appeal before this Court, a party cannot rely on their own mistake in presenting their case as if it were an appeal as of right and in obtaining a routine extension to file the docketing statement as a basis for claiming that the non-conforming petition was timely. An extension that this Court would not have granted if it were clear that what was actually being requested was that the Court excuse the untimely filing of a non-conforming petition will not itself excuse the late filing. Therefore, when the request for an extension of time to file the docketing statement is made after the time for filing a petition for writ of certiorari has passed, and if we have granted the motion for the extension, we will excuse the late filing only when the party's motion or other documents filed in this Court demonstrate the kind of unusual circumstances

warranting the acceptance of an untimely filing.

{10} Although we conclude that Audette's and Peron's non-conforming petition was timely as to the December order on sanctions, Hot Springs and the Commissioners argue that the petition was not timely as to the May order on the merits of the zoning decision, such that this Court should not consider any issues related to the zoning decision. Our Supreme Court has held that when a district court issues a decision on the merits and then later issues a decision on a collateral issue, such as whether to grant attorney fees, a party may choose to wait until the collateral matter is resolved to file the notice of appeal as to all issues. *Exec. Sports Club, Inc. v. First Plaza Trust*, 1998-NMSC-008, ¶ 14, 125 N.M. 78, 957 P.2d 63. Under such circumstances, the appellant can file the notice of appeal within thirty days of the order on the collateral matter, and the notice will be effective as to the judgment on the merits. *See id.* An order granting attorney fees but not setting the amount, such as the order in this case, constitutes a final, appealable order. *See id.* ¶ 13.

{11} However, in *San Juan 1990-A, L.P. v. El Paso Production Co.*, 2002-NMCA-041, ¶ 21, 132 N.M. 73, 43 P.3d 1083, we held that an order sanctioning a party for discovery violations and awarding attorney fees was not the sort of collateral post-judgment order that would toll the time for filing a notice of appeal from the judgment on the merits, and when the appellants failed to file a timely notice of appeal from the order on the merits and instead waited for the entry of the sanctions order to file their notice of appeal, their appeal of the merits was untimely. *San Juan* distinguishes cases like *Executive Sports Club* by stating that the award of attorney fees in those cases was for the whole litigation and may have involved a "substantive evaluation of legal and factual issues involved in the case[,]" whereas in *San Juan*, the sanction was just for a discovery violation, and the parties stipulated to the order on sanctions such that the district court did not have to make any substantive decisions. *San Juan*, 2002-NMCA-041, ¶¶ 19, 21 (internal quotation marks and citation omitted).

{12} *San Juan* does not control this case. Here, unlike the circumstances in *San Juan*, the parties did not enter into a stipulation regarding the sanctions, and the question decided by the district court—whether Audette had taken a frivolous position in her motion to reconsider—involved a substantive decision regarding the legal and factual issues in the case. Therefore, in accordance with *Executive Sports Club*, Audette and Peron could wait to file a notice of appeal from the sanctions order, and the notice was effective as to both the sanctions order and the order on the merits.

The Petition Is Denied

{13} We have reviewed Audette's and Peron's non-conforming petition. Because this case was erroneously presented to this Court as an appeal as of right, the entire record proper has been filed in this Court. However, with respect to the underlying zoning decision, we have only considered those documents in the record that should have been attached to a petition for writ of certiorari. *See* Rule 12-505(D)(3) (stating that a petition shall have attached the final order or judgment of the district court and any findings or decisions leading to the order or judgment, a copy of the administrative decision, and a copy of the statements of appellate issues filed in the district court). With respect to the order on sanctions, we have considered all of the documents in the record proper on that issue. After reviewing the petition and the relevant

material in the record, we deny the petition, as it does not present a question meriting discretionary review pursuant to Rule 12-505(D)(2)(d).

CONCLUSION

{14} Audette and Peron were required to file a timely petition for writ of certiorari in order to seek discretionary appellate review in this Court. Because their docketing statement is sufficient to constitute a non-conforming petition for writ of certiorari, and because they timely sought an extension of time to file the non-conforming petition, we have considered the petition on the merits. The petition is denied.

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

LINDA M. VANZI, Judge

WE CONCUR:

CELIA FOY CASTILLO, Chief Judge

CYNTHIA A. FRY, Judge

Certiorari Denied, December 21, 2011, No. 33,317

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-012

Filing Date: October 24, 2011

Docket No. 30,779

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

DARWIN ETSITTY,

Defendant-Appellant.

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for Appellant

OPINION

VANZI, Judge.

{1} This case presents another twist on the question of when a defendant can be successfully prosecuted for both driving while intoxicated (DWI) and child abuse by endangerment. A jury found Defendant guilty

of DWI by actual physical control and child abuse by endangerment. Defendant does not challenge his DWI conviction. Instead, he raises one issue on appeal, contending that the district court erred in denying his motion for directed verdict because there was insufficient evidence to support a conviction for child abuse when that conviction was based upon a DWI that had not yet occurred. We agree with Defendant and reverse his child abuse by endangerment conviction.

BACKGROUND

{2} Defendant was charged with DWI, contrary to NMSA 1978, Section 66-8-102 (2008) (amended 2010), and child abuse by endangerment, contrary to NMSA 1978, Section 30-6-1(D)(1) (2009), in relation to an incident that occurred in January 2010. The State called two witnesses at trial. Officers Eric Jennings and Joseph Schake testified that they were on duty conducting a "warrant round-up" at a trailer park in Farmington, New Mexico, when they saw Defendant's pickup truck parked outside of a residence. Believing that Defendant may have been the individual they were pursuing, the officers approached the truck and made contact with Defendant, who was seated in the vehicle. The officers testified that they observed Defendant seated in the driver's seat of the truck, with his wife in the middle, and his four-year-old child on the other end of the truck's front bench seat. The vehicle was not running, and Defendant was holding the keys in his hand. In the process of confirming that Defendant was not the subject of the warrant, the officers observed that there were open alcohol containers in the cup holders and on the floor of the vehicle. They testified that Defendant had bloodshot and watery eyes, spoke with slurred speech, and smelled of alcoholic beverages. Officer Jennings testified that Defendant informed him that he, his wife, and his child had just stepped out of the house and that they were "loading up" the vehicle and "leaving here" to go to a local store.

{3} Based on his observations, Officer Jennings began a DWI investigation. He administered field sobriety tests to Defendant and observed that Defendant was unable to keep his balance and could not perform the tests as instructed. Based on Defendant's statements and the officers' observations, Defendant was placed under arrest for suspicion of DWI. Defendant was transported to the police station where he provided two breath samples, both of which resulted in alcohol concentration readings of .15 grams per 210 liters of breath.

{4} The State rested after the two officers testified, and Defendant then moved for a directed verdict on the child abuse charge. Defendant argued that no evidence had been presented to support a child abuse conviction—the child had merely been sitting inside a nonmoving vehicle. The district court denied the motion, and Defendant was convicted on both the DWI and child abuse by endangerment charges. This appeal followed.

DISCUSSION

Standard of Review

{5} Defendant challenges his conviction for child abuse by endangerment, arguing that the misdemeanor DWI charge in this case does not support the conviction for felony child abuse. He does not challenge his DWI conviction, and it is thus not a part of this appeal. The parties agree that the question of whether the underlying DWI misdemeanor supports a finding of felony child abuse goes to the sufficiency of the evidence.

{6} We begin our sufficiency of the

evidence analysis by first reviewing the elements required to prove child abuse by endangerment. To convict Defendant of child abuse by endangerment, the State had the burden of proving beyond a reasonable doubt that Defendant caused a child to be placed in a situation that endangered his life or health and did so with reckless disregard for the safety of the child. *See* § 30-6-1(A)(3), (D)(1). Reckless disregard requires that Defendant "knew or should have known [his] conduct created a substantial and foreseeable risk, [he] disregarded that risk and [he] was wholly indifferent to the consequences of the conduct and to the welfare and safety of [the child]." UJI 14-604 NMRA. We have said that child abuse by endangerment, as opposed to physical abuse of a child, is a special classification designed to address situations where an accused's conduct exposes a child to a significant risk of harm, "even though the child does not suffer a physical injury." *State v. Ungarten*, 115 N.M. 607, 609, 856 P.2d 569, 571 (Ct. App. 1993), *abrogated on other grounds by State v. Chavez*, 2009-NMSC-035, 146 N.M. 434, 211 P.3d 891.

{7} Having set forth the statutory requirements of child abuse by endangerment, we apply a substantial evidence standard to determine the sufficiency of the evidence at trial. *State v. Treadway*, 2006-NMSC-008, ¶ 7, 139 N.M. 167, 130 P.3d 746. On a sufficiency of the evidence challenge, the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Perea*, 2001-NMSC-026, ¶ 5, 130 N.M. 732, 31 P.3d 1006. In performing this analysis, "we must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. "The reviewing court does not weigh the evidence or substitute its judgment for that of the fact finder as long as there is sufficient evidence to support the verdict." *State v. Mora*, 1997-NMSC-060, ¶ 27, 124 N.M. 346, 950 P.2d 789, *abrogated on other grounds as recognized by Kersey v. Hatch*, 2010-NMSC-020, 148 N.M. 381, 237 P.3d 683.

There Was Insufficient Evidence to Support a Conviction for Felony Child Abuse by Endangerment

{8} To date, every appellate case in New Mexico upholding a child endangerment conviction has involved a situation where a defendant was actually driving while intoxicated with a child in the vehicle. *See, e.g.*, *State v. Santillanes*, 2001-NMSC-018, ¶¶ 2, 38, 130 N.M. 464, 27 P.3d 456 (upholding the defendant's child abuse conviction when he drove drunk and collided with an oncoming vehicle, resulting in the death of four children); *State v. Chavez*, 2009-NMCA-089, ¶ 14, 146 N.M. 729, 214 P.3d 794 (holding that a defendant who drove drunk with her six-year-old in the car was guilty of child endangerment); *State v. Watchman*, 2005-NMCA-125, ¶¶ 4-5, 138 N.M. 488, 122 P.3d 855 (holding that there was sufficient evidence to find the defendant guilty of child abuse when she drove drunk to a bar with her child and then left the child in a dangerous parking lot alone); *State v. Montoya*, 2005-NMCA-078, ¶¶ 2, 4, 137 N.M. 713, 114 P.3d 393 (concluding that evidence that the defendant was drunk while driving with unrestrained children in his truck was sufficient to prove child abuse). These cases clearly establish that a defendant who is driving while intoxicated with a child in the vehicle can be charged and convicted of child abuse by endangerment.

{9} Difficulties arise, however, when an intoxicated defendant is not driving but rather is in a nonmoving vehicle with a child present. Our Supreme Court recognized in *Chavez* that, "[t]aken literally, our endangerment statute could be read broadly to permit prosecution for any conduct, however remote the risk, that '*may* endanger a child's life or health.'" 2009-NMSC-035, ¶ 16 (alteration omitted). The Court then clarified that "by classifying child endangerment as a third-degree felony, our Legislature anticipated that criminal prosecution would be reserved for the most serious occurrences, and not for minor or theoretical dangers." *Id.* In light of the Supreme Court's more restrictive view of the child abuse statute set forth in *Chavez*, this Court recently had the opportunity to discuss and provide guidance on what constitutes a "theoretical danger" for purposes of a child abuse charge in a DWI context. Specifically, we considered whether a conviction for child abuse could be sustained when the intoxicated driver was in a nonmoving vehicle. We held that it could not.

{10} In *State v. Cotton*, we reversed the defendant's conviction for child abuse by endangerment when the defendant was intoxicated while seated in the driver's seat of his vehicle with his girlfriend and four children. 2011-NMCA-096, ¶¶ 21-22, 150 N.M. 583, 263 P.3d 925, *cert. denied*, 2011-NMCERT-008, 268 P.3d 513 (No. 33,163, Aug. 29, 2011). The defendant's vehicle was parked by the side of the road, it was not running, and the keys were not in the ignition. *Id.* ¶ 21. Further, suspecting that the defendant and his girlfriend were intoxicated, the officer questioned the defendant, who admitted that he had recently consumed alcohol. *Id.* ¶ 1. Significantly, DWI by actual physical control was not charged or argued in that case; however, the State's child abuse claim relied on the theory that "the possibility that [the d]efendant might drive" placed the children in a situation that endangered their lives and health. *Id.* ¶ 16. We explained that, while "driving impaired with children in the car could cause grave harm depending on the circumstances, the possibility that [the d]efendant might drive is a theoretical danger—the exact type of danger our Legislature did not intend to bring within the ambit of Section 30-6-1." *Cotton*, 2011-NMCA-096, ¶ 21. Accordingly, we held that the theoretical danger to the children posed by the possibility of the defendant's impaired driving was insufficient to support a child abuse conviction. *Id.* ¶ 22.

{11} *Cotton* was not yet decided when the parties filed their briefs in this case and, as a result, they could not have foreseen its applicability here. Nevertheless, the analysis and holding in that case are relevant to our decision today. As in *Cotton*, the evidence in this case for the child abuse by endangerment charge was the same evidence presented in relation to the DWI charge. We briefly review the facts at the point in time when Defendant was intercepted by the police. Defendant was sitting outside a residence in the driver's seat of a pickup truck, a female was in the middle seat, and a child was on the other end of the front bench seat; Defendant appeared to be impaired; the keys were in his hand; he told the officers he was planning on going to a local store; he was arrested; and he never drove the truck. This conduct supported Defendant's conviction of DWI by actual physical control (and he does not challenge that conviction). However, we conclude that it does not rise to the level required by our child abuse statute. Clearly, had Defendant carried out his intentions and begun to drive with his child in the car, or had there been evidence that Defendant was driving while intoxicated prior to his contact with the police, he could have been convicted of child abuse

by endangerment. But without evidence of actual driving, Defendant had not yet put the child in real peril.

{12} Although the defendant in *Cotton* was not charged with DWI by actual physical control, we find no reason to depart from the rationale in that case merely because Defendant here admitted that he intended to drive and was ultimately convicted of DWI by actual physical control. DWI by actual physical control by its very nature relies on the possibility of future conduct, and its departure from the typical requirement of criminal actus reus is unique. In *State v. Sims*, our Supreme Court modified existing DWI by actual physical control law, requiring two elements to secure a conviction: "(1) the defendant was actually, not just potentially, exercising control over the vehicle, and (2) the defendant had the general intent to drive so as to pose a real danger to himself, herself, or the public." 2010-NMSC-027, ¶ 4, 148 N.M. 330, 236 P.3d 642. Recognizing the consequence of the above requirements, the Court then noted that the elements of DWI by actual physical control make it "analytically similar to an attempt crime." *Id.* ¶ 27; *see* NMSA 1978, § 30-28-1 (1963) (requiring "an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission" to convict for an attempt to commit a felony); *cf. State v. Johnson*, 2001-NMSC-001, ¶ 19, 130 N.M. 6, 15 P.3d 1233 (equating "actual physical control" with being "in a situation in which [drivers] can directly commence operating a vehicle while they are intoxicated"); *Atkinson v. State*, 627 A.2d 1019, 1025 (Md. 1993) (noting that the view among many states is that the purpose of the "actual physical control" language in DWI provisions is preventive, aimed to protect the public from what inebriated individuals "might" do).

{13} If interpreted in an overly-broad manner, our Supreme Court's analysis for DWI by actual physical control set forth in *Sims* may cause unintended consequences if extended to the child abuse context. Allowing actual physical control without requiring the act of driving to operate as a basis for a child abuse by endangerment charge effectively turns the child abuse charge into an attempted crime as well. In other words, Defendant here was convicted of committing an overt act in furtherance of and with the intent to commit child abuse, but at the point when Defendant was intercepted by the officers, the crime of child abuse had not yet been completed. Allowing a conviction for child abuse to stand on these facts would create liability for an inchoate crime where none was charged or otherwise shown to have been intended by the Legislature.

{14} In *State v. Roybal*, we determined that mere proximity to a dangerous situation was insufficient to support a conviction for child abuse by endangerment. 115 N.M. 27, 34, 846 P.2d 333, 340 (Ct. App. 1992). In *Roybal*, the defendant left his wife and child in a car approximately ten or fifteen feet away while he bought heroin. *Id.* When police officers arrived on the scene, one of the co-defendants resisted arrest. *Id.* Although the drug transaction could well have resulted in violence, we concluded that there was insufficient evidence that the child "was in fact placed in danger." *Id.* Likewise, in this case, while Defendant's actions prior to being intercepted by police could have resulted in Defendant driving while intoxicated thereby placing his young passenger in danger, Defendant had not yet "in fact placed [the child] in danger." *See id.* While we appreciate the seriousness of the potential danger to the minor child had Defendant driven the car, we hold that there was insufficient evidence to convict Defendant of

child abuse by endangerment under the facts of this case.

CONCLUSION

{15} For the foregoing reasons, Defendant's child abuse conviction is reversed.

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

LINDA M. VANZI, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

J. MILES HANISEE, Judge

Certiorari Granted, January 25, 2012, No. 33,296

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-013

Filing Date: October 25, 2011

Docket No. 29,997

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

JULIAN GUTIERREZ,

Defendant-Appellant.

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OPINION

GARCIA, Judge.

{1} Defendant Julian Gutierrez was granted a direct appeal and certification of the district court's amended decision letter denying Defendant's motion to dismiss. Defendant was indicted on three counts of

criminal sexual contact of a minor, contrary to NMSA 1978, Section 30-9-13(B)(2)(a) (2003). Defendant raises three issues on appeal: (1) whether the district court erred in declaring a mistrial on the basis of manifest necessity, (2) whether prosecutorial misconduct bars retrial of Defendant, and (3) whether Defendant's right to present a defense and due process rights require dismissal of all charges with prejudice. We affirm.

I. FACTUAL AND PROCEDURAL HISTORY

{2} A grand jury indicted Defendant on three counts of criminal sexual contact of a minor. Victim, Defendant's then sixteen-year-old daughter, testified at the grand jury hearing. A few days before trial, on February 22, 2009, the prosecutor interviewed Victim at her school (the Interview). The merits of Defendant's direct appeal rest on the contents of the Interview. The Interview lasted approximately one-half hour and included Victim, the prosecutor, a special investigator, and the victim's advocate. Following the Interview, Victim fled the jurisdiction.

{3} During the Interview, the prosecutor explained that the purpose of the Interview was to prepare Victim for trial, make sure she received her subpoena, and confirm she would appear. The prosecutor asked Victim about her living arrangements. Victim said she was living with her grandmother next door to Defendant. Victim indicated that her grandparents had not spoken to her about testifying but that her grandmother told her she was going to get herself into a "whole bunch of trouble," and her grandfather no longer wanted her to live there.

{4} The prosecutor wanted to go over the police report with Victim to make sure she still remembered the incidents. Victim recanted, said Defendant never touched her, and explained that her mother told her to lie to the grand jury. The prosecutor told Victim that she could be charged with perjury if she did not testify consistently with her prior statements. The prosecutor asked if she wanted to be faced with charges. The prosecutor and the victim's advocate also stressed that they were there to help Victim. They explained that they were worried Victim's family was threatening her and said they could find her another place to live. The special investigator asked Victim where her baby would go if she got into "trouble" and if she was willing to get into trouble and see her child sent to a home. Victim then said that her father had touched her, but they were playing a game. The special investigator told Victim she should tell the truth at trial, and if the truth was that she and Defendant were playing a game, that is what Victim should say. The prosecutor and special investigator stressed that Victim needed to tell the truth, but they made it clear that her grand jury testimony was that Defendant had touched her. The prosecutor and the special investigator commended Victim for remaining in school while raising a child and told her she should be proud. They also discussed driving Victim to the courthouse.

{5} Victim was not present the morning of trial. During an in-chambers hearing, defense counsel filed a written motion in open court to call the prosecutor as a witness or, in the alternative, to dismiss the charges. Defense counsel argued that the prosecution improperly threatened Victim during the Interview. The State responded that no one threatened Victim and that the State was concerned with reports that Defendant and his family, with whom Victim lived, were pressuring Victim. The State also moved for mistrial on the basis of Victim's unavailability and asked the district court to issue a bench

warrant for Victim's failure to respond to her subpoena. The district court noted that with regard to intimidation, there was much "speculation as to what exactly occurred, if anything." Similarly, the court explained that Victim fled the jurisdiction and, therefore, could not discuss why she fled. Before deciding whether a mistrial or dismissal was appropriate, the district court wanted to do more research and asked both parties for additional authority. The district court temporarily dismissed the jury but kept them impaneled. The prosecutor again asked for a bench warrant for Victim's arrest due to her failure to appear pursuant to a subpoena.

{6} Approximately two weeks later, the district court granted the State's motion for mistrial. Explaining that the present issue was only whether a mistrial was appropriate at that time, the court reserved ruling on Defendant's motion to dismiss. The court found manifest necessity due to Victim's unavailability and released the jury that had been impaneled for two weeks. To determine whether a mistrial was appropriate, the district court relied on the law and did not utilize the tape of the Interview. Defense counsel made a proffer at the mistrial hearing and asserted that the court should use the Interview to establish whether the prosecutor was coercing and threatening Victim.

{7} The district court held a separate hearing on Defendant's motion to dismiss for prosecutorial misconduct. The special investigator and Victim both testified about the Interview. Victim said she felt "kind of scared" because the prosecutor and the special investigator told her they could take her son away if she failed to appear for court. Victim also explained that she fled because she was afraid the prosecutor would take her son. After reviewing the actual recording of the Interview and the parties' briefs, the district court issued its amended decision letter denying Defendant's motion for dismissal. The court found no prosecutorial misconduct and again said that there was manifest necessity for a mistrial. A direct appeal was then filed by Defendant.

II. DISCUSSION

{8} Defendant argues on appeal that there was no manifest necessity for mistrial, and double jeopardy bars retrial of the charges. U.S. Const. amend. V; N.M. Const. art. II, § 15. Defendant also argues that this Court should dismiss the charges with prejudice because the prosecutor's conduct had an immediate and severely prejudicial impact on his rights to present a defense and violated due process.

A. PROPRIETY OF THE MISTRIAL

{9} When the district court declares a mistrial, double jeopardy precludes retrial unless the defendant consented to the mistrial, or manifest necessity compelled the mistrial. *State v. Salazar*, 1997-NMCA-088, ¶ 5, 124 N.M. 23, 946 P.2d 227. The district court ruled that manifest necessity compelled a mistrial in the present case. "A motion for a mistrial is addressed to the sound discretion of the trial court and is only reviewable for an abuse of discretion." *Id.* ¶ 4 (internal quotation marks and citation omitted). "No mechanical rule exists for determining the existence of manifest necessity. The standard involves a careful weighing of [the] defendant's right to have his trial completed and the public's interest in a fair trial and just judgment." *State v. Messier*, 101 N.M. 582, 584, 686 P.2d 272, 274 (Ct. App. 1984). "An appellate court should be wary of substituting its judgment for that of the trial court." *State v. Alberico*, 116 N.M. 156, 170, 861 P.2d 192, 206 (1993).

{10} The absence or unavailability of a key prosecution witness may fall within the parameters of manifest necessity. *Messier*, 101 N.M. at 585, 686 P.2d at 275. In *Messier*, this Court held that when a critical state witness is unavailable for trial, it is not an abuse of discretion for the district court to declare mistrial on the basis of manifest necessity. *Id.* at 584-85, 686 P.2d at 274-75. Mistrial, however, is not proper merely to allow the state to strengthen its case, where the state seeks a mistrial in bad faith, or where the witness is absent due to prosecutorial neglect. *Id.* at 584, 686 P.2d at 274. "Determination of the propriety of manifest necessity must be made under the particular facts of each individual case." *Id.* at 584-85, 686 P.2d at 274-75.

{11} Defendant attempts to distinguish *Messier* by arguing that the State acted in bad faith in seeking a mistrial, and the district court did not explore reasonable alternatives to mistrial. We disagree.

1. Bad Faith

{12} Defendant claims the State, believing that Victim would testify inconsistently with her grand jury testimony, participated in her absence or encouraged her not to testify. As such, Defendant believes the State acted in bad faith in seeking the mistrial. A prosecutor acts in bad faith when an action is "designed to afford the prosecution a more favorable opportunity to convict." *State v. Mestas*, 93 N.M. 765, 767, 605 P.2d 1164, 1166 (Ct. App. 1980).

{13} Due to Victim's failure to appear at trial pursuant to a subpoena, the district court found that this key witness was unexpectedly unavailable for the purposes of manifest necessity. In considering its ruling, the district court did look at whether the State in some way encouraged Victim's unavailability. To determine the propriety of whether manifest necessity existed, we strongly defer to the district court's factual determination of the reason behind the witness's unavailability. *See Salazar*, 1997-NMCA-088, ¶ 9 (explaining that the trial court performs a fact-finding role in resolving disputes and should be given "wide latitude" in making factual determinations). Nonetheless, in instances "when the basis for the mistrial is the unavailability of key prosecution evidence . . . the strictest scrutiny is necessary." *State v. Saavedra*, 108 N.M. 38, 42, 766 P.2d 298, 302 (1988).

{14} We conclude that where a mistrial is granted due to witness unavailability, the central question is whether the prosecutor was aware that the critical witness was unavailable before the jury was impaneled and sworn, thus acting in bad faith in seeking a mistrial. See *Arizona v. Washington*, 434 U.S. 497, 508 n.24 (1978) ("If . . . a prosecutor proceeds to trial aware that key witnesses are not available to give testimony and a mistrial is later granted for that reason, a second prosecution is barred."); *see also Downum v. United States*, 372 U.S. 734, 737 (1963) (finding no manifest necessity when prosecution's key witness failed to attend trial where district attorney impaneled a jury without serving prosecution witness with a summons and made no other arrangements to assure the witness would attend); *United States v. Gallagher*, 743 F. Supp. 745, 749 (Or. 1990) (finding manifest necessity for mistrial when an essential government witness abruptly and unexpectedly announced that he was a liar and refused to answer questions after both parties had emphasized witness's testimony in opening statements); *McCorkle v. State of Maryland*, 619 A.2d 186, 190 (Md. Ct. Spec. App. 1993) (explaining that the crucial question for manifest necessity due to witness

unavailability is whether the prosecution was aware of witness unavailability at the time jeopardy attaches).

{15} Focusing on the timing of the prosecutor's awareness protects against the prosecutor using the "first proceeding as a trial run of his case" and seeking a bad faith mistrial to buttress weaknesses in the state's evidence. *Arizona*, 434 U.S. at 508 n. 24. In *Downum*, the absence of the prosecution's key witness formed the basis of the mistrial declaration. 372 U.S. at 734-37. Unlike the present case, the prosecution in *Downum* knew about the key witness's absence before the first jury was impaneled and sworn. *Id.* at 735. In fact, it was this distinction on which the case turned. The Court noted that "when the district attorney impaneled the jury without first ascertaining whether or not his witnesses were present, he took a chance." *Id.* at 737 (internal quotation marks and citation omitted). "The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict." *Id.* (internal quotation marks and citation omitted); *see also State v. Nielsen*, 761 A.2d 876, 879 (Me. 2000) (finding no manifest necessity where state chose to proceed with trial and examine numerous witnesses before making a determination that it was necessary to seek mistrial).

{16} In the present appeal, the State moved for mistrial prior to the commencement of trial testimony when Victim failed to appear. Unlike *Downum*, where the prosecution made no effort to secure witness attendance, the Victim in the present case was under a subpoena. Similarly, the State had not "assumed the risk of not finding its key witness," as in *Nielsen*, because the State moved for mistrial as soon as the prosecutor realized Victim was unavailable. 761 A.2d at 879. In addition, Defendant did not produce any facts to establish that the State was aware of Victim's absence prior to jeopardy attaching. In fact, the record appears to reflect the opposite. The State expected and encouraged Victim to appear and offered to drive her to the courthouse to insure her appearance. It appears clear from the evidence that jeopardy had attached, Victim failed to appear due to a concern that she might testify inconsistently with her sworn grand jury testimony, and such inconsistent testimony could constitute perjury. If she did appear and commit perjury, such testimony could also result in a criminal charge of perjury against her.

{17} Defendant argues Victim's fear and subsequent failure to appear were the result of an improper perjury warning from the State. In many circumstances, however, a testifying witness should be warned about the possibility of a perjury charge. *See United States v. Davis*, 974 F.2d 182, 187 (D.C. Cir. 1992) ("[T]here are circumstances when warnings about the possibility and consequences of a perjury charge are warranted—even prudent"); *see also State v. Baca*, 1997-NMSC-045, ¶ 36, 124 N.M. 55, 946 P.2d 1066, (holding that a prosecutor's warning to defense witness that if she testified untruthfully she could be charged with perjury was not threatening and therefore not reversible error), *overruled on other grounds by State v. Belanger*, 2009-NMSC-025, 146 N.M. 357, 210 P.3d 783. We cannot conclude that this warning amounted to procurement of witness unavailability such that the State acted in bad faith in seeking a mistrial. In fact, the State did everything it could to get Victim to trial, including an offer to drive her to the courthouse and asking the district court to issue a bench warrant for Victim's arrest after her failure to appear.

{18} Finally, the State did not take a

chance but had reason to believe Victim would appear at trial and testify. Our review of the evidence confirms the district court's determination that Victim acted on her own accord when she decided not to appear at trial. Her failure to appear at trial was not encouraged or attributed to by any action of the State and, therefore, the State was not aware at the time jeopardy attached that Victim would be unavailable. The district court did not abuse its discretion in finding that the State did not act in bad faith in seeking a mistrial based on Victim's unavailability.

2. Reasonable Alternatives

{19} Having found that the State did not act in bad faith, we must look at whether the district court explored alternatives to a mistrial. "Before a mistrial is granted, other reasonable alternatives must be considered." *Messier*, 101 N.M. at 585, 686 P.2d at 275. While a court must examine other reasonable alternatives to mistrial, explicit findings on those options are not required. *Id.*

{20} Defendant argues that the district court did not appropriately explore alternatives to mistrial. We disagree. To support his argument, Defendant cites *State v. Yazzie*, 2010-NMCA-028, 147 N.M. 768, 228 P.3d. 1188. In *Yazzie*, this Court held there was no manifest necessity when defense counsel inquired about the defendant's prior bad acts and plea bargain during cross-examination of the victim. *Id.* ¶ 14. The district court declared a mistrial before the victim answered the questions. *Id.* Manifest necessity was improper because the district court failed to explore reasonable alternatives, such as curative instructions. *Id.* ¶ 19.

{21} Defendant's authority is not persuasive. In *Yazzie* and the other authorities cited by Defendant, trial testimony had already commenced and thus, reasonable alternatives were more readily available. *See Taylor v. State*, 811 So. 2d 803, 804-05 (Fla. Dist. Ct. App. 2002) (per curiam) (reasoning that the district court failed to explore reasonable alternatives to mistrial, such as severance, where trial had commenced and the court granted co-defendant's motion for mistrial despite the defendant's objection and willingness to continue with trial); see also *Thomason v. State*, 620 So. 2d 1234, 1239 (Fla. 1993) (explaining that there is no manifest necessity when, three days into trial, defense attorney suddenly became ill and the trial court actively refused to consider reasonable alternatives, such as a two week continuance or contacting defense attorney's doctor); *Nielsen*, 761 A.2d at 879 (finding no manifest necessity where the state chose to proceed with trial when a key witness was unavailable, but explaining that there would have been reasonable alternatives to mistrial had the State moved for continuance or dismissal without prejudice prior to trial).

{22} The present facts are closer to this Court's decision in *Messier*. In *Messier*, the audio portion of a previously recorded videotape examination of the key child witness for the state was defective. 101 N.M. at 583, 686 P.2d at 273. Due to an existing illness and a prior ruling that in-person testimony would cause the child harm, the witness was considered unavailable. *Id.* at 584, 686 P.2d at 274. Rather than immediately granting mistrial, the trial court continued the trial until the following day. *Id.* at 585, 686 P.2d at 275. At that time, the trial court concluded that "reexamining whether the witness could be called in person was the only reasonable alternative." *Id.* at 586, 686 P.2d at 276. After holding a second hearing and again finding the child witness could not be called to testify in person, the trial court declared a

mistrial based on manifest necessity. Under those facts, this Court determined the district court did not abuse its discretion. *Id.*

{23} Additionally, unlike *Yazzie*, where the error was evidentiary and could be addressed by a curative instruction, such options were not readily apparent or available in the present case. Recognizing this dilemma, the district court refused to immediately grant a mistrial. Instead, the district court kept the jury impaneled and considered the feasibility of a continuance for two weeks so that Victim might be made available to testify. The district court granted a mistrial only after evidence was presented to show that Victim left the jurisdiction on her own accord, her location was unknown, and the timing of her return could not be determined. Accordingly, we hold that the district court adequately considered other factors short of mistrial and reasonably delayed its ruling until other reasonable alternatives had been considered and eliminated. We affirm the district court's finding of manifest necessity for a mistrial.

B. DOUBLE JEOPARDY BASED ON PROSECUTORIAL MISCONDUCT

{24} Defendant asserts that double jeopardy bars his retrial due to prosecutorial misconduct. This Court reviews a claim of double jeopardy de novo, examining the prosecutor's conduct in light of the totality of the circumstances and giving deference to the district court's factual findings when they are supported by substantial evidence. *State v. Breit*, 1996-NMSC-067, ¶ 40, 122 N.M. 655, 930 P.2d 792; *State v. Gonzales*, 2002-NMCA-071, ¶ 10, 132 N.M. 420, 49 P.3d 681.

{25} Retrial may be barred under Article II, Section 15 of the New Mexico Constitution when (1) improper official conduct is so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial, (2) the official knows that the conduct is improper and prejudicial, and (3) the official intends to provoke a mistrial or acts in willful disregard of the resulting mistrial. *Breit*, 1996-NMSC-067, ¶ 32. The test to find prosecutorial misconduct is objective, focusing on the effect of the prosecutor's conduct on the trial rather than the prosecutor's belief regarding his or her conduct. *State v. McClaugherty*, 2008-NMSC-044, ¶¶ 26-27, 144 N.M. 483, 188 P.3d 1234. We now apply the three factors set forth in *Breit* to the particular facts and circumstances in this case.

1. Unfair Prejudice

{26} First, we address whether the prosecutor's conduct was so unfairly prejudicial to Defendant that it could not be cured by means short of a mistrial or motion for new trial. *See Breit*, 1996-NMSC-067, ¶ 32. We cannot say that the prosecutor's statements during the Interview were so unfairly prejudicial that it caused Victim's unavailability at trial and could be cured by means short of a mistrial.

{27} Victim chose to hide and make herself unavailable to testify because she told the prosecutor during the Interview that her testimony might be inconsistent with her previous grand jury testimony. The prosecutor explained to Victim that it would be considered perjury to testify inconsistently with prior sworn testimony and encouraged Victim to tell the truth during trial. The State was also concerned that Victim's change in testimony was due to pressure from Defendant and his family. The State did not encourage Victim to testify falsely and also explained that an act of perjury would carry potential

criminal consequences. Finally, the State's special investigator asked Victim to consider and understand one of the specific personal consequences that might result if she committed perjury and was actually charged with perjury due to her sworn testimony. Although these statements clearly scared Victim, they were legally accurate and did not misrepresent the potential implications of committing perjury while testifying under oath. As such, they cannot be deemed prosecutorial misconduct or unfairly prejudicial to Defendant.

{28} Similarly, Defendant fails to show how he was prejudiced by the State's conduct. Defendant claims Victim's testimony will exculpate him and argues that the State "intimidate[d], harrass[ed] and frighten[ed] a potentially exculpatory witness into either silence or collusion." First, we are not convinced that Victim's testimony will be exculpatory. Here, Victim is not a defense witness. She is under subpoena from the State, and the State is expecting her to testify truthfully. Although Victim originally failed to appear for trial, she later obtained an attorney, and through that attorney indicated that she will now appear in court to testify. Despite Victim's present availability to testify, Defendant speculates that she will not testify truthfully, and he will be falsely implicated because of Victim's concerns about committing perjury. We will not speculate about Victim's testimony at trial, whether it will prejudice Defendant, or any of the legal consequences that might result if Victim testifies falsely and commits perjury. Therefore, Defendant is unable to establish prejudice at this time, and we hold that the first prong of the *Breit* test has not been satisfied. Although failing to satisfy the first prong disposes of Defendants' double jeopardy arguments, we shall also proceed to address the other two prongs.

2. Improper and Prejudicial Conduct

{29} The second prong of the *Breit* test requires us to consider whether the prosecutor knew or should have known that the conduct was improper and prejudicial. *State v. Lucero*, 1999-NMCA-102, ¶ 24, 127 N.M. 672, 986 P.2d 468. We presume that a prosecutor is aware of the rules of professional conduct and the illegality of threatening witnesses. While Defendant correctly notes that the prosecution cannot "intimidate, harass and frighten" a witness not to testify, it is proper for the prosecutor and the court to "advise a witness that testimony which differs from prior sworn testimony may give rise to perjury charges." *Baca*, 1997-NMSC-045, ¶ 35. Here, the statements made by the prosecutor and the special investigator were intended to specifically alert Victim to some of the severe consequences that may result from committing perjury. It is not illegal or unethical to make a witness aware of these consequences. *See State v. Stanley*, 720 A.2d 323, 330 (Md. 1988) ("Generally, a party may warn its witness of the ramifications of perjury.").

{30} The prosecutor's statements during the Interview fail to reach the standard of egregiousness required to establish prosecutorial misconduct. *See Gonzales*, 2002-NMCA-071, ¶ 14 (holding that dismissal of criminal charges for prosecutorial misconduct should only be used for "the most severe prosecutorial transgressions"). The prosecutor and the special investigator consistently told Victim that the purpose of the Interview was to prepare her for trial and that her duty at trial was to tell the truth. The meeting lasted thirty minutes, and the tone of the Interview remained cordial at all times. When Victim said that Defendant never touched her, the prosecutor warned her of the possibility that false testimony might cause her

to face charges for perjury. The special investigator then brought up the additional possibility that Victim might lose her child if she were to be charged with perjury. The tone of this portion of the conversation, paired with the prosecution's concern that Victim's family was pressuring her to recant, indicate that the discussion was meant to warn Victim of the seriousness and potential consequences of lying under oath.

{31} Additionally, Victim, herself, testified that she felt "kind of scared" because the prosecutor and the special investigator told her they could take her son away if she failed to appear. Although statements regarding the consequences that could affect Victim's child might be considered scary to a young witness, the prosecutor could not have known or expected that Victim would flee as a result of the Interview. Instead, it is more reasonable for the prosecutor to believe that Victim would testify truthfully and be ready to explain any prior inconsistent statements that she had made before the grand jury. Similarly, although not independently significant, we note again that Victim was a State witness, not a witness for the defense. Thus the State was advising Victim to testify truthfully, not attempting to silence her. Taken in context, the district court could reasonably determine that the prosecutor's statements during the Interview do not rise to the level of a threat or that the State's conduct was improper and prejudicial. As a result, the second prong of the *Breit* test was not satisfied.

3. Willful Disregard

{32} Finally, Defendant argues that the State "acted in a way that demonstrated willful disregard of a potential discharge of proceedings." "Willful disregard" means "a conscious and purposeful decision . . . to dismiss any concern that . . . conduct may lead to a mistrial." *Breit*, 1996-NMSC-067, ¶ 34.

{33} In support of his argument, Defendant asserts that the State was attempting to obtain a conviction "at all costs." Defendant also claims that Victim was never unavailable and the "prosecution knew exactly where [Victim] was on the morning of trial." To the extent Defendant speculates about some grandiose plan by the State for Victim not to show up to trial, the evidence presented before the district court did not support such a plan. Defendant fails to cite to any facts in the record or other authority in support of this contention, and we decline to review Defendant's undeveloped argument on appeal. *See State v. Ortiz*, 2009-NMCA-092, ¶ 32, 146 N.M. 873, 215 P.3d 811 (noting that it is the party's responsibility to connect legal theories to the pertinent elements and the factual support for those elements and that this Court may decline to review undeveloped arguments on appeal).

{34} After thorough review of the record, we agree with the district court that the actions by the State did not constitute prosecutorial misconduct.

C. DISMISSAL OF CHARGES WITH PREJUDICE

{35} Defendant argues that this Court should dismiss the charges against him with prejudice because the prosecutor's actions had an immediate and severely prejudicial effect on his right to present a defense and his due process right to compulsory process. Defendant, however, does not indicate whether he preserved this argument or whether preservation was necessary. Additionally, Defendant fails to cite to the record to support his claims. We also note that Defendant's argument was premature and speculative. As

such, we will not consider his argument on appeal. *See State v. Gonzales*, 2011-NMCA-007, ¶ 19, 149 N.M. 226, 247 P.3d 1111 (explaining that this Court has no duty to review arguments that are not adequately developed), *cert. denied*, 2010-NMCERT-012, 150 N.M. 492, 263 P.3d 269 (No. 32,684, Dec. 16, 2010); *see also State v. Torres*, 2005-NMCA-070, ¶ 34, 137 N.M. 607, 113 P.3d 877 (stating that this Court will not address issues unsupported by argument and authority).

III. CONCLUSION

{36} We hold that there was manifest necessity for a mistrial and that the State did not commit prosecutorial misconduct during the Interview conducted with Victim prior to trial. As a result, we conclude that double jeopardy does not bar retrial of Defendant, and we remand this matter to the district court for a new trial.

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

TIMOTHY L. GARCIA, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

LINDA M. VANZI, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-014

Filing Date: December 12, 2011

Docket No. 29,705

T. DAVID THOMPSON, Individually and as the Personal Representative of the ESTATE OF CAROLYN ROSE BENNETT,

Plaintiff-Appellant,

v.

DOYLE D. POTTER, R.PH., and NCS HEALTHCARE OF NEW MEXICO, INC., a/k/a NCS HEALTHCARE ALBUQUERQUE,

Defendants-Appellees.

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OPINION

VIGIL, Judge.

{1} This case requires us to examine for the first time the nature of the duty owed by a consulting pharmacist that has contracted with a nursing facility to provide pharmaceutical services to the patients of the nursing facility. On the record before us, we hold that there is no issue of material fact and that Defendants were properly granted summary judgment on all of Plaintiff's claims.

BACKGROUND

{2} Ms. Carolyn Bennett was admitted to the Casa Arena Blanca nursing home with a diagnosis of early dementia. Upon admission, her doctor prescribed Ativan to control agitation and seizure activity commonly associated with dementia. The prescription ordered that Ativan be administered three times per day, as well as on an as-needed "prn" basis for severe agitation. Eleven months after her admission, Ms. Bennett's doctor called Casa Arena and told a nurse employed by Casa Arena to discontinue the as-needed Ativan dose. The nurse improperly transcribed the order. Instead of discontinuing the as-needed Ativan dose, the nurse discontinued the daily dose. After missing twenty-one scheduled daily doses of Ativan over a period of seven days, Ms. Bennett suffered a grand mal seizure in her bathroom at Casa Arena and fell, which resulted in a fracture to her right hip. Ms. Bennett later died.

{3} Plaintiff, as husband and personal representative of Ms. Bennett, sued, asserting that Ms. Bennett's seizure was caused by the sudden and abrupt withdrawal of Ativan. He did not sue the nurse who improperly transcribed the doctor's order; he did not sue the nurse's employer, Casa Arena; and he did not sue the doctor who changed the prescription. He sued NCS Healthcare of Albuquerque (NCS),[1] which was under contract with Casa Arena to provide pharmacy consultant services and pharmacy services to Casa Arena, and its registered pharmacist, Doyle Potter (Defendant). Plaintiff brought claims against NCS and Defendant for breach of contract, negligence, and negligence per se.

{4} Defendants filed motions for summary judgment. The district court initially denied the motions but then reconsidered and granted summary judgment in favor of Defendants on all of Plaintiff's claims. Plaintiff appeals, and we affirm. In our analysis of the issues, we discuss additional facts as necessary.

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[1]Plaintiff actually sued Omnicare Pharmacy of New Mexico, as the successor corporation of Sunscript Pharmacy Corporation. Sunscript Pharmacy Corporation is now known as NCS Healthcare Albuquerque (NCS). After the suit was filed, the parties filed a joint pleading stating that NCS Healthcare of New Mexico, Inc. a/k/a NCS Healthcare Albuquerque and Doyle Potter are the proper Defendants.

DISCUSSION

The District Court's Reconsideration of Defendants' Motion for Summary Judgment

{5} As an initial matter, we address Plaintiff's argument that the district court erred in reconsidering Defendants' previously denied motions for summary judgment. The denial of a summary judgment motion is an interlocutory order and may be reconsidered by the district court at any time before final judgment. *Tabet Lumber Co. v. Romero*, 117 N.M. 429, 431, 872 P.2d 847, 849 (1994). Further, "[i]t is permissible to renew motions for summary judgment previously denied." *Cordova v. City of Albuquerque*, 86 N.M. 697, 705, 526 P.2d 1290, 1298 (Ct. App. 1974). To the extent Plaintiff suggests that the district court must provide a rationale for reconsidering its order, Plaintiff has failed to cite any rule or case which requires the district court to state the basis for reconsidering its denial of a motion for summary judgment. *See In re Adoption of Doe*, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (explaining that issues raised on appeal that are unsupported by legal authority will not be reviewed on appeal). Further, while it is certainly preferable to know the district court's basis for granting or denying a motion for summary judgment, there is no requirement that the district court state its reasons beyond a statement that no genuine issues of material fact exist, and a specification of the ground upon which summary judgment has been granted if alternative grounds seeking summary judgment have been presented. *Skarda v. Skarda*, 87 N.M. 497, 499-500, 536 P.2d 257, 259-60 (1975); Rule 1-056(C) NMRA.

{6} Thus, we conclude that the district court did not err in reconsidering Defendants' previously denied motions for summary judgment, and we proceed to determine whether summary judgment was properly granted on the merits.

Standard of Review

{7} "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. "On appeal from the grant of summary judgment, we ordinarily review the whole record in the light most favorable to the party opposing summary judgment to determine if there is any evidence that places a genuine issue of material fact in dispute." *City of Albuquerque v. BPLW Architects & Eng'rs, Inc.*, 2009-NMCA-081, ¶ 7, 146 N.M. 717, 213 P.3d 1146. "However, if no material issues of fact are in dispute and an appeal presents only a question of law, we apply de novo review and are not required to view the appeal in the light most favorable to the party opposing summary judgment." *Id.*

{8} The party moving for summary judgment has the burden of establishing a prima facie case for summary judgment by presenting "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 10, 148 N.M. 713, 242 P.3d 280. The burden then "shifts to the non-movant to demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Id.* (internal quotation marks and citation omitted). "When a motion for summary judgment is made and supported . . . an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine

issue for trial." Rule 1-056(E).

Breach of Contract Claims

{9} NCS and Casa Arena entered into two contracts, a pharmacy consultant agreement in which NCS agreed "to be responsible for the general supervision of the pharmaceutical products and pharmacy services provided" to Casa Arena and a pharmacy services agreement that relates to the purchase of pharmacy products and services. Plaintiff contends that NCS violated these contracts in various ways, causing Ms. Bennett's injuries and damages. Plaintiff asserts that although Ms. Bennett was not a party to the contracts, the breach of contract claims survive because NCS and Casa Arena intended Casa Arena residents, including Ms. Bennett, to be third-party beneficiaries of the contracts. Plaintiff bases his argument on the fact that performance of the contracts results in benefits to Casa Arena residents. Conversely, Defendants argue that the contracts in plain language clearly and unambiguously express an intent to exclude any rights in third parties. Defendants specifically point to a clause in both agreements that states: "Nothing in this Agreement is intended nor will be deemed to confer any benefits on any third party." We therefore proceed to determine whether Ms. Bennett is a third-party beneficiary of the contracts.

{10} Generally, "[o]ne who is not a party to a contract cannot sue to enforce it." *Casias v. Cont'l Cas. Co.*, 1998-NMCA-083, ¶ 11, 125 N.M. 297, 960 P.2d 839. However, "[a] third-party may have an enforceable right against an actual party to a contract if the third-party is a beneficiary of the contract." *Callahan v. N.M. Fed'n of Teachers-TVI*, 2006-NMSC-010, ¶ 20, 139 N.M. 201, 131 P.3d 51. There are two classes of potential beneficiaries to a contract, intended and incidental. *Tarin's, Inc. v. Tinley*, 2000-NMCA-048, ¶ 13, 129 N.M. 185, 3 P.3d 680. Only an intended beneficiary has a right to enforce a contract to which he is not a party. *Id.* The determination of whether a party is an intended beneficiary depends on the intent of the parties in making the contract. *Id.* Intent to benefit a third party "must appear either from the contract itself or from some evidence that the person claiming to be a third party beneficiary is an intended beneficiary." *Valdez v. Cillessen & Son, Inc.*, 105 N.M. 575, 581, 734 P.2d 1258, 1264 (1987). *Permian Basin Inv. Corp. v. Lloyd*, 63 N.M. 1, 7-8, 312 P.2d 533, 537 (1957). Incidental beneficiaries, on the other hand, are those who may derive incidental benefits from the performance of the contract but who were not intended to have rights to enforce it. Plaintiff contends that there are ambiguities in the contracts concerning whether the residents are third-party beneficiaries, and that the district court should have considered extrinsic evidence to determine whether such ambiguities existed. We take each argument in turn.

A. Viewing the Contract as a Harmonious Whole

{11} Plaintiff argues that when viewed as a harmonious whole, the contracts between NCS and Casa Arena evidence an intent to benefit Casa Arena residents. Plaintiff argues that despite the third-party exclusionary clauses, the parties' intent is evidenced by benefits to Casa Arena residents which result from performance of the contracts. Thus, Plaintiff contends, the contracts are ambiguous as to whether the third-party exclusionary clauses include Casa Arena residents.

{12} Courts view the entire contract to determine if there is an ambiguity. *Heye v. Am. Golf Corp.*, 2003-NMCA-138, ¶ 14, 134

N.M. 558, 80 P.3d 495. A contract is ambiguous if different sections conflict or if the language of the contract is capable of more than one meaning. *Id.* We review issues of contract interpretation de novo. *See Cordova v. Bd. of Cnty. Comm'rs of Valencia Cnty.*, 2010-NMCA-039, ¶ 5, 148 N.M. 460, 237 P.3d 762, *cert. denied*, 2010-NMCERT-004, 148 N.M. 572, 240 P.3d 659.

{13} We have previously held that a clause in a contract specifically excluding third-party beneficiaries clearly established that the parties did not intend to grant any third-party rights under the contract. *Cobos v. Doña Ana Cnty. Hous. Auth.*, 121 N.M. 20, 25, 908 P.2d 250, 255 (Ct. App. 1995), *aff'd in part, rev'd in part on other grounds by* 1998-NMSC-049, 126 N.M. 418, 970 P.2d 1143. In *Cobos*, a tenant residing in a low-income housing project was killed by smoke inhalation as a result of the property failing to have smoke detectors. *Id.* at 21, 908 P.2d at 251. The estate argued that the deceased tenant was a third-party beneficiary of the contract between the housing authority and the rental property owner and could therefore sue for its breach. *Id.* at 24, 908 P.2d at 254. However, we concluded that the tenant was not a third-party beneficiary on the grounds that a clause in the contract stated: "Nothing in this Contract shall be construed as creating any right of the Family or other third party . . . to enforce any provision of this Contract, or to assert any claim against HUD, the PHA or the Owner under this Contract." *Id.* at 25, 908 P.2d at 255 (internal quotation marks omitted). We determined that, in spite of the fact that these types of housing assistance contracts were generally intended to benefit tenants like the decedent, the limiting clause in the contract established a clear intent to exclude any rights of a third party to enforce the contract. *Id.* We stated, "It is fundamental that if two contracting parties expressly provide that some third party who will be benefitted by performance shall have no legally enforceable right, the courts should effectuate the expressed intent by denying the third party any direct remedy." *Id.* (internal quotation marks and citation omitted).

{14} We conclude that *Cobos* is dispositive. NCS and Casa Arena clearly stated their intent in plain language within the contracts to deny any third-party beneficiary rights. Our public policy is to give effect to the intention of the parties, and we do not rewrite parties' agreements. *Nearburg v. Yates Petroleum Corp.*, 1997-NMCA-069, ¶ 23, 123 N.M. 526, 943 P.2d 560. The clear language excluding rights of third parties is not invalidated or made ambiguous by the incidental benefits received by the residents of Casa Arena. *See Flores v. Baca*, 117 N.M. 306, 310, 871 P.2d 962, 966 (1994) ("Contract liability to the promisee or third-party beneficiary for personal injuries proximately caused by misfeasance is dependent, therefore, upon the implied intent of the parties and upon the absence of an express contract provision to the contrary."). We conclude that Ms. Bennett has no contractual enforcement rights as a third-party beneficiary of the contracts between NCS and Casa Arena.

{15} Plaintiff also relies on the termination clauses of the contracts to support the argument that Ms. Bennett was a third-party beneficiary. The termination clauses of both contracts recognize that a failure to perform by Defendant NCS to perform "creates imminent jeopardy to patient safety" at Casa Arena. We conclude as a matter of law that this recognition of the importance of proper pharmaceutical services is not sufficient by itself to override the specific provisions denying third-party beneficiary status or to create a question of fact about its efficacy.

B. Consideration of Extrinsic Evidence

{16} Plaintiff also argues that the district court erred in failing to consider extrinsic evidence which creates a material issue of fact about whether NCS and Casa Arena intended to grant the residents of Casa Arena third-party beneficiary rights. Plaintiff relies on *Mark V, Inc. v. Mellekas*, 114 N.M. 778, 845 P.2d 1232 (1993), in arguing that the extrinsic evidence should have been considered for this purpose.

{17} Here, however, Plaintiff does not point to the extrinsic evidence that might establish an intent to benefit a third party to the contract, nor does Plaintiff point to any specific ambiguity in the contract. We conclude that Plaintiff failed to submit admissible relevant evidence to demonstrate an issue of material fact. The district court did not err in finding the contracts unambiguous and in granting summary judgment without considering any extrinsic evidence.

Negligence Claim

{18} Plaintiff also asserts that summary judgment was improperly granted on his negligence and negligence per se claims. Specifically, Plaintiff contends that Defendants breached common law and statutory and regulatory duties they owed to Ms. Bennett. "It is axiomatic that a negligence action requires that there be a duty owed from the defendant to the plaintiff; that based on a standard of reasonable care under the circumstances, the defendant breached that duty; and that the breach was a cause in fact and proximate cause of the plaintiff's damages." *Romero v. Giant Stop-N-Go of N.M., Inc.*, 2009-NMCA-059, ¶ 5, 146 N.M. 520, 212 P.3d 408.

Common Law Negligence Claim

A. Duty

{19} "Whether a duty exists is a question of law for the courts to decide[,]" which invokes de novo review on appeal. *Id.* ¶ 6. Duty may be based on common law, statutory law, or general negligence standard. *Lessard v. Coronado Paint & Decorating Ctr., Inc.*, 2007-NMCA-122, ¶ 30, 142 N.M. 583, 168 P.3d 155. "The question of the existence and scope of a defendant's duty of care is a legal question that depends on the nature of the [activity] in question, the parties' general relationship to the activity, and public policy considerations." *Edward C. v. City of Albuquerque*, 2010-NMSC-043, ¶ 14, 148 N.M. 646, 241 P.3d 1086. "To impose a duty, a relationship must exist that legally obligates a defendant to protect a plaintiff's interest, and in the absence of such a relationship, there exists no general duty to protect others from harm." *Estate of Haar v. Ulwelling*, 2007-NMCA-032, ¶ 15, 141 N.M. 252, 154 P.3d 67 (alteration, internal quotation marks, and citation omitted). The case is before us on summary judgment. We therefore proceed to examine the pertinent facts in greater detail to determine whether there are issues of fact about whether Defendants breached a duty they owed to Ms. Bennett.

{20} When Ms. Bennett was admitted to Casa Arena on February 9, 2004, her doctor prescribed daily doses of Ativan. Beginning in March 2004, the prescription ordered by her doctor directed that she be administered Ativan three times per day, as well as on an as-needed basis. Ms. Bennett's doctor renewed the orders for all of her medications, including the Ativan from that point forward, and from March 2004 until January 10, 2005, Ms. Bennett was given Ativan three times per day, as scheduled, as well as additional doses

of Ativan on an as-needed basis.

{21} On January 10, 2005, a nurse employed by Casa Arena received a telephonic order from Ms. Bennett's doctor to discontinue the as-needed dose of Ativan. The nurse improperly transcribed the order. Instead of discontinuing the Ativan as-needed order, the nurse discontinued the daily Ativan dose. Beginning on January 10, 2005, until January 17, 2005, when she had the grand mal seizure and fell, Ms. Bennett did not receive the scheduled routine doses of Ativan.

{22} No one from Casa Arena notified Defendant of the change in the prescription, although the pharmacy services contract required Casa Arena to notify Defendant "daily of any changes in resident medication upon receipt of physicians' orders[.]" The pharmacy consultant agreement and state regulations required Defendant to go to Casa Arena once per month to review the medication regimens of each patient. *See* 16.19.4.11(B)(1)(h) NMAC (08/27/1990) (amended 06/30/2006) (requiring that the consultant pharmacist "review [the] drug regimen of each patient at least once a month"). Pursuant to these requirements, Defendant reviewed Ms. Benentt's medications on December 14, 2004, and wrote her doctor a "note to attending physician" asking whether efforts could be made to discontinue her as-needed orders for Ativan. Ms. Bennett's doctor has no record of receiving this recommendation. Defendant did not return to Casa Arena until January 18, 2005, (the day after Ms. Bennett suffered the grand mal seizure and fell) to conduct his monthly review of the patients' medication regimens. Defendant did not receive communication from Casa Arena from December 14, 2004, to January 18, 2005, and he was not aware of any changes in Ms. Bennett's medications.

{23} New Mexico courts have not yet ruled on the existence or scope of a duty of consulting pharmacists to patients of a nursing facility. However, we need not reach that issue today because Plaintiff presented no evidence that Defendant had a duty or ability to control the nurse employed by Casa Arena when she made the transcription error or that Defendant had a duty or opportunity to detect the transcription error when it was made. Plaintiff presented no evidence that Defendant had a duty to monitor patients outside of the monthly review. Defendant was required to be at Casa Arena once a month to do his monthly review, and the error was made after Defendant performed his monthly review, and before he returned the following month. Further, Defendant was not informed of the change to Ms. Bennett's prescription as required by the pharmacy services contract, with the result that he was not able to take any appropriate corrective action.

{24} We conclude that there is no issue of material fact about whether Defendant violated any duty to Ms. Bennett based on the common law or a general negligence standard.

B. Voluntary Assumption of Duty

{25} Nevertheless, Plaintiff argues Defendant engaged in conduct giving rise to a duty under the "voluntary assumption of duty doctrine." This doctrine declares that "[o]ne who undertakes to act, even when under no obligation to do so, thereby becomes obligated to act with reasonable care." *Sanderson v. Eckerd Corp.*, 780 So. 2d 930, 931-32 (Fla. Dist. Ct. App. 2001) (quoting *Union Park Mem'l Chapel v. Hutt*, 670 So. 2d 64, 66-67 (Fla. 1996)). Florida courts have concluded there is no reason why the voluntary assumption of a duty doctrine could not be applied to a dispensing pharmacy in a proper case. *Id.* at 932; *Estate of Sharp v. Omnicare,*

Inc., 879 So. 2d 34, 37 (Fla. Dist. Ct. App. 2004). Plaintiff asks that we adopt the doctrine based on the following facts.

{26} The pharmacy services agreement allows a patient to choose his or her own pharmacy. On August 2, 2004, Plaintiff wrote a letter to Casa Arena "closing" Ms. Bennett's account with Defendants, and ordering, "Under no circumstances are there to be any future drug ordering attempts to N.C.S.!" A copy of the letter was sent to NCS. As we have already related, in connection with his monthly review of patient medications, Defendant made a recommendation to Ms. Bennett's doctor in a note dated December 14, 2004, that efforts be made to discontinue her as-needed orders for Ativan. Plaintiff contends that because Defendant made the recommendation, he had a duty to Ms. Bennett under the voluntary assumption of duty doctrine "because recommending modifications to Ms. Bennett's medication regime increased her risk of harm." Assuming we were to adopt the voluntary assumption of duty doctrine in relation to a consulting pharmacist, there is no evidence in the record that the recommendation, not transmitted to the doctor, and not acted upon, increased Ms. Bennett's risk of harm.

C. Special Relationship

{27} Plaintiff argues that Defendants owed a heightened duty to protect Ms. Bennett because they had a special relationship with her. Under New Mexico jurisprudence, special relationships "arise out of particular connections between the parties, give rise to a special responsibility, and take the case out of the general rule [that there is no general duty to aid or protect others]." *Johnstone v. City of Albuquerque*, 2006-NMCA-119, ¶ 14, 140 N.M. 596, 145 P.3d 76. The special relationship case law in New Mexico typically involves situations where there is a supervisory or treatment relationship, or where there is direct custody and control over another. *Id.* "[I]n order to create a duty based on a special relationship, the relationship must include the right or ability to control another's conduct." *Estate of Haar*, 2007-NMCA-032, ¶ 23 (internal quotation marks and citation omitted).

{28} The facts in this case fail to establish the control and custody elements necessary to establish a special relationship. A consultant pharmacist has neither the right nor ability to dispense or change prescriptions without a physician's order. *See* 16.19.11.8 NMAC(A)(2) (12/15/2002) (requiring that "[a]ll medications administered to patients shall be by direct order of a physician, or [a] licensed practitioner"). Further, facts must be presented demonstrating sufficient contact with a patient on a regular basis to establish custody or control over the patient. *See Lester ex rel. Mavrogenis v. Hall*, 1998-NMSC-047, ¶ 7, 126 N.M. 404, 970 P.2d 590 (holding that a doctor owed no duty to third parties injured by his patient because the "taking of the drug outside of [the doctor's] control made preventative measures more difficult and reliance on professional judgment more remote").

{29} Here, Defendant did not dispense or change Ms. Bennett's medications, nor did he have a contractual or other responsibility to monitor Ms. Bennett outside of a monthly review of her medication records. *See* 16.19.4.11(B)(1)(h) NMAC. Such a relationship is distinguishable from the typical cases establishing a special relationship due to custody, control, or a treatment relationship. *See City of Belen v. Harrell*, 93 N.M. 601, 603, 603 P.2d 711, 713 (1979) (involving the imposition of a duty of a jailer to a prisoner because of custody and control and knowledge

of prisoner's suicidal intent); *Wilschinsky v. Medina*, 108 N.M. 511, 512-13, 775 P.2d 713, 714-15 (1989) (holding that a doctor owed a duty to third parties when a powerful medication was administered to a patient in his office who then drove); *Lester*, 1998-NMSC-047, ¶ 6 (holding that a doctor who prescribed medication to a patient had no duty to third parties injured by the patient in car accident when the medication was taken out of the office). The evidence fails to establish that Defendants had the requisite custody and control over Ms. Bennett, for us to conclude that the general relationship between Defendants and Ms. Bennett gives rise to a special relationship, resulting in a special duty to protect her from harm.

{30} For the foregoing reasons, we conclude that there are no issues of material fact, and Defendants were entitled to summary judgment on Plaintiff's claim that Defendants had a special relationship with Ms. Bennett.

Negligence Per Se

{31} Plaintiff argues that summary judgment was improper on his negligence per se claims because there are issues of material fact about whether Defendants violated New Mexico regulations regarding consultant pharmacists, the New Mexico Resident Abuse and Neglect Act, and Federal Medicare statutes. We disagree.

{32} "[W]hen a statute imposes a specific requirement, there is an absolute duty to comply with that requirement, and no inquiry is to be made whether the defendant acted as a reasonably prudent man, or was in the exercise of ordinary care." *Heath v. La Mariana Apartments*, 2008-NMSC-017, ¶ 8, 143 N.M. 657, 180 P.3d 664 (internal quotation marks and citation omitted). Thus, negligence per se consists of the following elements:

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

Alcantar v. Sanchez, 2011-NMCA-073, ¶ 34, 150 N.M. 146, 257 P.3d 966 (alteration in original) (internal quotation marks and citation omitted). Further, the statute or regulation at issue must "define with specificity what is reasonable in a particular circumstance, such that the jury does not have to undertake that inquiry." *Heath*, 2008-NMSC-017, ¶ 9. Thus, the regulation or statute at issue must specify a duty that is distinguishable from the ordinary standard of care. *Abeita v. N. Rio Arriba Elec. Coop.*, 1997-NMCA-097, ¶ 21, 124 N.M. 97, 946 P.2d 1108. "[W]here duties are undefined, or defined only in abstract or general terms, leaving to the jury the ascertainment and determination of reasonableness and correctness of acts and conduct under the proven conditions and circumstances, the phrase negligence per se has no application." *Id.* (internal quotation marks and citation omitted).

{33} Plaintiff has failed to present for our consideration any statute, rule or regulation directing with specificity that Defendants perform, or refrain from, actions or conduct to prevent Casa Arena's nurse from making the transcription error, to detect the transcription error when it was made, or to be informed of a doctor's change to a patient's prescription at the time it is communicated to

the employee of a skilled nursing facility. Instead, the regulations impose general duties, unrelated to the specific facts of this case.

{34} For example, Plaintiff asks us to consider a regulation that requires a consultant pharmacist to have the duties and responsibilities to:

> (2) Ensure that drugs are handled in the facility in which he/she is the consultant pharmacist, in a manner that protect[s] the safety and welfare of the patient.
>
> (3) Set the policy and procedures in the facility as related to all facits [sic] of drug handling and distribution;
>
> . . . .
>
> (5) [Require the consulting pharmacist's] primary goal and objective shall be the health and safety of the patient, and he/she shall make every effort to assure the maximum level of safety and efficacy in the provision of pharmaceutical services.

16.19.4.11(A) NMAC. Plaintiff also cites a regulation requiring a pharmacy consultant agreement to specify that the consultant pharmacist has responsibilities which include the following (among others):

> (c) Monitor on a routine basis all aspects of the total drug distribution system–to be accomplished in a manner designed to monitor and safeguard all areas of the drug distribution system.
>
> . . . .
>
> (h) Make routine inspections of drug storage areas, patient health records, and review drug regimen of each patient at least once a month[, r]eport irregularities, contraindication, drug interactions, etc., to the medical staff.
>
> . . . .
>
> (j) Provide in-service training of staff personnel as outlined in the procedures manual.
>
> (k) Meet all other responsibilities of a consultant pharmacist as set forth in the Board regulations and federal or state laws and which are consistent with quality patient care.

16.19.14.11(B)(1) NMAC.

{35} Plaintiff argues that under these regulations, "Defendants had a duty to provide consultation on all aspects of the provision of pharmacy services at Casa Arena and to make every effort to assure the maximum level of safety and efficacy in the provision of pharmaceutical services, and there are genuine disputes of material fact regarding whether Defendants breached their duties and are liable for the death of Ms. Bennett." Plaintiff's argument overlooks the fact that the majority of regulations are not sufficiently specific under New Mexico standards to support a negligence per se claim in the factual setting before us. The one specific requirement of the regulations requires inspection of drug storage areas, health record and patient regimen "at least once a month." This requirement was echoed in the contracts between Casa Arena and NCS. Plaintiff has provided no facts that this schedule was either inadequate or not met. Thus, Plaintiff has

failed to provide any basis to argue that a question of fact exists in this regard in any event.

{36} Plaintiff also asserts that the failure of Defendants to train the nurse who made the transcription error was negligence per se. 16.19.4.11(B)(1)(j) NMAC states, "The consultant pharmacist's agreement with the facility shall include . . . [providing] in-service training of staff personnel as outlined in the procedures manual." The pharmacy consultant agreement incorporates this requirement, which requires Defendants to provide "annual training." Assuming that this regulation is sufficiently specific to support a negligence per se claim, Plaintiff has failed to make a showing that the regulatory requirement was violated.

{37} The nurse who incorrectly transcribed the prescription order was in orientation when she received the call from Ms. Bennett's doctor on January 10, 2005. However, there is no evidence of when annual training was provided by Defendants, and where in that cycle the nurse was hired. Because she was in orientation, the nurse had a preceptor who would teach her and show her how to complete the form for a prescription change. Moreover, she testified that Casa Arena had a policy and procedure for documenting telephonic orders and that she followed the procedure in this case. Plaintiff suggests that there is a question about whether the nurse's preceptor was herself properly trained. However, we have not been directed to any facts that support this suggestion.

{38} Plaintiff's argument that there are issues of material fact about whether Defendants violated the New Mexico Resident Abuse and Neglect Act, NMSA 1978, §§ 30-47-1 to -10 (1990, as amended through 2010), and federal statutes and regulations fails because Plaintiff fails to cite to any evidence in the record that they were violated by Defendants.

{39} For all the reasons set forth above, we conclude that the district court properly granted summary judgment on Plaintiff's claims of negligence per se.

CONCLUSION

{40} The order of the district court granting summary judgment in favor of Defendants is affirmed.

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

MICHAEL E. VIGIL, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

LINDA M. VANZI, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMSC-004

Filing Date: February 22, 2012

Docket No. 32,436

ESTATE OF DANIEL RALPH GUTIERREZ, by and through his personal representative, JANET JARAMILLO, individually and as next friend of SAGE G., JORDAN G., and NOAH G.,

Plaintiffs-Petitioners,

v.

METEOR MONUMENT, L.L.C. d/b/a ALAMEDA METEOR,

Defendant-Respondent.

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OPINION

CHÁVEZ, Justice.

{1} On August 31, 2003, while driving at approximately 7:00 p.m., Defendant Dean Durand crashed his Ford Bronco into a motorcycle driven by Daniel Gutierrez, ultimately resulting in Gutierrez's death. Durand admitted that earlier in the afternoon and up until 6:00 p.m., while at the business establishment operated by Defendant Meteor Monument, L.L.C., he had consumed seven twelve-ounce cans of beer and a twenty-four-ounce can of malt liquor, which has a higher alcohol content. He also testified that he consumed three ounces of malt liquor after 6:00 p.m. and ingested heroin and crack cocaine shortly before the accident. Approximately three and one-half hours after the accident, Durand's blood alcohol level was recorded at 0.09 gms/100 ml.

{2} Gutierrez's estate and family successfully sued both Durand and Meteor for Gutierrez's wrongful death. Only the verdict against Meteor is at issue in this appeal. The causes of action against Meteor were four-fold: (1) that Meteor was liable under the Alcohol Licensees Liability Act, also known as the New Mexico Dram Shop Liability Act (Dram Shop Liability Act), NMSA 1978, § 41-11-1 (1986), for serving alcohol to Durand when it was reasonably apparent that he was intoxicated; (2) that Meteor was negligent in

hiring, supervising, and retaining Durand, knowing that he was an alcoholic and permitting him to consume alcohol in excess while working for Meteor ("negligent supervision"); (3) that Meteor was vicariously liable for the negligence of its employees; and (4) that Meteor's conduct was so egregious that it was liable for punitive damages under the dram shop and employment causes of action.

{3} Meteor appealed to the Court of Appeals, raising five issues. First, Meteor contended that the evidence was insufficient to support a verdict on the dram shop liability cause of action because there was no evidence that identified which Meteor employee served Durand, nor was there any evidence from which the jury could find that Durand's intoxication was reasonably apparent to that server. Second, Meteor claimed as a matter of law that it could not be vicariously liable for Durand's actions because there was no evidence that Durand was in the scope of his employment at the time of the accident. Third, Meteor contended it did not have notice that the negligent supervision claim included Durand as one of its employees. Fourth, Meteor argued that the scope of employment instruction given by the trial court at the request of both parties was erroneous because the instruction inappropriately conflated vicarious liability and the negligent supervision causes of action. Fifth, Meteor contended that the evidence was insufficient to support a punitive damages verdict against it. *Estate of Gutierrez ex rel. Jaramillo v. Meteor Monument, LLC*, No. 28,799, slip op. at 1 (N.M. Ct. App. May 18, 2010).

{4} The Court of Appeals reversed the dram shop liability verdict and remanded the negligent supervision verdict for a new trial, and therefore it did not address the punitive damages claim. Slip op. at 19. Regarding the dram shop claim, the Court of Appeals concluded as a matter of law that the evidence was insufficient to support a finding that it was reasonably apparent to Meteor that Durand was intoxicated at the time he was sold alcohol because there was no evidence in the record identifying who sold Durand the alcohol. Slip op. at 17. Regarding the employment claims, the Court of Appeals agreed with Gutierrez that "employer vicarious liability was not argued" to the jury, slip op. at 8, nor could it have been, because the facts did not support a finding that Durand was acting in the course and scope of his employment at the time of the accident, slip op. at 9. This holding has not been challenged. However, with respect to the negligent supervision claim, the Court of Appeals concluded that Gutierrez did not include a claim for negligent supervision of Durand in his complaint, nor was such a claim clearly argued at trial, slip op. at 8, although the claim "was clearly contemplated by Plaintiffs and the court throughout the course of the trial," slip op at 12. In addition, the Court of Appeals concluded that scope of employment was not at issue in the negligent supervision claim. Slip op. at 13-14. Therefore, the Court determined that the jury was unable to decide the actual issues before it (1) because the jury was given a scope of employment instruction, (2) because of the confused fashion in which the case was argued, and (3) because in answering two jury questions, the trial court advised the jury that to hold Meteor liable, it must find that Durand was in the scope of his employment. Slip op. at 14. This confusion and uncertainty resulted in the Court of Appeals remanding the negligent supervision claim for a new trial, and therefore it did not reach the punitive damages issue. Slip op. at 15. Meteor did not cross-appeal.

{5} After granting Gutierrez's petition for

writ of certiorari regarding the dram shop claim, we conclude that (1) identification of the server was not essential, and (2) the circumstantial evidence in this case was sufficient for a jury to find that it was reasonably apparent to Meteor that Durand was intoxicated at the time he was last served alcohol. Regarding the negligent supervision claim, although the pleadings in this case are not a model of clarity, the trial court did not err in holding that Meteor was on notice that the negligent supervision claim included Durand as an employee. In addition, scope of employment may be a factor in a negligent supervision claim; both Gutierrez and Meteor requested a scope of employment instruction and agreed with the trial court's answers to the jury questions regarding that instruction. As a result, this error was invited, and the trial court did not abuse its discretion in rejecting Meteor's motion for a new trial. We therefore reverse the Court of Appeals and remand to that Court to address the issue regarding punitive damages.

I. PLAINTIFFS PRESENTED ENOUGH EVIDENCE UNDER THE DRAM SHOP LIABILITY ACT FOR THE JURY TO REASONABLY FIND THAT IT WAS "REASONABLY APPARENT" TO DURAND'S SERVER THAT DURAND WAS INTOXICATED AT THE TIME OF SERVICE.

{6} To establish a defendant's liability under the New Mexico Dram Shop Liability Act, a plaintiff must prove that the defendant licensee "(1) sold or served alcohol to a person who was intoxicated; (2) it was reasonably apparent to the licensee that the [patron] . . . was intoxicated; and (3) the licensee knew from the circumstances that the [patron] . . . was intoxicated." Section 41-11-1(A). The issue before us is whether, after viewing the evidence in the light most favorable to the jury verdict, we are convinced that the verdict cannot be sustained either by the evidence or reasonable inferences therefrom. *Gonzales v. New Mexico Dep't of Health*, 2000-NMSC-029, ¶ 18, 129 N.M. 586, 11 P.3d 550.

{7} Meteor contends that there is no evidence to support a finding that it was reasonably apparent to its employee-server that Durand was intoxicated at the time he was served. The Court of Appeals agreed. *Gutierrez*, No. 28,799, slip op. at 17. Initially the Court of Appeals acknowledged that a reasonable jury could find that Meteor's employees sold alcohol to Durand when Durand was intoxicated, and based on both the circumstances and Durand's history of alcoholism, it was reasonably apparent to Meteor's employees at the time they sold alcohol to Durand that he was intoxicated. Slip op. at 16. However, despite this acknowledgment, the Court of Appeals, applying a de novo standard of review, slip op. at 7, reversed the district court because "there [was] no evidence in the record regarding who sold the alcohol to Durand and, therefore, no evidence to support a finding that [Meteor] knew that Durand was drunk based on what was reasonably apparent." Slip op. at 17.

{8} We disagree with the Court of Appeals that the identity of the server who actually sold or served alcohol to a patron is a prerequisite to proving dram shop liability. In *Plummer v. Devore*, 114 N.M. 243, 247, 836 P.2d 1264, 1268 (Ct. App. 1992), *overruled on other grounds by State v. Martinez*, 2007-NMSC-025, ¶ 21, 141 N.M. 713, 160 P.3d 894, the Court of Appeals found sufficient evidence to support liability in a dram shop case without looking to the identity of the server. There are two reasons why evidence of

who actually served the patron is immaterial: (1) the reasonably-apparent prong is based on an objective standard—not what the actual server subjectively perceived about the patron's level of intoxication; and (2) circumstantial evidence can support a finding of what should have been reasonably apparent to a server regarding whether the patron was intoxicated at the time he or she was served alcohol.

A. THE "REASONABLY-APPARENT" PRONG CREATES AN OBJECTIVE STANDARD.

{9} We have consistently interpreted legislation using the adverb "reasonably" as imposing an objective standard. In *State v. Rudolfo*, 2008-NMSC-036, ¶ 17, 144 N.M. 305, 187 P.3d 170, we interpreted an "acted reasonably" requirement for self-defense as an objective, rather than subjective, element. Similarly, in *Shull v. New Mexico Potash Corp.*, 111 N.M. 132, 134, 802 P.2d 641, 643 (1990), we contrasted the subjective "good faith" standard with the objective "reasonable" standard. *Accord Kestenbaum v. Pennzoil Co.*, 108 N.M. 20, 27-28, 766 P.2d 280, 287-88 (1988) (same). As we explained in *Rudolfo*, 2008-NMSC-036, ¶ 17 (internal quotation marks and citation omitted), "the ['acted reasonably'] requirement is objective in that it focuses on the hypothetical behavior of a reasonable person acting under the same circumstances as the defendant." In *Plummer*, the Court of Appeals applied an objective standard to the reasonably-apparent prong when it concluded that the evidence was sufficient to support a finding that the server, who was unidentified, "knew or should have known" that the patron was intoxicated at the time the patron was sold alcohol. 114 N.M. at 247, 836 P.2d at 1268.

{10} Our interpretation of the reasonably-apparent prong as creating an objective standard is in accord with how other jurisdictions have interpreted similar dram shop act language. In *Becks v. Pierce*, 638 S.E.2d 390 (Ga. Ct. App. 2006), the Georgia Court of Appeals recognized that its dram shop act holds servers liable "if a provider in the exercise of reasonable care should have known" that the patron was intoxicated. *Id.* at 393 (internal quotation marks and citation omitted). In *Hutchens v. Hankins*, 303 S.E.2d 584 (N.C. Ct. App. 1983), the North Carolina Court of Appeals interpreted its dram shop act to impose liability where the server "knew or should have known that the patron was in an intoxicated condition at the time he or she was served." *Id.* at 594-95. In *Perseus, Inc. v. Canody*, 995 S.W.2d 202, 206-07 (Tex. App. 1999), the Texas Court of Appeals implicitly read its statute's "apparent to the provider" requirement to create an objective test. The *Perseus* court defined "apparent," a term also used in our Dram Shop Liability Act, as "[t]hat which is obvious, evident, or manifest; what appears, or has been made manifest. That which appears to the eye or mind; open to view; plain; patent." *Id.* at 206 (quoting *Black's Law Dictionary* 88 (5th ed. 1979) (internal quotation marks omitted)). The court reasoned that "[i]t is not the actual observation of conduct that makes the conduct 'apparent.' Rather, conduct is apparent when it is visible, evident, and easily observed." *Id.* at 206. The court therefore concluded that the "apparent" language indicated an objective standard. *Id.*

{11} The *Perseus* court explained its rationale for applying an objective standard, as follows:

> Were we to construe the statutory "apparent to the provider" requirement [to be subjective], then a provider of alcohol could always escape liability by merely turning a

> blind eye to signs of intoxication that are plain, manifest, and open to view. Surely this is not what the Legislature intended when it enacted legislation to hold providers responsible when they serve obviously intoxicated individuals.

Id. The Georgia Supreme Court echoed this same concern in *Riley v. H & H Operations, Inc.*, 436 S.E.2d 659, 661 (Ga. 1993), reasoning that "a construction of [its dram shop act] requiring *actual* knowledge would render the Act an ineffective sanction, since only when the defendant admitted its own knowledge could the plaintiff prevail."

{12} Similarly, in *Miller v. Ochampaugh*, 477 N.W.2d 105, 109 (Mich. Ct. App. 1991), the Michigan Court of Appeals held that Michigan's dram shop act requirement that the intoxication be "apparent to an ordinary observer" was an objective standard. The court reasoned, "had the Legislature wished to create a subjective standard, it could have worded the dramshop act accordingly." *Id.* The *Miller* court also expressed concern that the "adoption of a subjective standard would essentially do away with the dramshop cause of action," noting that a defendant could escape liability if the serving employee simply testified that he or she did not personally observe the patron to be intoxicated. *Id.* We agree and are persuaded that, in New Mexico, the Legislature intended the reasonably-apparent prong to require an objective standard of proof.

B. PLAINTIFFS MAY RELY ON CIRCUMSTANTIAL EVIDENCE OTHER THAN EVIDENCE AT THE TIME OF SERVICE TO PROVE WHAT WAS REASONABLY APPARENT TO THE SERVER.

{13} Although Meteor acknowledges that circumstantial evidence may support a finding under the reasonably-apparent prong, it contends that the circumstantial evidence must be from witnesses who were present at the time of service. Meteor does not cite case law to support this argument; instead it advances a policy argument that "the use of circumstantial evidence could be stretched to the point that evidence that is remote in either time or place could be used to find a licensee liable." We disagree. Again, the Court of Appeals opinion in *Plummer* is instructive. In *Plummer*, the Court of Appeals found sufficient evidence to support a finding under the reasonably-apparent prong, despite the lack of evidence from witnesses who were present at the time the patron was served alcohol. 114 N.M. at 247, 836 P.2d at 1268. The evidence in *Plummer* consisted of testimony from the patron regarding the length of time he was present at the bar, the results of a Breathalyzer test, and expert testimony interpreting the results of the test. *Id.*

{14} Other states with similar dram shop acts allow circumstantial evidence to be used to prove what the server should have known of the patron's intoxication. In *Kish v. Farley*, 24 A.D.3d 1198 (N.Y. App. Div. 2005), New York's intermediate appellate court explicitly addressed this issue. It stated that "visible intoxication may be established by circumstantial evidence," *id.* at 1200, and that no "direct proof in the form of testimonial evidence from someone who actually observed the allegedly intoxicated person's demeanor at the time and place that the alcohol was served" is required, *id.* (internal quotation marks and citation omitted). *See also Perseus*, 995 S.W.2d at 206-07 (holding that proof that the server actually witnessed the drunken behavior was not required).

{15} Applying this principle, in *Cadillac*

Cowboy, Inc. v. Jackson, 69 S.W.3d 383, 389-90 (Ark. 2002), the Arkansas Supreme Court found sufficient evidence that the patron was visibly intoxicated at the time of service, based on evidence that the patron consumed several beers before going to a club, followed by consuming at least one mixed drink at the club, combined with a police officer's testimony that the patron appeared intoxicated at the accident scene. Similarly, in *Studer v. Veterans of Foreign Wars Post 3767*, 925 N.E.2d 629, 637 (Ohio Ct. App. 2009), the Ohio Court of Appeals found a genuine issue of material fact as to what was apparent to the server based on several pieces of circumstantial evidence: the patron had consumed four beers before arriving at the serving bar; he had then consumed nine beers at the bar; he was a regular at the bar in question; bar employees had many chances to observe the patron at the bar; he appeared drunk at the time of his arrest shortly after the car accident following service; and he had a blood alcohol content well over the legal limit.

{16} In permitting the plaintiff to rely on circumstantial evidence that the patron's intoxication was obvious at the time of service, the *Studer* court reasoned:

> [I]t is logical to presume that a liquor permit holder, or its employee(s), may never make the admission that they continued to serve a person after that person exhibited signs of intoxication. For a liquor permit holder to make such an admission would be to concede liability on his behalf. Thus, the only way for a third party injured by an intoxicated person to substantiate his claim against the liquor permit holder would be by use of circumstantial evidence.

Id. at 636-37 (internal quotation marks and citation omitted). In summary, because the reasonably-apparent prong in the Dram Shop Liability Act is based on an objective standard, and because circumstantial evidence at a time other than the time of service may be sufficient to prove what a server should have known regarding the level of the patron's intoxication at the time the patron was served, the identity of the server is not essential. We next turn to the evidence in this case to determine whether the evidence was sufficient for the jury to find Meteor liable to Gutierrez under the Dram Shop Liability Act.

C. PLAINTIFFS PRESENTED SUFFICIENT EVIDENCE UNDER THE "REASONABLY-APPARENT" PRONG.

{17} In assessing the sufficiency of the evidence, we review for substantial evidence. *See Weststar Mortg. Corp. v. Jackson*, 2003-NMSC-002, ¶ 8, 133 N.M. 114, 61 P.3d 823. "In reviewing the jury verdict for substantial evidence, we examine the record for relevant evidence such that a reasonable mind might accept as adequate to support a conclusion," viewing the facts in the light most favorable to the verdict. *Nava v. City of Santa Fe*, 2004-NMSC-039, ¶ 10, 136 N.M. 647, 103 P.3d 571 (internal quotation marks and citations omitted).

{18} Meteor contends that the only testimony regarding Durand's appearance at the time of sale was Durand's own testimony that he did not think he appeared drunk when he was last sold a beer by Meteor. Durand testified at his deposition that he was not intoxicated at the time Meteor employees sold him beer on the day of the accident, but later stipulated that he was intoxicated at the time Meteor employees sold him the beer that same day. He also testified that Meteor's

employees knew that he was drinking while working on August 31, 2003, because sometimes one of the employees would ask him for a drink. Durand believed that he could not have appeared intoxicated, boasting that he could still walk straight, and that in the past he would drink 18-20 beers and then drive to buy more beer. However, other evidence at trial calls into question Durand's self-assessment.

{19} The manager admitted that Durand's alcoholism was "pretty well-known" among Meteor employees. The manager also testified that Durand, a daily patron who also worked there, was usually visibly intoxicated by 3:00 p.m. Durand testified that the Meteor place of business is the only place he bought his beer. *See Studer*, 925 N.E.2d at 637 (noting that "[s]ignificantly, [the patron] was a regular at the . . . [bar] and admitted to consuming about eight beers per day"). Durand testified that the store's employees who were working on the day of the accident knew that when he purchased beer he was working and that he had been drinking all day long, because they observed him doing so. *See Plummer*, 114 N.M. at 247, 836 P.2d at 1268 (relying in part on the length of time that the patron spent at the bar); *Studer*, 925 N.E.2d at 637 (finding relevant that the servers had plenty of opportunities to observe the patron while on the premises).

{20} Moreover, Durand admitted that he drank seven twelve-ounce cans of beer and one twenty-four-ounce can of malt liquor, which has a higher alcohol content than regular beer, while he was at the Meteor business establishment. *See Plummer*, 114 N.M. at 247, 836 P.2d at 1268 (relying in part on the quantity of alcohol that the patron had consumed before the relevant service). Approximately one hour after Durand left Meteor, he crashed into Gutierrez. Officer Richard Castillo, who investigated the accident, testified that Durand's appearance indicated that Durand was intoxicated. He further testified that Durand's speech was slurred and his eyes were bloodshot. When Officer Castillo administered field sobriety tests to Durand, Durand was unable to complete the tests as instructed. Durand swayed heavily from side to side and missed the tip of his nose when he was asked to touch it with his forefinger. *See Studer*, 925 N.E.2d at 637 (an officer's observation of the patron at the accident scene was relevant to the patron's drunken state at the earlier time of service). Five hours after the accident and six hours after he was sold his last beer by Meteor, Durand's blood alcohol level was 0.09 gms/100 ml. *See Plummer*, 114 N.M. at 247, 836 P.2d at 1268 (relying in part on the patron's blood alcohol level). All of this circumstantial evidence was sufficient to support a jury finding that Durand was intoxicated at the time Meteor employees sold him beer and that it was reasonably apparent that he was intoxicated. Although Durand attributed his dangerous driving and poor performance on field sobriety tests to his consumption of illegal drugs minutes before the accident, the jury was free to reject this testimony.

II. BECAUSE BOTH PARTIES REQUESTED INSTRUCTIONS ON SCOPE OF EMPLOYMENT AND AGREED WITH THE COURT'S ANSWERS TO JURY QUESTIONS REGARDING SCOPE OF EMPLOYMENT, FUNDAMENTAL ERROR DOES NOT WARRANT A REMAND FOR A NEW TRIAL.

{21} The Court of Appeals remanded the negligent supervision claim for a new trial for three reasons. First, it was not clear in either the pleadings or during trial that Gutierrez

contended that Meteor was negligent in hiring, supervising, and retaining Durand. *Gutierrez*, No. 28,799, slip op. at 8. Second, the Court of Appeals disagreed with the trial court that if the scope of employment instruction was given in error, it was not fundamental error. Slip op. at 14. Third, because scope of employment was not an issue in this case, the jury was misdirected. Slip op. at 14-15.

{22} The Court of Appeals recognized that Meteor never objected to either of these jury instructions or counsel's arguments. Slip op. at 10-11. However, the Court decided that these errors, in sum, "created an environment in which the jury would have been unable to fairly determine the actual issues before it," and cited to a case reviewing unpreserved jury instruction error for fundamental error. Slip op. at 14.

{23} Gutierrez contends that the Court of Appeals was wrong to remand this case for a new trial under the fundamental error doctrine because this doctrine does not apply in civil cases and, in any event, because Meteor actively advocated for the instructions, there was no fundamental error. Meteor did not appeal the Court of Appeals' remand of the negligent supervision claim for a new trial. However, Meteor defends the Court of Appeals' remand, arguing that the Court did not rely on fundamental error because Meteor preserved all of the issues considered by the trial court, and the Court of Appeals was correct to conclude after a de novo review that the jury was confused or misdirected by the jury instruction on scope of employment. As part of this argument, Meteor contends that it did not have notice that Gutierrez alleged that Durand was one of the employees whom Meteor negligently supervised. *See Gutierrez*, No. 28,799, slip op. at 8, 10-12.

{24} Regarding the notice issue, we acknowledge that the pleadings in this case did not expressly list Durand as an employee whom Meteor negligently hired, supervised, or retained. In the pretrial order, which governed the proceedings, Gutierrez alleged that Meteor "negligently hired, trained, supervised, and retained [Nena] Brackeen, John Brackeen, and other employees and agents." Although it would have been a simple matter to name Durand as one of the "other employees," we agree with the trial court that the claim was "sufficiently pled [and] factually presented." The evidence during trial from witnesses and transcripts of depositions preserved for use during trial was primarily focused on Meteor's hiring and supervision of Durand. The evidence developed by Gutierrez was that the employees knew that Durand was an alcoholic, he consumed alcohol while performing work for Meteor, he was served alcohol while he worked, and he drove away from work after having consumed alcohol. Although the pleadings were imperfect, as was the trial of this case, Meteor had sufficient notice that Durand was the focus of Gutierrez's negligent supervision claim. In any event, Meteor has neither argued nor demonstrated any prejudice as a result of the negligent supervision claim being submitted to the jury. The trial court did not abuse its discretion when it allowed the claim of negligent supervision of Durand to go to the jury. *See Bellet v. Grynberg*, 114 N.M. 690, 692, 845 P.2d 784, 786 (1992) (no abuse of discretion in allowing a claim that was not well-pled unless the defendant did not have a fair opportunity to defend against the claim, creating prejudice).

{25} The more complicated issue concerns the scope of employment instruction that was given to the jury. Generally when a plaintiff seeks to hold an employer vicariously liable for the negligence of its employees, whether the employees' negligence occurred in the

scope of their employment may be at issue. *Lessard v. Coronado Paint & Decorating Ctr., Inc.*, 2007-NMCA-122, ¶ 40, 142 N.M. 583, 168 P.3d 155. However, even when an employee is alleged to have negligently caused injury to a plaintiff outside the employee's scope of employment, scope of employment may still be a factor for the jury to consider under a negligent hiring, supervision, or retention claim. *Id.*

{26} In this case, Gutierrez and Meteor each prepared a scope of employment instruction to be submitted to the jury. While the parties and the trial court were settling the jury instruction on the negligent supervision claim, the trial judge suggested that the parties needed to define the employer-employee relationship in the body of the negligent supervision instruction. Meteor's attorney advised the trial court that he also wanted to define scope of employment for the jury at that point in the instructions.

{27} Gutierrez's attorney indicated that he had the scope of employment instruction in his package of proposed instructions. Meteor's attorney next persuaded the trial court to modify the scope of employment instruction to specify that "Defendant Dean Durand's acts of smoking crack cocaine and injecting heroin were not within the scope of his employment." However, this was not without objection from Gutierrez, who contended that the revision of the standard uniform jury instruction seems to "completely negate the idea that anything Dean Durand does would be within the scope of employment." Thus, Gutierrez suggested that if the language proposed by Meteor were added, the trial court should also add that "[d]rinking alcohol and being served alcohol is within the course and scope of employment." Meteor responded, "[w]ell, that's a fact issue for the jury." Although the parties did not describe for the trial court the specifics of why they wanted a scope of employment instruction, they both wanted the instruction. Meteor appeared to believe that the instruction was significant on the issue of Durand drinking on the job. As we have indicated, scope of employment may be a factor for the jury to consider in a negligent supervision case. *Lessard*, 2007-NMCA-122, ¶ 40. How the parties thought that scope of employment might be a factor for the jury was not revealed to the trial court, but what is clear is that both parties wanted a scope of employment instruction. The trial court rejected Gutierrez's scope of employment instruction by modifying it at Meteor's request.

{28} During its deliberations, the jury asked two questions related to the scope of employment instruction. First, it asked whether, in order to find Meteor liable, it had to find both that Durand was an employee of Meteor and that he was "acting within the scope of his employment at the time of the occurrence." The trial court responded, with the consent of all parties, that both elements needed to be proven to find Meteor liable under the claim for negligent supervision. Second, the jury asked whether it could assess punitive damages if it found that Durand was an employee but was not acting in the scope of employment at the time of the occurrence. The trial court again responded, with the consent of all parties, that the jury could not assess punitive damages against Meteor if they found that Durand was not acting in the scope of his employment at the time of the occurrence.

{29} After the jury returned its verdict, Meteor moved for judgment as a matter of law notwithstanding the verdict and for a new trial. In this motion, Meteor did not challenge either the scope of employment instruction or the employer liability jury instruction, but rather

insisted that these jury instructions were "the law of the case," quoting *Payne v. Hall*, 2004-NMCA-113, ¶ 18, 136 N.M. 380, 98 P.3d 1030. Meteor capitalized on these instructions to urge the trial court to conclude that there was insufficient evidence to support the jury's verdict.

{30} It was not until the hearing on Meteor's motion for judgment as a matter of law that Meteor first contended that the scope of employment instruction should not have been given. Meteor argued that the scope of employment instruction mixed vicarious liability and direct liability for negligent hiring and "may have colored the whole jury deliberations." Meteor went on to argue that there was no evidence that Durand was in the scope of his employment at the time of the accident. The trial court replied that the argument was that "the scope of his employment was getting drunk and his employer letting him get drunk and then leaving and putting the public at risk." Meteor disagreed with the trial court's interpretation.

{31} The post-trial objection to the scope of employment instruction is not sufficient for Meteor to have preserved this error. *See Kelly v. La Cueva Ranch Co.*, 25 N.M. 674, 678, 187 P. 547, 548 (1920) ("It is not the function of a motion for a new trial to raise propositions not raised in the progress of the cause."). The time to object to the scope of employment instruction was at the time it was tendered, not in a post-trial motion. *See Williams v. Town of Silver City*, 84 N.M. 279, 281, 502 P.2d 304, 306 (Ct. App. 1972) (applying the principle that issues not raised until the judgment notwithstanding the verdict are "too late to be the subject of review"). Meteor cannot have it both ways. By requesting the scope of employment instruction and then insisting post-trial that it was the law of the case, Meteor endorsed the instruction. Meteor's post-trial argument that the scope of employment instruction should not have been given was simply too late.

{32} Therefore, because Meteor did not object to the instruction before it went to the jury, we agree with Gutierrez that the Court of Appeals had to have remanded the case for a new trial based on fundamental error. The fundamental error doctrine provides that a court may remand for a new trial where an error is so fundamental that it puts the jury's verdict into grave doubt. *See State v. Reyes*, 2002-NMSC-024, ¶¶ 41-42, 132 N.M. 576, 52 P.3d 948, *abrogated on other grounds by Allen v. LeMaster*, 2012-NMSC-001, ¶ 36, 267 P.3d 806. The fundamental error doctrine is codified in Rule 12-216(B)(2) of the Rules of Appellate Procedure, which provides: "This rule shall not preclude the appellate court from considering . . . in its discretion, questions involving . . . (2) fundamental error . . . ." There is nothing in the rule's text to indicate that this discretion is confined only to criminal cases.

{33} However, this Court has applied the doctrine in civil cases under the most extraordinary and limited circumstances. *See Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶¶ 19, 20, 150 N.M. 398, 259 P.3d 803; *Payne*, 2006-NMSC-029, ¶¶ 37-38. In *Payne*, a successive tortfeasor claim that was relatively new to New Mexico jurisprudence, the plaintiff argued on appeal that the jury was confused about what law to apply, based on instructions to which she had not objected at trial. 2006-NMSC-029, ¶¶ 8-9, 31. This Court agreed that the instructions at issue "were particularly likely to confuse the jury." *Id.* ¶ 35. We recognized that the plaintiff had in fact suggested some of the offending instructions, and noted that we usually do not "grant a new trial if the original

error was the fault of the complaining party." *Id.* ¶ 37. However, because the case was unique in that at the time of the trial, there were no uniform jury instructions for successor tortfeasor cases, and there was very little case law on the subject, which was in flux, we remanded for a new trial. *Id.* ¶ 38.

{34} Here, unlike in *Payne*, while no uniform jury instruction on negligent hiring existed at the time of trial, *see* UJI 13-1647 NMRA Use Note (adopted December 3, 2010), well-established case law laying out the elements of negligent hiring did exist. *See Valdez v. Warner*, 106 N.M. 305, 307-08, 742 P.2d 517, 519-20 (Ct. App. 1987) (describing the standard for negligent hiring); *see also Spencer v. Health Force, Inc.*, 2005-NMSC-002, ¶¶ 10, 22-24, 137 N.M. 64, 107 P.3d 504 (discussing causation in the negligent hiring context); *Pittard v. Four Seasons Motor Inn, Inc.*, 101 N.M. 723, 729, 688 P.2d 333, 339 (Ct. App. 1984) (recognizing that a showing of "scope of employment" is unnecessary under a negligent hiring theory). Because Meteor invited jury instruction error in the face of established case law on this issue, it would be improper to reward Meteor with a new trial based on these errors. Allowing a party "to invite error and to subsequently complain about that very error would subvert the orderly and equitable administration of justice." *State v. Collins*, 2007-NMCA-106, ¶ 27, 142 N.M. 419, 166 P.3d 480 (internal quotation marks and citation omitted).

{35} As a final note, even if it were error, we doubt that this error was fundamental, because a finding of "scope of employment" was consistent with a finding of causation under the negligent supervision theory. The trial court adopted this analysis below, finding that this jury instruction error was not fundamental, but rather harmless, because the "scope of employment" instruction could "be reconciled with all of the factual requirements" under the negligent supervision claim.

III. CONCLUSION.

{36} Because the Court of Appeals erred both in reversing the jury verdict under the Dram Shop Liability Act and in granting a new trial under Plaintiffs' negligent supervision claim, the Court of Appeals is reversed and this case is remanded to the Court of Appeals to consider the issue regarding punitive damages.

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

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

CHARLES W. DANIELS, Chief Justice

PATRICIO M. SERNA, Justice

PETRA JIMENEZ MAES, Justice

RICHARD C. BOSSON, Justice

Certiorari Granted, January 30, 2012, No. 33,372

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-015

Filing Date: December 6, 2011

Docket No. 28,508

CHERYL SCHULTZ on behalf of KEVIN SCHULTZ (deceased),

Worker-Appellant,

v.

POJOAQUE TRIBAL POLICE DEPARTMENT, and NEW MEXICO MUTUAL CASUALTY COMPANY,

Employer/Insurer-Appellees.

Law Offices of George Wright Weeth
George Wright Weeth
Albuquerque, NM

for Appellant

Riley, Shane & Keller, P.A.
Richard J. Shane
Kristin J. Dalton
Albuquerque, NM

for Appellees

OPINION

FRY, Judge.

{1} During a recreational church outing, Kevin Schultz (Worker) drowned while rescuing a child who had fallen into the Rio Grande near Pilar, New Mexico. At the time of his death, Worker was an off-duty police officer with the Pojoaque Tribal Police Department (Employer). Approximately fourteen months after Worker's death, his widow, Cheryl Schultz, filed a workers' compensation complaint for medical and survivor benefits against Employer and its insurer. The Workers' Compensation Judge (WCJ) denied Mrs. Schultz's claims, determining that the complaint was barred by the statute of limitations and that, even if the complaint had been timely filed, Worker's death did not arise out of his employment. We affirm that part of the WCJ's decision holding that Mrs. Schultz's complaint was not timely filed and is therefore barred by the statute of limitations pursuant to NMSA 1978, Section 52-1-31(B) (1987), of the New Mexico Workers' Compensation Act (the Act), NMSA 1978, §§ 52-1-1 to -70 (1929, as amended through 2007). Given our disposition, we do not address whether Worker's death arose out of and in the course of his employment.

BACKGROUND

{2} On August 17, 2002, Worker took the day off from his job as a police officer in order to accompany his church youth group as a chaperone on a recreational outing near Pilar, New Mexico. Worker drove his personal vehicle to the outing. During the outing, one of the children fell into the Rio Grande, and Worker died while rescuing the child. An autopsy determined that the cause of Worker's death was drowning. Worker's death occurred off tribal land. Worker was not in uniform at the time of his death, but his badge, department-issued pager, and department-issued revolver were found in his possession. Worker was survived by his wife and a minor son.

{3} On October 1, 2003, nearly fourteen months after Worker's death, Mrs. Schultz filed a pro se workers' compensation complaint for medical and survivor benefits on behalf of her deceased husband against Employer and its insurer, New Mexico Mutual Insurance Company. The complaint automatically entered into an internal mediation process pursuant to requirements of the Workers' Compensation Administration (WCA). On December 19, 2003, the mediator issued a recommended resolution that the complaint be "dismissed without prejudice" so that Mrs. Schultz could seek attorney representation. The recommended resolution also gave Mrs. Schultz leave to immediately file an amended complaint. Specifically, the recommended resolution stated:

> [T]he Mediator asked the parties whether they were prepared to enter into settlement negotiations. [Mrs. Schultz] stated that she would be consulting an attorney prior to making any decisions about settlement. The Mediator recognizes that [Mrs. Schultz] has the right to have an attorney present at any stage in this case. It is the Mediator's evaluation, however, that under the circumstances of this case, [Mrs. Schultz's] attorney should be present during settlement negotiations for her consultation. *Therefore, the Mediator recommends that the complaint . . . be dismissed without prejudice. [Mrs. Schultz] may immediately file an amended complaint with the accompanying documents required by this Administration.*

(Emphasis added.) Neither party filed a notice of acceptance or rejection of the recommended resolution, and the WCA generated a Notice of Completion on February 13, 2004.

{4} On June 18, 2004, Mrs. Schultz, through her attorney, filed a second complaint for compensation benefits on behalf of Worker. The clerk's office at the WCA gave the second complaint the same case number as the first complaint and, in addition to the filing date, included a "reopened" stamped date of June 18, 2004. Although nearly identical to the first complaint filed in October 2003, the second complaint included the following additional request by Mrs. Schultz:

> [Mrs. Schultz] requests modification of the Recommended Resolution [dated] December 19, 2003[,] pursuant to [NMSA 1978,] Section 52-5-9 [1989,] for the reason that [Mrs. Schultz] has retained an attorney to represent her, the attorney will be available to consult with [Mrs. Schultz] during settlement negotiations, and it is no longer equitable that the recommended resolution ha[ve] prospective application.

{5} In 2007, after mediation proved unsuccessful, Mrs. Schultz's second complaint proceeded to a formal hearing before a WCJ. After a three-day hearing, the WCJ denied Mrs. Schultz's claims on two grounds. First, the WCJ determined that Mrs. Schultz's claims were barred because "[t]he statute of limitations ha[d] run without reasonable excuse or [without] misleading conduct on the part of Employer or Insurer." Second, the WCJ found that even if Mrs. Schultz's claims were not barred by the statute of limitations, "Worker's accident did not arise out of his employment with Employer" because his accident "was not within the course and scope of his employment, and was not caused by a

risk incident to his employment."

{6} This appeal followed. We initially dismissed the appeal due to a late filing of the notice of appeal. The Supreme Court reversed and remanded for us to consider the merits of this appeal. *Schultz ex rel. Schultz v. Pojoaque Tribal Police Dep't*, 2010-NMSC-034, ¶ 25, 148 N.M. 692, 242 P.3d 259 (concluding that Mrs. Schultz's late filing of the appeal was excusable because it was due to an unanticipated mailing delay outside of her control).

DISCUSSION

{7} Mrs. Schultz raises two issues on appeal, arguing that the WCJ erred in determining that: (1) the statute of limitations barred her claims, and (2) Worker's death did not arise out of and in the course of his employment with Employer. Because we conclude that the statute of limitations issue is dispositive here, we do not address whether Worker's death arose out of his employment.

1. Statute of Limitations

{8} Under the Act, the applicable statute of limitations provides:

> In case of the death of a worker who would have been entitled to receive compensation if death had not occurred, claim for compensation may be filed on behalf of his eligible dependents to recover compensation from the employer or his insurer. Payment may be received or claim filed by any person whom the director or the court may authorize or permit on behalf of the eligible beneficiaries. No claim shall be filed, however, to recover compensation benefits for the death of the worker unless he or someone on his behalf or on behalf of his eligible dependents has given notice in the manner and within the time required by Section 52-1-29 . . . and *unless the claim is filed within one year from the date of the worker's death.*

Section 52-1-31(B) (emphasis added). In this case, Worker's death occurred on August 17, 2002. The parties stipulated in a pre-trial order that Employer had actual notice of Worker's death and, thus, according to Section 52-1-31(B) of the Act, a claim for compensation benefits was required to be filed by August 17, 2003—which was one year from the date of Worker's death. Mrs. Schultz's first and second complaints were filed on October 1, 2003, and June 18, 2004, respectively. Although Mrs. Schultz acknowledged that both filing dates fell outside the one-year limitations period provided by Section 52-1-31(B), she argued at the formal hearing before the WCJ that her claim was timely filed because the statute of limitations was tolled for an additional time period that ultimately covered the filing of both complaints. The WCJ disagreed and entered a number of findings, concluding that there was no basis for tolling the statute of limitations.

{9} On appeal, Mrs. Schultz argues that the WCJ's determination was incorrect because the statute of limitations was tolled by two circumstances: (1) Employer's conduct, which lulled Mrs. Schultz into a false sense of security and caused her to believe workers' compensation would be paid under Section 52-1-36 of the Act, and (2) Employer's failure to timely file an accident report under Sections 52-1-58 and -59 of the Act.

{10} In reviewing the WCJ's factual

findings, we apply whole record review. *DeWitt v. Rent-A-Center, Inc.*, 2009-NMSC-032, ¶ 12, 146 N.M. 453, 212 P.3d 341. We view the evidence in the light most favorable to the decision, "but may not view favorable evidence with total disregard to contravening evidence." *Id.* (internal quotation marks and citation omitted). To the extent that Mrs. Schultz's arguments regarding the statute of limitations challenge the WCJ's factual findings, we must determine whether substantial evidence supports the findings. *Torres v. Plastech Corp.*, 1997-NMSC-053, ¶ 8, 124 N.M. 197, 947 P.2d 154. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation marks and citation omitted). In addition, our review of the WCJ's interpretation of statutory requirements concerning the statute of limitations is subject to a de novo standard of review. *See DeWitt*, 2009-NMSC-032, ¶ 14; *see also Nelson v. Homier Distrib. Co.*, 2009-NMCA-125, ¶¶ 7, 11, 147 N.M. 318, 222 P.3d 690 (indicating that where facts relevant to a statute of limitations issue are not in dispute, the issue becomes a question of law to which we apply de novo review).

a. Accrual of the One-Year Limitations Period

{11} As a preliminary matter, we clarify when the one-year limitations period began to accrue in this case. According to Section 52-1-31(B), a complaint for workers' compensation benefits must be filed "within one year from the date of the worker's death." Based on this statutory language, it is clear that the one-year time limit for bringing a claim for benefits begins to accrue on the date of the worker's death. At oral argument before this Court, Mrs. Schultz's counsel argued that the one-year limitations period in this case began running, not from the date of Worker's death, but from the date that Mrs. Schultz filed her first complaint on October 1, 2003. Mrs. Schultz's counsel argued that the filing date was the same date that Mrs. Schultz learned from the WCA ombudsman that Employer had not yet filed a claim on her behalf, and that, given Employer's conduct, the one-year limitations period began accruing from the filing date. Her counsel cited *Elsea v. Broome Furniture Co.*, 47 N.M. 356, 143 P.2d 572 (1943), as authority for this contention. Alternatively, Mrs. Schultz argued in her brief in chief that the one-year limitations period did not begin to accrue until October 27, 2003, the date that Employer filed a written accident report with the WCA.

{12} Neither of these arguments is persuasive. First, the language of Section 52-1-31(B) is clear that the one-year limitations period begins accruing from the date of a worker's death. We see nothing in the language of that subsection indicating that the running of the one-year limitations period may be delayed for the reasons given by counsel.

{13} Second, *Elsea* is not controlling. *Elsea* did not involve death benefits and instead concerned an injured worker filing a suit for benefits after the employer refused to pay compensation. 47 N.M. at 361-62, 143 P.2d at 575-76. In *Elsea*, the employer argued that the worker's claim was not timely filed, while the worker claimed that the employer's conduct misled him into delaying the filing of his claim. 47 N.M. at 366-67, 143 P.2d at 578. Our Supreme Court affirmed the fact finder's finding supporting the worker's view and further rejected the employer's alternative argument that, at minimum, a worker must file a claim within "a reasonable time after [the employer's] refusal" of the claim. 47 N.M. at 367-70, 143 P.2d at 578-80. We see nothing in *Elsea* suggesting that the limitations period begins to run at a time other than the date of

the worker's death in a case involving an alleged work-related death. Thus, the one-year limitations period in this case began accruing on August 17, 2002—the date of Worker's death—and, absent any tolling, expired on August 17, 2003.

b. The Operation of Tolling

{14} Before we consider Mrs. Schultz's specific arguments regarding the statute of limitations, we address how tolling of the statute of limitations would play out under the factual scenario presented in this case. Mrs. Schultz filed an initial untimely complaint for compensation benefits that was dismissed without prejudice through mediation and then, some months later, Mrs. Schultz filed a second complaint. Thus, if we were to determine that the late filing of the initial complaint was excused by Employer's conduct or by Employer's late filing of the accident report, we explain how tolling of the initial complaint would occur in the context of a later dismissal without prejudice and re-filing of a new complaint.

{15} Mrs. Schultz's initial complaint, filed on October 1, 2003, proceeded to mediation before a WCA mediator on December 19, 2003. This complaint was dismissed without prejudice as a result of the mediator's recommended resolution. The recommended resolution made no reference to any statute of limitations issue, nor did it address whether the initial October 1, 2003, filing date would be preserved by the filing of an amended complaint. Because neither party filed a notice of acceptance or rejection of the recommended resolution, we assume that the recommended resolution became binding on the parties by operation of law. *See* 11.4.4.10(D)(5)(a) NMAC (6/13/03); *see also* NMSA 1978, § 52-5-5(C) (1993) (stating that any party who fails to notify the director of the WCA of its acceptance or rejection of the recommended resolution becomes conclusively bound by the resolution). At the formal hearing, Mrs. Schultz's written pleadings and closing argument did not address what, if any, effect the dismissal without prejudice of the first complaint had on the second complaint.

{16} In relevant part, the WCJ's order concluded that: (1) "Mrs. Schultz'[s] original [c]omplaint was dismissed without prejudice"; (2) "the Recommended Resolution did not contain any language which preserved the original filing date for her"; and (3) "[w]hen a [c]omplaint is dismissed without prejudice it is as if the [c]omplaint were never filed; without saving language in the dismissal document, the statute of limitations continues to run."

{17} On appeal, Mrs. Schultz relies on *Ortega v. Shube*, an earlier case from this Court, to assert that the WCJ's conclusion was legally incorrect. 93 N.M. 584, 603 P.2d 323 (Ct. App. 1979), *overruled on other grounds by Bracken v. Yates Petroleum Corp.*, 107 N.M. 463, 760 P.2d 155 (1988). In *Ortega*, the plaintiffs brought an initial suit for workers' compensation benefits within the one-year statute of limitations period that was dismissed without prejudice for lack of jurisdiction. 93 N.M. at 585, 603 P.2d at 324. The plaintiffs later filed a second lawsuit, in which they relied on NMSA 1978, Section 37-1-14 (1880), to claim that the second action was a continuation of the previously dismissed lawsuit. *Ortega*, 93 N.M. at 585-86, 603 P.2d at 324-25; *see* § 37-1-14 (providing that commencement of a second suit within six months after the original suit fails is "deemed a continuation of the first"). The district court declined to apply Section 37-1-14 and dismissed the second action because the statute of limitations had run prior to the filing

of the second lawsuit. *Ortega*, 93 N.M. at 585, 603 P.2d at 324. On appeal, this Court determined that because the Workers' Compensation Act specifically limits the commencement of an action to one year, Section 37-1-14 is inapplicable to workers' compensation lawsuits and cannot extend the one-year statutory time limit for filing a claim. *Ortega*, 93 N.M. at 586-87, 603 P.2d at 325-26. Because the plaintiffs brought the second lawsuit after the one-year time limit had elapsed, we determined that the district court properly dismissed the lawsuit. *Id.* at 587, 603 P.2d at 326.

{18} Of relevance to this case is the dissent in *Ortega* because it contains the approach that was later adopted by our Supreme Court, an approach that Mrs. Schultz appears to argue is applicable here. The *Ortega* dissent reasoned that the second lawsuit should not have been dismissed on statute of limitations grounds because the filing of the first action tolled the one-year limitations period during the pendency of that action. *Id.* at 588, 603 P.2d at 327 (Sutin, J., dissenting). The dissent determined that, once the first action was dismissed without prejudice, the statute of limitations began running once again and the second action was filed during the time remaining in the limitations period, stating:

> The first claims were filed within the statutory period [on July 20, 1976]. When these claims were filed, the statutory period of limitation was tolled during their pendency since commencement of an action arrests the running of the applicable statutory period. When [the] plaintiffs' claims were dismissed without prejudice on December 23, 1976, they were not dismissed because the district court was without power to adjudicate the claims, but solely for the reason the claims were improperly stated and were joined with other common law claims and with one of products liability; that non-jury claims could not be joined with jury claims. The statutory period was tolled from July 20, 1976[,] to December 23, 1976, a period of five months thereafter. The claims filed on January 13, [1977,] were not untimely.

Id.

{19} In *Bracken*, our Supreme Court looked favorably on the dissent in *Ortega* and applied the dissent's reasoning to that case. *Bracken*, 107 N.M. at 464, 466, 760 P.2d at 156, 158. In *Bracken*, the worker's widow filed a claim for workers' compensation approximately twenty-seven days prior to the expiration of the one-year period of limitations. 107 N.M. at 463, 760 P.2d at 155. The district court dismissed the case for lack of venue and, on appeal, the plaintiff argued that the district court should have transferred the case to a court with proper venue. *Id.* Our Supreme Court did not address whether the case can be transferred from an improper venue and instead relied on the reasoning in the dissent in *Ortega*. *Bracken*, 107 N.M. at 464, 760 P.2d at 156. The Court determined that the statute of limitations was tolled by "the diligent filing of the complaint" in the improper venue and that, following dismissal for improper venue, the plaintiff could re-file the complaint in the proper venue. *Id.* at 466, 760 P.2d at 158. The Court instructed that "[u]pon entry of the final order on remand from this appeal, the plaintiff shall have the remainder of the one-year statute of limitations, twenty-seven days, more or less, in which to file her complaint in a proper venue." *Id.*

{20} We conclude that the reasoning in *Bracken* is applicable to this case. With the foregoing in mind, we turn to address Mrs. Schultz's arguments for tolling.

c. Section 52-1-36: Employer's Conduct

{21} Mrs. Schultz's primary argument for tolling of the statute of limitations in this case is that her late filing was excused under Section 52-1-36 based on Employer's conduct that led her to believe that compensation would be paid. Section 52-1-36 provides that the failure of a person, entitled to compensation under the Act, to timely file a claim shall not be a bar to compensation "where the failure was caused in whole or in part by the conduct of the employer or insurer which reasonably led the person entitled to compensation to believe the compensation would be paid." Section 52-1-36. The WCJ determined that Section 52-1-36 was inapplicable to this case because there was "[n]o conduct by Employer, in whole or in part, [that] led Mrs. Schultz to believe that compensation would be paid."

{22} The WCJ entered several findings of fact, which Mrs. Schultz does not appear to challenge on appeal, concerning the course of conduct between Employer and Mrs. Schultz regarding workers' compensation benefits in connection with Worker's death prior to October 1, 2003—the filing date for the first complaint. The WCJ found that in June 2003, approximately ten months after Worker's death and still within the one-year limitations period, Mrs. Schultz met with a financial advisor who first informed her that she might be entitled to receive workers' compensation benefits as a result of Worker's death. Prior to this meeting, Mrs. Schultz was unaware that she might be eligible for workers' compensation benefits, and Employer also had never raised the possibility of benefits with Mrs. Schultz. Later, on July 28, 2003, Mrs. Schultz and her financial advisor met with the Employer's police chief to discuss the availability of benefits. Mrs. Schultz testified that the police chief told her that "he would take care of getting the workers' compensation paperwork done." The police chief testified that the possibility of workers' compensation benefits had never occurred to him because Worker was off duty at the time of his death. The WCJ found that the police chief did not recall saying whether he would take care of filing the paperwork but that, when he was asked about Mrs. Schultz's testimony, he responded by saying that "'if she said that, it must be correct.'"

{23} The WCJ found that, following the meeting, Mrs. Schultz did not speak to Employer again regarding the paperwork, and she "evidently believed . . . that because Employer had done the paperwork necessary for her to receive . . . federal benefits [some months earlier], it would do so similarly for the workers' compensation benefits." In late September 2003, Mrs. Schultz became concerned that she had not yet received workers' compensation benefits, and she contacted the WCA on October 1, 2003. She learned from an ombudsman that Employer had not filed a claim on her behalf. She proceeded to file a pro se complaint on the same day, although the complaint was outside the one-year limitations period.

{24} Mrs. Schultz argues that the WCJ misapplied Section 52-1-36 to the facts of this case. She contends that the above facts indicate "that the course of conduct between [her and Employer] lulled her into a false sense of security that her claim would be paid" and caused her to delay in filing the complaint. As support, she cites to other jurisdictions which she claims have held that a worker's late filing is excused by an

"employer's assurance that it would initiate a workers' compensation claim on the worker's behalf."

{25} There is authority supporting Mrs. Schultz's argument. Section 52-1-36 permits tolling when an employer's conduct reasonably leads the worker to believe that compensation will be paid. And Professor Larson's treatise on workers' compensation notes that

> [t]he most common type of case [for excusing lateness on the basis of employer fault] is that in which a claimant . . . contends that he or she was lulled into a sense of security by statements of [the] employer[,] or carrier representatives that the claimant "will be taken care of[,]" or that the claim has been filed[,] or that a claim will not be necessary because the worker would be paid compensation benefits in any event. When such facts are established by the evidence, the lateness of the claim has ordinarily been excused.

7 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 126.09[1] (2011) (footnote omitted); *see also id.* § 126.09D[1] n.1 (for cases cited therein). However, we need not decide whether Employer's conduct tolled the statute of limitations because, even if we assume without deciding that such tolling took place, it would not extend to cover the second complaint Mrs. Schultz filed.

{26} On July 28, 2003, the date Mrs. Schultz first met with Employer to discuss the possibility of workers' compensation benefits, there were still approximately twenty-one days left in the one-year limitations period, which was set to expire on August 17, 2003—one year from Worker's death. If Employer's representations at that meeting tolled the one-year limitations period, the tolling would have occurred from July 28, 2003, to October 1, 2003—the duration of time during which Mrs. Schultz believed, as a result of her meeting with Employer, that Employer would take care of the claim. This time period was approximately two months long and represents the tolling period. *See Owens v. Eddie Lu's Fine Apparel*, 95 N.M. 176, 178, 619 P.2d 852, 854 (Ct. App. 1980) (stating that "during the time the [employer] reasonably led the plaintiff to believe that compensation would be paid, the limitation period for filing a claim was tolled"), *abrogation on other grounds recognized Cole v. J.A. Drake Well Serv.*, 106 N.M. 484, 745 P.2d 392 (Ct. App. 1987). Once Mrs. Schultz filed the first complaint on October 1, 2003, the statute of limitations stopped running during the pendency of that action because the commencement of an action arrests the running of the applicable statutory time period. *See Bracken*, 107 N.M. at 466, 760 P.2d at 158; *see also City of Rio Rancho v. Amrep Sw. Inc.*, 2011-NMSC-037, ¶ 45, 150 N.M. 428, 260 P.3d 414 (citing *Bracken* and other cases for the general proposition that the filing of a complaint tolls the statute of limitations during the pendency of the action). After the first complaint was dismissed without prejudice and a notice of case completion was issued, Mrs. Schultz then had the remainder of the one-year statute of limitations, twenty-one days, in which to file her second complaint. Because some months elapsed before an attorney for Mrs. Schultz filed the second complaint, the statute of limitations expired. Thus, even if there was tolling as a result of Employer's conduct, the second filing still fell outside the one-year limitations period.

d. Sections 52-1-58, -59: Employer's Late Filing of the Accident Report

{27} Mrs. Schultz next argues that the statute of limitations was tolled according to Sections 52-1-58 and -59, due to Employer's alleged late filing of the accident report. It appears that Mrs. Schultz did not preserve this argument for appellate review. In her opening and closing arguments during the formal hearing as well as in her requested findings of fact and conclusions of law, Mrs. Schultz did not raise any arguments based on Sections 52-1-58 and -59. Her only argument regarding the statute of limitations at the hearing was that Employer's conduct required tolling of the one-year limitations period according to Section 52-1-36. Because Mrs. Schultz did not make any arguments regarding Sections 52-1-58 and -59, the WCJ did not make any specific findings or conclusions on this basis. *See* Rule 12-216(A) NMRA ("To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked[.]"). However, even if we were to ignore the preservation issue, we conclude that Sections 52-1-58 and -59 do not provide a basis for us to determine that Mrs. Schultz's second complaint was timely filed.

{28} Section 52-1-58(A) requires an employer to file a written report of an accidental injury suffered by an employee during the course of employment with the director of the WCA within ten days of the injury or within ten days of notification to the employer of the injury. Section 52-1-59 addresses the consequences of an employer's late filing or failure to file the written accident report, as follows:

> No claim for compensation under the Workers' Compensation Act . . . as it now provides or as it may hereafter be amended, shall be barred prior to the filing of such report or within thirty days thereafter, but this section does not shorten the time now provided for filing claims with the director.

Based on our reading of Sections 52-1-58 and -59, a worker has one year from the date of injury/death to file a claim for workers' compensation unless the employer has failed to file the written accident report. Once the initial one-year limitations period has run, no claim for compensation will be barred as long as the claim is filed prior to the accident report. *See* § 52-1-59 ("No claim for compensation . . . shall be barred prior to the filing of such report[.]"). However, once the employer files the accident report, the worker is given only thirty days from that date to file his/her claim for compensation. *See id.* ("No claim for compensation . . . shall be barred prior to the filing of such report or within thirty days thereafter, but this section does not shorten the time now provided for filing claims[.]"). Our reading is consistent with prior cases holding that Section 52-1-59 tolls the statute of limitations for untimely filed workers' compensation claims where the employer has failed to file the written accident report. *See Nelson*, 2009-NMCA-125, ¶¶ 8-15 (determining that a workers' compensation claim, although filed seven months past the one-year limitations period, was not barred by the statute of limitations due to the employer's failure to file an accident report in New Mexico); *see also Herman v. Miners' Hosp.*, 111 N.M. 550, 556, 807 P.2d 734, 740 (1991) (stating that "Section 52-1-59 provides that the effect of a failure to file is that no claim for compensation is barred prior to the filing of the appropriate report" and then determining in that case that the late filing of a compensation claim almost two years after the worker's death was excused by the employer's failure to file the report).

{29} In this case, Mrs. Schultz filed her initial complaint on October 1, 2003, which was nearly a month before Employer filed the written accident report on October 27, 2003. Consistent with Section 52-1-59, her initial complaint was timely because it could not be barred until the accident report was filed. However, this does not solve the timeliness problem that ensued when the initial complaint was dismissed without prejudice. Once the dismissal occurred, Section 52-1-59 would no longer apply. Section 52-1-59 would have allowed Mrs. Schultz an additional thirty days from the date the accident report was filed within which to file her second complaint—to November 26, 2003. But because that date had already passed before the second complaint was filed, Mrs. Schultz was not entitled to any additional time upon dismissal of her initial complaint. We are aware of no authority suggesting that Mrs. Schultz would be entitled to a *second* thirty-day period under Section 52-1-59 upon dismissal of her initial complaint.

e. Relation Back to the Original Filing Date of the First Complaint

{30} Mrs. Schultz makes a final argument for bringing the second complaint within the one-year limitations period. She contends that the recommended resolution issued by the mediator "intended to preserve [Mrs. Schultz]'s original filing [date of October 1, 2003,] and relate a subsequent complaint back to that date." She further argues that if this Court determines that the language of the mediation order is unclear and that it in fact "failed to preserve her rights," we should interpret the order to preserve her original filing date in order to accomplish the mediator's obvious intent.

{31} Mrs. Schultz did not make this argument before the WCJ. As a result, Employer was not given the opportunity to respond to it, and the WCJ had no chance to rule on the specific argument that Mrs. Schultz now makes. *See Diversey Corp. v. Chem-Source Corp.*, 1998-NMCA-112, ¶ 38, 125 N.M. 748, 965 P.2d 332 (explaining that preservation serves the purposes of (1) allowing the trial court an opportunity to correct any errors, thereby avoiding the need for appeal; and (2) creating a record from which the appellate court can make informed decisions). However, even if we were to set aside the preservation issue, we are not persuaded by this argument for two reasons. First, Mrs. Schultz does not point to any language within the recommended resolution that suggests the mediator's intent was to preserve the original filing date. Second, our Supreme Court in *Bracken* expressly held that the general savings statute, Section 37-1-14, is not applicable in the workers' compensation context. *Bracken*, 107 N.M. at 465, 760 P.2d at 157. That statute deems a new suit begun within six months to be a continuation of a prior suit in which the plaintiff "fail[ed] therein for any cause." Section 37-1-14. The Court in *Bracken* stated that "Section 37-1-14 is made inapplicable by Section 37-1-17 to any action or suit limited by separate statute." *Bracken*, 107 N.M. at 465, 760 P.2d at 157. Therefore, this relation-back mechanism is unavailable to Mrs. Schultz, and she has not cited any other authority supporting her argument.

{32} We recognize that Mrs. Schultz's second complaint fails due to the technicality of the mediator's dismissal of her initial complaint without prejudice. We acknowledge that the mediation process in workers' compensation proceedings is not infallible and that there may be instances, such as here, where a recommended resolution drafted by a mediator can have unfortunate consequences for workers or their surviving

dependents. This is perhaps why our Legislature has created mechanisms under the Workers' Compensation Administration Act by which a worker can reject, seek modification, or pursue a number of other actions with respect to recommended resolutions and compensation orders. *See* § 52-5-5(C) (allowing a party to accept or reject a recommended resolution within thirty days of receipt); *see also* § 52-5-9 (discussing procedures for modifying compensation orders); *Hidalgo v. Ribble Contracting*, 2008-NMSC-028, 144 N.M. 117, 184 P.3d 429 (addressing the relationship between Sections 52-5-5 and -9). Unfortunately, in this case, counsel for Mrs. Schultz did not argue that the recommended resolution, which dismissed her first complaint, was issued in error or that it should have been modified on any of the statutory grounds available to her. Mrs. Schultz also did not file a notice of acceptance or rejection of the recommended resolution. And, although her counsel included in the second complaint a request for modification of the recommended resolution pursuant to Section 52-5-9, there is no indication that counsel followed up on this request or that any argument was made at the formal hearing on the basis of Section 52-5-9. We are unable to discern any basis for overcoming the technical issues in this case in order to reach the merits.

CONCLUSION

{33} Based on the foregoing, we affirm the WCJ's determination that Mrs. Schultz's claim was barred by the statute of limitations.

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

CYNTHIA A. FRY, Judge

I CONCUR:

CELIA FOY CASTILLO, Chief Judge

JONATHAN B. SUTIN, Judge (specially concurring).

SUTIN, Judge (specially concurring).

{35} I concur in the Majority Opinion (the Opinion), but do so with misgivings about the WCA process.

{36} As to the one-year limitations period, the Opinion assumes a two-month tolling from July 28, 2003, to October 1, 2003, Opinion ¶ 27; and then a stoppage based on the filing of the October 1, 2003, complaint, lasting until the case closure on February 13, 2004, Opinion ¶¶ 3, 27; or perhaps a stoppage until thirty days after Employer filed its accident report, Opinion ¶¶ 29-30. In any case, the Opinion affirms dismissal of Mrs. Schultz's case with prejudice because her second complaint, filed June 18, 2004, was outside even the most liberal view of the time deadline. I do not quarrel with the Opinion's time-deadline analysis. What moves me to specially concur is that the analysis is dependent on the premise that the mediator's recommended dismissal without prejudice, followed by the case closure upon Mrs. Schultz's failure to reject the recommended resolution, was appropriate and required the filing of an amended complaint within the one-year statute of limitations in Section 52-1-31(B). It is this process that I address, after first discussing the time-deadline issues.

Two-Month Tolling

{37} Based on whole-record review, I agree with a July 28, 2003, to October 1, 2003, two-month tolling period. Employer engaged in "such conduct as would 'in whole or in part' reasonably lead [Mrs. Schultz] to believe compensation would be paid." *Elsea*, 47 N.M. at 366-67, 143 P.2d at 579; *see* § 52-1-36. Approximately two months after

Worker's death, in October 2002, Employer filed with the Office of Justice Programs, Bureau of Justice Assistance, United States Department of Justice, a Report of Public Safety Officer's Death, along with a Claim for Death Benefits by Mrs. Schultz. In April 2003, a Department of Justice benefits specialist prepared and signed a Public Safety Officers' Benefits Act Claim Determination stating that Worker was off duty at the time of his rescue effort, yet also stating that Worker "died as a direct and proximate result of a personal injury sustained in the line of duty from drowning while attempting to rescue another person." This determination was approved by the chief of the Department of Justice's Benefits and Payments Division and the Department's Office of General Counsel concurred in the determination in June 2003. A total benefit of $259,038 was awarded. The Office of Justice Programs informed Mrs. Schultz by letter in June 2003 of the award.

{38} In June 2003, Mrs. Schultz met with a retired police officer who assisted Mrs. Schultz as her financial counselor and together, in July 2003, they met with the Employer's Police Chief in regard to workers' compensation. The Chief told Mrs. Schultz and the counselor that he would take care of getting the workers' compensation paperwork done. The Chief's testimony that the possibility of workers' compensation benefits had never occurred to him because Worker was off duty at the time of his death is not credible given Employer's earlier report and Mrs. Schultz's claim submitted to the Department of Justice and the Department's determination that the death resulted from "injury sustained in the line of duty" and given that Employer was aware that Mrs. Schultz received compensation based on the documents submitted to the Department.

{39} Also, on October 21, 2003, Employer wrote a letter to Mrs. Schultz stating, "Your husband, Kevin Schultz, died in the line of duty. The Pueblo of Pojoaque will do anything necessary for you to receive survivor's benefits, workmen's compensation or any other benefits available to you and your grieving family." Employer prepared its First Report of Injury on October 16, 2003, and the report was submitted to the WCA on October 27, 2003. One might reasonably infer from the report and letter that Employer was sufficiently aware in July 2003 of the possibility that Worker's death was compensable.

The Remaining Time

{40} Based on the mediator's recommended dismissal and the WCA case closure on February 13, 2004, the Opinion allows Mrs. Schultz twenty-one days from that case closure date within which to file the amended complaint mentioned in the recommended resolution. This set a drop-dead date of March 5, 2004. If there had been no dismissal by the mediator, there would have been no limitations issue save that of whether Employer reasonably led Mrs. Schultz to believe that compensation would, in whole or in part, be paid. Hence the significance of the question whether the recommended dismissal and its effect were appropriate and effective to trigger a requirement that Mrs. Schultz file an amended complaint within the limitations period, which as the Opinion analyzes it with tolling and stoppage times, was twenty-one days following the February 13, 2004, WCA case closure.

Failure to File Accident Report

{41} In regard to Employer's failure to file an accident report, the Opinion assumes, for the purpose of its analysis, that Employer had

a duty to file an accident report much earlier than Mrs. Schultz's October 1, 2003, complaint. Op. ¶¶ 28-30. In my view, Employer had a duty under Section 52-1-58(A) to file its First Report of Accident within ten days of Worker's death or within ten days after Employer received notification of Worker's death. An employer has a duty to timely file the First Report of Accident and to send a copy of the report to the injured worker. *Id.* The Employer's First Report of Injury or Illness "must be filed within [ten] days of knowledge of any alleged work-related injury or illness that results in more than [seven] days of lost work." NM WCA Form E1.2 (filing instructions) (available at http://www.workerscomp.state.nm.us./pdf/e1.pdf). The report "must be filed even if the employer disputes the worker's claim of work-related injury or illness." *Id.* "No claim for compensation . . . shall be barred prior to the filing of such report or within thirty days thereafter[.]" Section 52-1-59; *see Anaya v. City of Santa Fe*, 80 N.M. 54, 55, 56-57, 451 P.2d 303, 304, 305-06 (1969) (indicating that "barred" in what is now Section 52-1-59, formerly 1953 Comp., § 59-10-28, refers to the statute of limitations in workers' compensation cases).

{42} Employer's own standard operating procedures contemplated an off-duty officer acting in an emergency situation to save a life. And as earlier indicated, based on Employer's report and Mrs. Schultz's compensation claim submitted to the Department of Justice, the Department determined that Worker died in the line of duty. Employer acknowledged that Worker died in the line of duty in its letter to Mrs. Schultz. And Employer implicitly acknowledged that it was required to file its First Report of Accident when the Chief said he would take care of getting the workers' compensation paperwork finished and, as well, when Employer ultimately filed its report.

{43} No citation of authority is required for the knowledge in workers' compensation practice that, from time to time, employers contest a claim for compensation on the ground that a worker was not acting within the scope of employment at the time of injury. That defense to liability does not excuse an employer, such as Employer here, from ignoring its duty to file the first report of accident within ten days of learning of a worker's death. Employer not only had actual notice of Worker's death and the circumstances surrounding the death, Employer was on notice that Worker's action might fall within the scope of Employer's standard operating procedures and his duties as an officer and that his injury might fall within the purview of a work-related injury. *Cf. Herman*, 111 N.M. at 554, 556, 807 P.2d at 738, 740 (reversing the Court of Appeals, which had determined there was no evidence in the record that the defendant hospital "knew that the heart attack was caused by the decedent's employment" and holding that the evidence did support knowledge when the defendant knew of the heart attack, knew of the decedent's stressful schedule, and knew that the decedent had had an argument with one of the surgeons the day of the death (internal quotation marks omitted)). Thus, because Employer failed to file the report required under Section 52-1-58(A) until October 27, 2003, pursuant to Section 52-1-59, Mrs. Schultz had until October 27, 2003, at the earliest to file her complaint for compensation. Because she filed her original complaint with the WCA before that date, on October 1, 2003, that complaint was not barred by the limitations period in Section 52-1-31(B). *See Herman*, 111 N.M. at 556, 807 P.2d at 740 (holding a claim was not time barred when the employer had actual notice of an injury but failed to file the required report). A determination that Section 52-1-59 was inapplicable or irrelevant because Mrs.

Schultz did not file her second complaint until June 2004 brings to the fore that the mediator's recommended dismissal was appropriate and effective to trigger a requirement that Mrs. Schultz file an amended complaint by November 26, 2003.

Mrs. Schultz's Failures

{44} I note here that Mrs. Schultz's original complaint was on the WCA's Workers' Compensation Complaint printed form. The mediator's recommended resolution stated that Mrs. Schultz could file an amended complaint. Mrs. Schultz's June 18, 2004, complaint that was filed by her legal counsel was typewritten using the format of the WCA's complaint form. I am unaware whether there exists a WCA form for or designating a complaint as an "amended complaint." Mrs. Schultz's June 18, 2004, complaint requested modification of the recommended resolution on the ground that Mrs. Schultz retained counsel who was available to consult with Mrs. Schultz during settlement negotiations. Her June 18, 2004, complaint asserted that "it is no longer equitable that the recommended resolution has prospective application." Nothing in the record or argument shows whether the June 18, 2004, complaint was or was not intended to be the amended complaint referred to in the recommended resolution. Indeed, from the statements in the June 18, 2004, complaint, one could reasonably infer that the complaint was intended as an amended complaint.

{45} Except as might be gleaned from what Mrs. Schultz stated in her June 18, 2004, complaint, however, Mrs. Schultz did not specifically raise any issue or mount an attack during the WCA proceedings as to the propriety of recommending a dismissal and of a resulting case closure. Mrs. Schultz did not before the WCJ specifically object to, or otherwise attack or develop a record to question, that process or its effect. Nor did she raise such an issue on appeal. These preservation failures cause me to concur in the Opinion. But I must comment on the WCA process here.

{46} Workers' compensation adjudications are part of a specialized statutory administrative system and process separate from our court system. Ombudsmen, mediators, and judges employed within the WCA are expected to be fully knowledgeable in regard to the statutes and rules governing reporting requirements, deadlines, and tolling provisions that may affect relief. Surely when it comes to a bar to any relief based on a time deadline, a mediator should raise and discuss that concern with someone in Mrs. Schultz's position. The WCA is not to be a trap for an unwary, pro se surviving spouse.

{47} It appears that on October 1, 2003, the date that Mrs. Schultz filed her original complaint, an ombudsman informed her that there existed an issue with regard to the statute of limitations and the complaint would be untimely. That warning was obviously based on the fact that October 1, 2003, fell outside of the one-year period following August 17, 2002, the date of Worker's death. The advice from the ombudsman is irrelevant here, however, because the Opinion assumes, and I agree, that the one-year period was tolled for the two-month period discussed earlier based on Employer's conduct.

{48} Several circumstances strike me as particularly disconcerting with respect to the WCA process. The mediation can result in a case closure and a bar to relief. Yet it is not reported. There exists no record of what was discussed. Interestingly, the mediator presumably did not think that Mrs. Schultz's October 1, 2003, complaint was untimely

filed, given that he did not recommend dismissal based on the timeliness of the complaint (which dismissal would have been a dismissal with prejudice). Instead, the mediator recommended dismissal without prejudice because Mrs. Schultz did not want to continue with the mediation until she obtained counsel. Nothing in the record indicates whether the mediator ever explained or discussed with Mrs. Schultz why her timely complaint had to be dismissed without prejudice instead of merely left in pending status until she obtained counsel; in fact, nothing in the record indicates that a dismissal procedure was required or proper. As well, nothing in the record indicates that the mediator explained or discussed with Mrs. Schultz whether she was confronted with a statute of limitations deadline within which to file the amended complaint or else she would lose her right to relief; how the time deadline would be established and play out; why she needed to "immediately" file an amended complaint; or why, upon obtaining a lawyer, the mediation would not simply continue under the timely filed original complaint. The mediator apparently did not refer Mrs. Schultz to an ombudsman with respect to these matters. I find it difficult to understand why at the close of the mediation Mrs. Schultz would, or should, have reasonably understood that the mediator's recommended resolution of dismissal would follow the course taken by the WCA and the WCJ. I understand that Mrs. Schultz appears to have taken too long to engage counsel and file another complaint, but delay could have, and likely should have, been resolved differently than through a limitations bar.

{49} To advise a pro se surviving spouse with respect to these matters would not, in my view, violate the policy in the Act against favoring one party over the other as proscribed in NMSA 1978, Section 52-5-1 (1990). Under the peculiar circumstances here, where Mrs. Schultz did not want to continue to mediate without a lawyer present, I have difficulty understanding why the workers' compensation process could not, for one example, have accommodated her by, instead of a dismissal without prejudice and apparently without any explanation as to the effect of the dismissal, setting a definitive date for the continuation of the mediation and indicating in writing that Mrs. Schultz was required by then to have counsel present and that no further continuation would be granted.

{50} Moreover, as I understand the process, a recommended resolution is to recommend a resolution of a *dispute* between the parties. Section 52-5-5(C); NMSA 1978, § 52-5-7(A) (1993); 11.4.4.10(C)(6)(a), (d) NMAC. The reason for the recommended dismissal, Mrs. Schultz's desire to have a lawyer at the mediation, did not resolve a *dispute*. No resolution was called for in terms of liability or amount of compensation. The recommended resolution leaves no suggestion that Mrs. Schultz's original complaint no longer served to stop the running of the statute of limitations. Indeed, upon the filing of Mrs. Schultz's June 18, 2004, complaint, the WCA "reopened" the case with the same case number. If time or delay in workers' compensation cases is a significant concern, could the mediator's recommended resolution not have set a definitive deadline for the filing of the amended complaint, and could Mrs. Schultz not have been told of the dire consequences if it were not timely filed? Further, given the anomalous, counterintuitive process employed here, under the particular circumstances, would it not make sense to consider the June 18, 2004, complaint as relating back to the date of filing of the original complaint if it is shown that Employer would not be prejudiced?

{51} Unfortunately, this Court is constrained by the failures of Mrs. Schultz to develop and argue throughout the administrative proceedings what seem to me to be critical facts, processes, and issues. Unfortunate because, but for the lack of preservation, this case appears classifiable as the height of procedural anomaly. *See Bracken*, 107 N.M. at 465, 760 P.2d at 157 (criticizing "procedural anomalies").

{52} As I earlier indicated, based on its technical correctness, I am constrained to concur in the Opinion. That constraint does not, however, prevent questioning whether the workers' compensation system and process should work in the fashion seen here. And to deepen the concern, I think that Mrs. Schultz's compensation claim stated a claim deserving of a trial on the merits.

JONATHAN B. SUTIN, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-016

Filing Date: December 20, 2011

Docket No. 30,417

FINANCIAL INDEMNITY COMPANY,

Plaintiff-Appellee,

v.

LEO CORDOBA,

Defendant-Appellant.

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Matthew S. Rappapport
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for Appellee

Kenneth G. Egan
Las Cruces, NM

L. Helen Bennett
Albuquerque, NM

for Appellant

OPINION

SUTIN, Judge.

{1} In this workers' compensation case,

Defendant Leo Cordoba appeals the district court's dismissal of his counterclaim against Plaintiff Financial Indemnity Company (FIC) and denial of his motion for reconsideration or, in the alternative, for leave to amend the counterclaim. We hold that the district court misconstrued and misapplied Rules 11-408 and 1-012(B)(6) NMRA. Rule 11-408 is not designed or intended to preclude admission of evidence of settlement negotiations in an insurance coverage dispute when the settlement negotiations are offered not to prove coverage or amount, but are offered to prove wrongful conduct such as bad faith or unfair practices during the claim investigation and upon denial of the claim. Here, insofar as the averments of settlement negotiations related to claims of wrongful conduct, dismissal was inappropriate.

BACKGROUND

{2} Cordoba was injured in an accident that occurred when he was a passenger in a company-owned truck driven by his co-worker. His medical costs were approximately $35,000. Workers' compensation, which was the exclusive remedy available to Cordoba through his employer, paid his lost wages and medical bills.

{3} Cordoba sought payment from his own insurer, FIC, under the uninsured/underinsured motorist coverage of his policy and requested payment of $25,000, the limit for bodily injury. Following a failed attempt at settlement negotiations, FIC filed a declaratory judgment action as to whether the policy covered Cordoba's claim and, if so, in what amount. FIC's position was that the policy did not apply because Cordoba could not establish that his injuries were caused by an uninsured or underinsured motorist and also that, in accordance with the policy, any amount payable should be reduced by any payment made by workers' compensation.

{4} Cordoba filed a counterclaim alleging that FIC had breached its contract, violated New Mexico law, and acted in bad faith. As a factual basis for his counterclaim, Cordoba averred, in part, that FIC had acknowledged coverage of Cordoba's claim by way of two settlement offers. Cordoba further averred that after he demanded the policy limit, FIC made two counteroffers of $8,000 and $10,000 respectively, and that FIC's rationale for offering these amounts was that it was entitled to offset the amount Cordoba had already received from workers' compensation. Cordoba also averred that, in attempting to offset the workers' compensation payments, FIC did not follow New Mexico law, and that when FIC "learned of its error" in this regard, it filed the declaratory judgment action as a "tactic" to cause further delay. FIC moved under Rule 1-012(B)(6) to dismiss Cordoba's counterclaim for failure to state a claim upon which relief could be granted. FIC broadly asserted that the counterclaim cited the alleged settlement negotiations between the parties in order to establish liability and was, therefore, attempting to do what was expressly prohibited by Rule 11-408.

{5} In a hearing on FIC's motion to dismiss, Cordoba contended that his reference to the settlement negotiations, rather than being used to show FIC's acknowledgment of coverage, was intended only to show that, because full coverage was otherwise indisputable, FIC acted wrongfully in attempting to pay less than the policy limits. Unpersuaded by Cordoba's argument, the district court granted FIC's Rule 1-012(B)(6) motion. The district court reasoned that Cordoba's counterclaim contravened Rule 11-408 insofar as it was drafted to say that, in making settlement offers, FIC admitted that Cordoba's claim was

covered. The court noted that "[t]he first step is whether . . . [FIC] even ha[d] a responsibility of coverage . . . which [was] the subject of the declaratory judgment action" and that, by using FIC's offer of settlement to establish that FIC had a duty of coverage, Cordoba was using the settlement offer to "make step one of [his] claim." The dismissal was without prejudice based on Cordoba's request that he be permitted to proceed with discovery already requested, "in case new information is learned that would support [his counterclaim]."

{6} Cordoba filed a motion to reconsider or, in the alternative, for leave to amend his counterclaim. His proposed amended counterclaim restated the averments of the settlement negotiations but, in place of the averment that FIC had acknowledged coverage for Cordoba by making the settlement offers, the amended counterclaim averred that "FIC took the erroneous position at all relevant times . . . that they were entitled to [offset] workers['] compensation benefits paid to Cordoba." Simultaneously, he filed a motion to compel discovery of information that may have been relevant to an amended counterclaim.

{7} With Cordoba's motion to reconsider or to allow him to amend his counterclaim still pending, the district court heard FIC's motion for summary judgment and Cordoba's motion to compel discovery. The court denied FIC's motion for summary judgment, ruling that Cordoba was entitled to seek recovery under his uninsured/underinsured motorist coverage, and the court granted Cordoba's motion to compel discovery. The district court declined to reconsider its prior Rule 1-012(B)(6) dismissal of the original counterclaim, but it agreed that if Cordoba was able to discover sufficient evidence to support his counterclaim, the court would reconsider its ruling.

{8} Several weeks later, FIC filed a motion to dismiss, with prejudice, Cordoba's motion to amend his counterclaim. In its motion, FIC asserted that, after the court's ruling on its motion for summary judgment, FIC paid Cordoba the policy limits and that, therefore, the only outstanding issue in the case was Cordoba's request to amend his counterclaim. In that regard, FIC asserted that it had produced sufficient discovery for Cordoba to determine whether he had an alternative basis for his counterclaim. Thereafter, Cordoba filed a second motion to compel discovery in which he asserted that his attempts "to schedule depositions with various individuals of [FIC]" had all been refused.

{9} At a hearing on FIC's motion to dismiss Cordoba's motion to amend his counterclaim and on Cordoba's second motion to compel, the court ruled that because the declaratory judgment action was resolved and the policy limits were paid, there remained "no pending claims." The court entered a final judgment by which it granted FIC's motion to dismiss with prejudice and denied as moot all pending motions.

{10} On appeal, Cordoba contends that the district court erred in its application of Rule 11-408 and in dismissing his counterclaim on Rule 1-012(B)(6) grounds and also erred in not permitting him to proceed on that counterclaim or on his proposed amended counterclaim.

DISCUSSION

{11} "A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint, not the factual allegations of the pleadings which, for purposes of ruling on the motion, the court must accept as true."

Herrera v. Quality Pontiac, 2003-NMSC-018, ¶ 2, 134 N.M. 43, 73 P.3d 181 (internal quotation marks and citation omitted). "A district court's decision to dismiss a case for failure to state a claim under Rule 1-012(B)(6) is reviewed de novo." *Delfino v. Griffo*, 2011-NMSC-015, ¶ 9, 150 N.M. 97, 257 P.3d 917 (internal quotation marks and citation omitted). Dismissal under Rule 1-012(B)(6) is appropriate only if the non-moving party is "not entitled to recover under any theory of the facts alleged in their complaint." *Delfino*, 2011-NMSC-015, ¶ 12 (internal quotation marks and citation omitted). Moreover, on review, "we accept all well-pleaded factual allegations in the complaint as true and resolve all doubts in favor of sufficiency of the complaint." *Id.* ¶ 9 (internal quotation marks and citation omitted). Whether to admit evidence of settlement offers for a purpose other than proving liability is within the discretion of the district court. *Fahrbach v. Diamond Shamrock, Inc.*, 1996-NMSC-063, 122 N.M. 543, 547-48, 928 P.2d 269, 273-74. "[W]e may characterize as an abuse of discretion a discretionary decision that is premised on a misapprehension of the law." *Clark v. Sims*, 2009-NMCA-118, ¶ 20, 147 N.M. 252, 219 P.3d 20 (internal quotation marks and citation omitted).

{12} FIC contends that Rule 11-408 strictly prohibited Cordoba's "impermissible use of settlement negotiations" to show that FIC acknowledged coverage or admitted liability to Cordoba for benefits. *See* Rule 11-408 (stating that "[e]vidence of . . . offering or promising to furnish . . . a valuable consideration in compromising or attempting to compromise a claim . . . is not admissible to prove liability for . . . the claim or its amount"). Rule 11-408 does not exclude evidence of settlement negotiations, however, if the evidence is offered for "another purpose[.]" *See Jesko v. Stauffer Chem. Co.*, 89 N.M. 786, 789, 558 P.2d 55, 58 (Ct. App. 1976) (stating that Rule 11-408 excludes evidence when its purpose is "proving the validity or invalidity of the claim or its amount, [however] an offer for another purpose is not within the rule" (internal quotation marks and citation omitted)). Cordoba's argument regarding evidence of the settlement negotiations is that they were not to show that FIC acknowledged coverage or admitted liability for benefits. Before the court ruled that Cordoba's claim was covered under the policy, the settlement negotiations were offered based on a theory that coverage was otherwise indisputable and that FIC engaged in bad faith and other wrongful conduct in an attempt to delay payment or to pay less than it was required by law to pay. After the court ruled that Cordoba's claim was covered under the FIC policy, the settlement negotiations indisputably could no longer have been offered to prove that FIC acknowledged coverage or admitted liability for benefits. At all times during the pendency of this case below, evidence of FIC's actions during settlement negotiations, taken as true, was relevant to prove Cordoba's derivative bad faith claims.

{13} Cordoba relies on *ABM Industries, Inc. v. Zurich American Insurance Co.*, 237 F.R.D. 225, 228 (N.D. Cal. 2006) (order), for the proposition that he was entitled to reference FIC's conduct and statements made during settlement negotiations to allege that FIC's conduct and actions in adjusting Cordoba's claim for coverage were undertaken in bad faith and in violation of New Mexico law governing insurance practices. *See* Rule 11-408 comm. cmt. ("This rule was changed to conform to federal rule."); *see also State v. Lopez*, 1997-NMCA-075, ¶ 10, 123 N.M. 599, 943 P.2d 1052 (stating that, where the state and federal rules are similar, federal case law is instructive in

interpreting the state rule).

{14} *ABM Industries* involved a question of whether insureds could amend their complaint to add facts concerning settlement offers, mediation efforts, and allegations of bad faith against the insurers in an insurance coverage dispute. 237 F.R.D. at 226. The insurers opposed the amendment request on the ground that evidence regarding settlement and mediation was barred by Federal Rule of Evidence 408 and the amendments were therefore futile. *ABM Indus.*, 237 F.R.D. at 228. The insureds argued that Rule 408 was inapplicable because evidence of mediation and settlement negotiations was not being offered to prove liability in the underlying action, but was being used for "another purpose" which was to show that the insurers had unreasonably denied coverage. *ABM Indus.*, 237 F.R.D. at 228. The court agreed with the insureds' position and held that the insureds' allegations that the amount of the settlement in the underlying action triggered the insurance policy with one of the insurers, if taken as true, raised a question of whether the insurer's denial of coverage was reasonable. *Id.* at 229. The court explained that the amendment would be held futile "only if no set of facts could be proved under the amendment to the pleadings that would constitute a valid and sufficient claim[.]" *Id.* at 227 (internal quotation marks and citation omitted). Thus, in *ABM Industries*, the court made a distinction that applies to this case, namely, that there is a difference between using evidence of settlement to prove the existence or amount of coverage and using that evidence in a separate claim or action to prove bad faith or other wrong doing.

{15} Here, as in *ABM Industries*, taking as true Cordoba's allegations that "FIC did not follow New Mexico law in its interpretation of the insurance policy" and that his damages were "clearly covered under the Cordoba/FIC contract," FIC's conduct in denying policy limits either prior to or during settlement negotiations raised a legal issue separate from the question of liability for the uninsured/ underinsured motorist benefits. *See* 237 F.R.D. at 229; *see also Delfino*, 2011-NMSC-015, ¶ 9 (stating that on review for propriety of dismissal for failure to state a claim, the appellate courts accept as true all well-pleaded facts in a complaint). Cordoba referenced the settlement negotiations in his counterclaim, among other reasons, to demonstrate that FIC had no legitimate or arguable basis on which to refuse to pay the policy limits and that FIC wrongfully attempted to reduce that obligation. Accordingly, dismissal of the counterclaim under Rule 1-012(B)(6) was improper. Even more so, the court erred in holding fast to the dismissal and not permitting Cordoba to file his amended counterclaim. It is indisputable that, once the court ruled in Cordoba's favor on coverage, the settlement negotiation averments Cordoba sought to plead in his proposed amended counterclaim unambiguously related only to FIC's bad faith or other wrongful conduct. As such, reaffirming the Rule 1-012(B)(6) dismissal based on Rule 11-408 was improper. *See* Rule 1-015(A) NMRA (stating that after a responsive pleading has been served, a "party may amend his pleading. . . by leave of [the] court . . . and leave shall be freely given when justice so requires"); *Amica Mut. Ins. Co. v. McRostie*, 2006-NMCA-046, ¶ 20, 139 N.M. 486, 134 P.3d 773 (recognizing that the clear policy behind Rule 1-015 is that amendments should be freely granted); *Lovato v. Crawford & Co.*, 2003-NMCA-088, ¶ 6, 134 N.M. 108, 73 P.3d 246 ("Amendments to the pleadings are favored and should be liberally permitted as justice requires.").

{16} Moreover, Cordoba's reference in his counterclaim to any facts that may have

eventually been ruled inadmissible in evidence did not provide a proper basis for dismissal of his counterclaim under Rule 1-012(B)(6). *See Ricciuti v. N.Y.C. Transit Auth.*, 941 F.2d 119, 123 (2d Cir. 1991) (stating that "[t]he fact that a pleading contains references to documents that may eventually be ruled inadmissible in evidence is not a proper basis for dismissal pursuant to Rule 12(b)(6)"). Thus, while the district court and FIC noted that in his counterclaim Cordoba alleged that "FIC, by way of two separate financial settlement offers, [acknowledged] coverage to Cordoba[,]" the presence of this in the averments was not a basis for dismissal of Cordoba's counterclaim because in significant part, if not fully, reference to FIC's acknowledgment of coverage was intended not as proof of coverage liability, but rather as proof of liability for bad faith.

{17} Additionally, the fact that the objectionable reference was made while the declaratory judgment was pending was not a proper basis for dismissal. Any reference to FIC's acknowledgment of liability by way of settlement offers would undeniably have been improper had it been included in Cordoba's response to FIC's declaratory judgment action; however, that is not what occurred here. Rather, the averment appeared only in Cordoba's counterclaim which, in addition to being pertinent to legal issues other than liability for coverage, was compulsory and, therefore, could not have been raised except within a counterclaim. *See* Rule 1-013(A) NMRA (stating that "[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim"); *Bentz v. Peterson*, 107 N.M. 597, 601, 762 P.2d 259, 263 (Ct. App. 1988) (stating that "[f]ailure to plead a compulsory counterclaim bars a later action on that claim"). Therefore, to the extent that FIC's acknowledgment of liability provided proof of Cordoba's counterclaim allegations, its inclusion in the counterclaim was proper notwithstanding the pendency of the declaratory judgment action.

{18} We conclude that the district court abused its discretion by misinterpreting and misapplying Rule 11-408 and erroneously dismissed Cordoba's counterclaim under Rule 1-012(B)(6). *See Clark*, 2009-NMCA-118, ¶ 20 (stating that a district court abuses its discretion by making a decision based on misapprehension of the law).

{19} On a final note, we distinguish *Reeder v. American Economy Insurance Co.*, 88 F.3d 892 (10th Cir. 1996), upon which the district court relied in making its determination and upon which FIC relies on appeal. In *Reeder*, the insurer filed a declaratory judgment action to determine whether the insured was entitled to recover under the uninsured motorist coverage, and the insured counterclaimed for compensatory damages and for damages in bad faith. *Id.* at 893. On the coverage issue, the insured sought $1.5 million, which represented three insured vehicles each with uninsured motorist coverage of $500,000. *Id.* at 893, 895.

{20} Both parties moved for summary judgment. *Id.* at 893. The court ruled that the insured's claim was covered. *Id.* The court also ruled that the insurer had not acted in bad faith. *Id.* The court set trial on the issue of compensatory damages only. *Id.* Just before trial, the insurer offered $1 million in settlement. *Id.* The jury awarded $612,000 for the insured's bodily injuries. *Id.* The court (1) entered judgment on that verdict, (2) granted partial summary judgment in favor of the insured on liability, and (3) granted summary judgment in favor of the insurer on

the bad faith claim. *Id.*

{21} On appeal, the insured claimed that the court erred in failing to proceed to jury trial on the issue of whether the $1 million offer fully compensated her or whether she was entitled to $1.5 million. *Id.* at 894. The apparent underlying rationale for this request was the insurer's duty under state law that if the insurer does not conduct an investigation or, after investigation, determines that the likely worth of the claim exceeds the liability limits, "prompt payment [of the limits] must be offered." *Id.* (internal quotation marks and citation omitted).

{22} Apparently, based on *Buzzard v. Farmers Insurance Co.*, 824 P.2d 1105, 1112 (Okla. 1991), which imposed a duty on the insurer to investigate and evaluate claims and offer payment if the claim so warrants, the insured wanted to show that the $1 million offered was the insurer's "evaluation" apparently for the purpose of having a jury determine whether it was adequate compensation for her claim, and this, presumably in the insured's mind, was linked to proving the insurer's bad faith in failing in its state law duty to timely and promptly investigate and pay her claim. *Reeder*, 88 F.3d at 894. The court in *Reeder* held that the "evaluation" was a settlement offer and that it was "inexorably linked with proving the amount of the [coverage] claim." *Id.* Here, unlike *Reeder*, the references to settlement negotiations were not linked with proving the amount of the claim. Rather, as we have already indicated, they were for "another purpose" allowable under Rule 11-408. *Reeder* is also distinguishable insofar as it was not a case in which the court dismissed for failure to state a claim based on Rule 12(b)(6). And finally, *Reeder* is distinguishable because the *Reeder* court, unlike the district court in the present case, ruled on the merits of the insured's bad faith claim. Owing to its inapplicability to issues in this case, *Reeder* does not support FIC's position.

CONCLUSION

{23} We reverse the district court's dismissal under Rule 1-012(B)(6) and remand for further proceedings consistent with this Opinion.

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

JONATHAN B. SUTIN, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

RODERICK T. KENNEDY, Judge

Certiorari Denied, January 4, 2012, No. 33,323

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-017

Filing Date: September 19, 2011

Docket No. 29,959

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

SANDRA GREENWOOD,

Defendant-Appellant.

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for Appellant

OPINION

SUTIN, Judge.

{1} A jury found Defendant Sandra Greenwood guilty of neglect of a resident resulting in death contrary to the Resident Abuse and Neglect Act (the Act), NMSA 1978, §§ 30-47-1 to -10 (1990, as amended through 2010). Defendant's developmentally disabled adult son, Jared, died while under her care and supervision in her home. We reject Defendant's constitutional vagueness attack and interpret the Act to cover and the evidence to support Defendant's grossly negligent failure to take any reasonable precaution necessary to prevent Jared's death and therefore affirm Defendant's conviction.

BACKGROUND

{2} Jared and his sister, Journey, were profoundly developmentally disabled adult children of Defendant. This case involves Jared, who was totally dependent on Defendant for his hygiene, grooming, bathing, medications, and cognitive functioning. Jared also required assistance from Defendant with going to the bathroom, getting dressed, and eating.

{3} At times, more particularly discussed later in this Opinion, Defendant was employed by LINKS II (LINKS), a privately owned personal care agency that employed caregivers who would provide in-home, non-medical care to its clients. LINKS clients are individuals, such as Jared and Journey, who are over the age of twenty-one and who require non-medical assistance, and approximately sixty to seventy percent of LINKS employees are family members of the clients. The caregivers are employed to provide assistance to the clients with such things as cognitive functioning, including cues, reminders and

prompts, as well as assistance with light household cleaning, preparing meals, bathing, errands, mobility, and durable medical equipment maintenance. In order to qualify for the LINKS program, prospective clients are required to be examined by a medical doctor who would assess the prospective client's daily living needs and, if necessary, would recommend the need for a caregiver's assistance.

{4} A care plan for Jared through LINKS was in place from February 2006 to February 2007. This care plan required Defendant as caregiver to devote one hour each day to assist Jared with bowel and bladder functions, thirty minutes each day for cognitive assistance, fifteen minutes each day to help Jared eat, two to three hours each week for household chores, one hour each day for Jared's hygiene, and thirty minutes each day to prepare meals for Jared. A care plan through LINKS was in place for Journey starting in November 2006, with Defendant as the caregiver. The details of Journey's care plan were not in evidence at trial.

{5} To remain in the LINKS program, clients are required to see a doctor every year; that is, annual renewal of each care contract was conditioned on an annual medical assessment. Defendant failed to obtain that medical assessment for Jared despite LINKS personnel's efforts to help arrange for the medical assessment. That failure caused the care contract for Jared to lapse in February 2007, after which LINKS paid Defendant to provide care for only Journey at the family's residence. Jared died in September 2007 in the family residence.

{6} On a Saturday evening in September 2007, Defendant contacted her brother and told him that Jared was not "feeling right." Her brother agreed to help Defendant take Jared to the emergency room the next morning if Jared was not better. Sometime the next day, Defendant called her brother to report that Jared was dead. Defendant's brother-in-law arrived at the residence that afternoon and told Defendant that they had to call the police. At Defendant's request, the brother-in-law gave Defendant thirty minutes before notifying the police.

{7} Upon arriving at the residence late that afternoon, a detective noticed an overwhelming stench of trash, as if at the dump, along with the smell of feces and the smell of a dead body. He saw Jared's body lying face up on the bathroom floor, and it appeared that someone had attempted to clean the area up around the body, in spite of which attempt Jared's arms, legs, hands, feet, back and face were caked with dried feces, blood, dirt, and trash. Jared's head lay near the toilet, which contained no water but was almost overflowing with feces. Gaping wounds, consisting of pressure ulcers, covered much of Jared's body, including his arms, trunk, chest, abdomen, buttocks, and legs down to his toes. Later examination determined that the pressure ulcers indicated that Jared had been lying on the affected parts of his body for an extended period of time. A forensic pathologist testified regarding the amount of time it takes for pressure ulcers to develop, as well as precautions that should be taken in order to prevent infection of blood by bacteria that enters through such open wounds. Jared suffered from at least eleven areas of ulceration, the majority of which were described as being Stage 4, which is the most deep and severe of ulcer classification.

{8} In an adjacent bedroom, a tablecloth and plastic bed sheet had been placed over the carpet which was covered with fecal matter and trash. The kitchen and living room were piled four feet high with garbage, food, dirt,

and dead insects. Narrow pathways cut through the heaps of refuse. As the detective photographed the living room area, he discovered Journey sitting amongst the rubble.

{9} At the scene, Defendant told a police officer that Jared's death was her fault because she did not take care of him. She voluntarily went to the police station where she gave a videotaped interview. She stated that she did not know Jared was sick, that she did not understand why she did not know, and that there was no excuse or explanation. Distraught and in tears, Defendant also stated,

> He shouldn't be gone, it's my fault, and I can't fix it. . . . He was one hundred percent dependent on me for his life, and I failed him. And it's my fault. I have no explanation and no excuses, and I'm not ever going to offer one. There is no reason for Jared to be gone except for my negligence or my not paying attention. But it wasn't because I didn't care.

{10} Defendant was charged with neglect of Jared, a resident in a care facility, resulting in Jared's death, a second degree felony under Section 30-47-5(D) of the Act (the neglect charge). She moved unsuccessfully to dismiss the neglect charge on the grounds that, as a matter of law for the purposes of the Act, her residence was not a "care facility" as it related to Jared, he was not a "resident" of a care facility, and the Act was void because it is unconstitutionally vague. The jury found Defendant guilty of the neglect charge.[1]

[1] Defendant was also charged, alternatively, with involuntary manslaughter (negligent act) under NMSA 1978, § 30-2-3(B) (1994). The district court directed a verdict of acquittal as to this charge.

{11} Defendant's points on appeal are that (1) the jury instructions were confusing, making it impossible to know if she was convicted under a proper legal standard; (2) the Act, as a matter of law, was not intended to apply to her house because it does not qualify as a care facility and was not intended to apply to Jared because he did not qualify as a "resident" for purposes of the Act; (3) the Act is void for vagueness on the facts of the case; (4) the State failed to present sufficient evidence for a conviction; and (5) the district court erred in not holding mid-trial voir dire owing to the significant media exposure of the case.

DISCUSSION

The Jury Instruction Issue

{12} Under *State v. Benally*, 2001-NMSC-033, 131 N.M. 258, 34 P.3d 1134, on review we determine whether a reasonable juror would have been confused or misdirected by the jury instruction. *Id.* ¶ 12. "Under fundamental error review, . . . the jury verdict will not be reversed unless necessary to prevent a miscarriage of justice." *State v. Sandoval*, 2011-NMSC-022, ¶ 13, 150 N.M. 224, 258 P.3d 1016 (internal quotation marks and citation omitted).

{13} There exists no uniform jury instruction for violation of the Act. The district court gave the following elements instruction, Instruction No. 4, to the jury.

> For you to find . . . [D]efendant guilty of neglect of a resident resulting in death, as charged in Count 1, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. Jared . . . was an adult who resided at [Defendant's] residence;

2. [Defendant's] residence was a care facility;

3. [Defendant], subject to Jared['s] . . . right to refuse treatment and subject to [Defendant's] right to exercise sound medical discretion, was grossly negligent in her failure to take any reasonable precaution that was necessary to prevent damage to Jared['s] . . . health;

4. [Defendant's] failure resulted in Jared['s] . . . death;

5. This happened in New Mexico on or about the 30th day of September 2007.

Instruction No. 5 added that the jury had to find that Defendant's gross negligence was a significant cause of Jared's death. The court also gave Instruction No. 8 containing a lesser-included offense of neglect of a resident resulting in no harm.

{14} Defendant appears to have objected to the elements instruction on the neglect charge, and she offered her own elements instruction, which the court refused. The pertinent additional elements Defendant added were that the jury was required to find that "[Defendant] was Jared['s] caretaker"; as his caretaker, "[Defendant] failed to take a reasonable precaution regarding Jared" and failed to take precaution "necessary to prevent damage to the health and safety of Jared"; and Defendant "did not exercise sound medical discretion[.]"

{15} Based on an arguable belief that Jared would not require immediate medical attention in order to stay alive, Defendant sought, and the jury was given, UJI 14-5120 NMRA mistake-of-fact instruction, labeled Instruction No. 6. Defendant did not include a mistake-of-fact element in her proposed elements instruction. Instruction No. 6 required the State to prove that Defendant did not fail to act under an honest and reasonable belief in the existence of the fact that Jared would not require immediate medical attention to stay alive. A written jury note to the court stated: "Could we ask for a clarification on Instruction [No.] 6. Because we are not sure how to interpret Instruction [No.] 6. We deem that Instruction [No.] 6 conflicts with Instruction [No.] 4 and [No.] 5."

{16} The court reviewed the instructions that had been given to the jury and concluded that the elements instruction had been written incorrectly. The court indicated that the use note accompanying UJI 14-5120 instructed that mistake of fact, when given as an instruction, should also be added to the elements of the crime. *See* UJI 14-5120, Use Note 1 ("If this instruction is given, add to the essential elements instruction for the offense charged, 'The defendant did not [act] [fail to act] under a mistake of fact.'"). The court determined that the proper resolution would be to instruct the jury to add the missing component to the previously given elements instruction.

{17} Accordingly, the court responded by writing the following instruction on the same note:

> Please add as [No.] 6
> to Instruction [No.] 4
> the following
> 6) The Defendant did not fail to act
> under a mistake of fact.

The jury did not seek any further clarification regarding Instruction Nos. 4, 5, or 6.

{18} The original Instruction No. 6 submitted to the jury, as it exists in the record in this case, appears to have "not" marked through in the phrase "did not fail to act[.]" No reliable information or explanation regarding this circumstance exists in the record. In a footnote in her brief in chief, Defendant suggests that "[t]he word 'not' . . . was struck from [Instruction No. 6] but [was] ambiguously included in the court's note to the jurors, 'not' was raised above the rest of the sentence[.]" In its answer brief, the State explains that "the court included the word 'not' in reading the instruction [to the jury]," and "somebody apparently later crossed out the word 'not' in the written copy of Instruction [No.] 6."

{19} Nothing material or significant is to be made of the mark-through of "not" in mistake-of-fact Instruction No. 6. Nothing in the record indicates that the mark-through occurred at any time or anywhere other than in the jury room. Defendant in fact acknowledges that it appeared "the jury must have struck the word[.]" The court's handwritten clarification on the jury note was intended to inform the jury that the State was required to prove beyond a reasonable doubt, as an essential element of the offense, that "Defendant did not fail to act under a mistake of fact." After receiving the court's handwritten clarification and deliberating for about forty more minutes, the jury returned its verdict. We see no basis on which to conclude any error existed resulting from the mark-through.

{20} Despite the fact that Instruction No. 6 was requested by Defendant, and despite her acknowledgment that the mark-through of "not" in Instruction No. 6 must have been made in the jury room, Defendant contends that this instruction varied from UJI 14-5120 and was "inherently confusing" because "not" was struck from the instruction and because the jury sought a clarification of the instruction. Defendant asserts that the length of time that passed before the jury sought clarification demonstrated the substantial degree of confusion. Defendant explains in a footnote that "[i]t could only otherwise demonstrate that [the jury] failed to follow [the] instruction . . . which directs '[y]ou should be sure that you fully understand the elements of each crime before you deliberate further.'"

{21} With respect to the mistake-of-fact instruction, we agree with the State that Defendant failed in her brief in chief to show, in the record, where she objected to the manner in which the jury was instructed by use of the handwritten clarification on the jury's note to the court. Only in her reply brief on appeal does she attempt to describe an objection, but she describes nothing more than defense counsel stating, as to the language chosen by the court that quoted the rule, that "the sentence sounds non-sensical, and that's troubling." Because we find no specific objection, we review this issue only for fundamental error. *Benally*, 2001-NMSC-033, ¶ 12.

{22} The issue boils down to whether the jury's apparent confusion before their request for clarification continued after the court's handwritten clarification regarding inserting the additional mistake-of-fact element into Instruction No. 4 and, if so, whether the circumstances give rise to fundamental error. "For fundamental error to exist, the [jury] instruction given must differ materially from the uniform jury instruction, omit essential elements, or be so confusing and

incomprehensible that a court cannot be certain that the jury found the essential elements under the facts of the case." *State v. Caldwell*, 2008-NMCA-049, ¶ 24, 143 N.M. 792, 182 P.3d 775 (internal quotation marks and citations omitted).

{23} No error, much less fundamental error, occurred. The word "not" was in Defendant's own mistake-of-fact Instruction No. 6 as it was read to the jury by the court and, without evidence to the contrary, we must assume that is how Instruction No. 6 went to the jury. As we indicated earlier in this Opinion, there exists no evidence or explanation in the record regarding how or why the word "not" was marked through in Instruction No. 6 as it appears in the record on appeal. Every indication is that the mark-through occurred in the jury room during its deliberations, and we are not persuaded that the mark-through reflects ultimate jury confusion as to the burden on the State in regard to the mistake-of-fact element. And, while the better practice might have been to prepare a typed replacement Instruction No. 4 containing the additional mistake-of-fact element, we cannot say that the manner in which the jury was instructed to consider the additional element as part of Instruction No. 4 meets the fundamental error standard. The clarifying handwritten instruction undisputedly contained the word "not," and the jury was instructed to add the mistake-of-fact element as the sixth element to Instruction No. 4. Defendant complains that "not" in the clarifying instruction was raised above the other wording but fails to show why this added something that tips any balance toward confusion or results in a miscarriage of justice. *See Sandoval*, 2011-NMSC-022, ¶ 13. The jury obviously knew how to alert the court to confusion, and the jury did not raise any issue of confusion after the court's clarification. The jury could in fact have resolved its confusion by reading the court's clarification in tandem with Instruction No. 6.

{24} We are equally unpersuaded by Defendant's contentions that Instruction Nos. 4 and 8 did not state the elements clearly and separately and that the instructions' consolidation of the several elements "diminished the significance of some elements and provided an instruction that would have confused any reasonable juror as to how to read and apply the instruction." Noting that there is no uniform jury instruction on the charge, Defendant claims that "shoehorning five elements into a single element . . . created a strong probability of confusion . . . as to how [the jury] could read the several elements and apply them singly." We reject the argument, and we hold that no error occurred in this regard. Defendant acknowledges that all of the elements required to prove the crime are in the instructions. The manner in which the instructions laid out the elements was adequate for jury consideration. Defendant fails to provide any authority even close on the issue to support a determination of error. Nor does Defendant show how any instruction was so confusing and incomprehensible as to forbid certainty that the jury found the essential elements under the facts. An instruction need only fairly and accurately present the law. *Caldwell*, 2008-NMCA-049, ¶ 24. It need only "substantially follow the language of the statute or use equivalent language [to be] sufficient." *State v. Doe*, 100 N.M. 481, 483, 672 P.2d 654, 656 (1983), *modified on other grounds by State v. Beach*, 102 N.M. 642, 699 P.2d 115 (1985). Instructions No. 4 and No. 8 come within these guidelines.

{25} Finally, we reject Defendant's argument that the lesser-included offense, Instruction No. 8, was inherently confusing and misleading because it contained an

element that "[Defendant's] failure resulted in no harm to Jared[.]" Defendant argues that the confusion necessarily arose because the State would produce no proof of that element and, given that the State was attempting to prove neglect resulting in death, "the jury would believe they were required to find that no harm was suffered, as opposed to no harm resulting directly from neglect." We do not see that Defendant has informed us where in the record she preserved this argument as required in Rule 12-213(A)(4) NMRA. We are not persuaded of inherent confusion or misleading instructions, and we hold that no error, much less fundamental error, occurred in that regard. Instruction No. 8 first required the State to prove that Defendant "was grossly negligent in her failure to take any reasonable precaution that was necessary to prevent damage to Jared['s] . . . health" and then required the State to prove that the "failure resulted in no harm to Jared[.]" The instruction substantially followed the language of Section 30-47-3(E) and (F)(2) and fairly presented the law. The jury was informed in the instruction that the offense was a lesser-included offense. As to guilt, the verdict form gave the jury alternative choices, that is, neglect resulting in death or neglect resulting in no harm as a lesser-included offense. Defense counsel was at liberty to argue the meaning and purpose of the lesser-included offense instruction.

The Act's Coverage Issues

{26} We review issues in regard to the coverage of the Act and statutory interpretation de novo. *See State v. Billington*, 2009-NMCA-014, ¶ 8, 145 N.M. 526, 201 P.3d 857. We endeavor to give effect to the intent of the Legislature, looking first to the statute's plain language and interpreting statutes as a whole to determine legislative intent. *State v. Davis*, 1998-NMCA-148, ¶ 19, 126 N.M. 297, 968 P.2d 808.

{27} Section 30-47-3(I) of the Act defines "resident" as "any person who resides in a care facility or who receives treatment from a care facility." "Care facility," as it existed in the applicable version of the statute, is defined as

> a hospital; skilled nursing facility; intermediate care facility; care facility for the mentally retarded; psychiatric facility; rehabilitation facility; kidney disease treatment center; home health agency; ambulatory surgical or out-patient facility; home for the aged or disabled; group home; adult foster care home; private residence that provides personal care, sheltered care[,] or nursing care for one or more persons; adult day care center; boarding home; adult residential shelter care home; and any other health or resident care related facility or home but does not include a care facility located at or performing services for any correctional facility[.]

Section 30-47-3(B) (1990).

{28} Jared resided in Defendant's home. The questions are whether he was residing in a care facility and whether he was receiving treatment from a care facility. Defendant does not dispute that her home, insofar as Journey was concerned, was a care facility. Nor does she dispute that her home was a care facility for Jared during the LINKS care plan that was effective for Jared from February 2006 to February 2007. Defendant's point is that, although Jared resided in her home after February 2007 until his death, the home cannot be considered a "care facility" under

the Act in relation to Jared because Defendant was not treating or caring for him under any contract that would bring the home within the meaning of "care facility." In a nutshell, Defendant argues that the Legislature did not intend the Act to be construed to apply to her or Jared because, in her words, "a care facility defined as a private home in which one person is contracted to give care to a second person does not logically encompass the non-contractual care of or by a third person."

{29} The State contended at trial that Defendant was subject to the Act because Jared was her son, and she recently had been under the LINKS contract for Jared's care that Defendant allowed to lapse by failing to take Jared to a doctor for the requisite annual evaluation. The State also argued that Defendant was the caregiver under the Act for Journey, at the time of Jared's death, in the same home in which Defendant had cared for Jared. The State further relied on *Davis*, 1998-NMCA-148, ¶¶ 18-23, in which the defendant received federal veteran's benefits to be used for the eighty-year-old victim's personal care and was considered the victim's legal custodian for veteran's benefits, and this Court determined that the defendant's mother's home was a care facility under the Act and that the defendant was obligated to care for the victim who was a resident in the home. At trial, Defendant requested a directed verdict and argued that because she was not under any contract to provide care for Jared at the time of his death, she was not subject to the Act. Relying on *Davis*, 1998-NMCA-148, the district court denied Defendant's motion for a directed verdict, explaining that it did not think that "LINKS as a matter of the statute has anything to do with anything" because Defendant was caring for Jared at her home, she was receiving social security income to provide for Jared's care, and Jared was unable to care for himself.

{30} Defendant maintains that her "statement that Jared . . . was a recipient of social security benefits and that she was not to live off her kids' benefits" was insufficient to "demonstrate the relationship" required for criminal liability under the Act. Further, in Defendant's view, "regardless of the literal language [of the Act] that states that a care facility may be a private home contracted to provide care to one or more persons, it would be absurd to hold that this private home was such a facility beyond the contractual confines of [Defendant's] employment contract." Thus, according to Defendant, because she was not under any contract with LINKS relating to Jared, "as a matter of law, [her] house was not a care facility for purposes of the 'neglect of a resident' statute as it applies to Jared[.]" In addition, Defendant employs the principle of *ejusdem generis* to argue that the several facilities enumerated in the definition of "care facility" in Section 30-47-3(B), different from her private house, "describe institutions whose sole purpose is to provide care"; thus, "the intention of the [L]egislature was to deter and remedy the abuse, neglect[,] and exploitation of those persons receiving care at care facilities, not persons who might also and coincidentally be within the four walls of the same building." Defendant also contends that, in order to avoid an absurd result, the Act must be construed narrowly to evince legislative intent, which she argues is to require a contractual relationship and duty to provide care.

{31} In that regard, Defendant argues that the Legislature could not have intended "punishment for persons conducting themselves outside the scope of their employment duties." And, related to her legislative-intent pursuit, Defendant points out in a footnote that "[t]he . . . Act is positioned between ticket scalping and tobacco products in the New Mexico Criminal [Manual], further

demonstrating that this criminal legislation relates to the [governance] of business regulation and employers and employees and not the conduct and behavior in common homes." Defendant contends that, after February 2007, her private home "was only a care facility for purposes of care being provided to Journey."

{32} To analyze Defendant's arguments, we begin with the provisions of the Act. Its purpose is "to provide meaningful deterrents and remedies for the abuse, neglect[,] or exploitation of care facility residents and to provide an effective system for reporting instances of abuse, neglect[,] or exploitation." Section 30-47-2. Among other proscriptions, the Act criminalizes neglect of a resident that results in the death of the resident. Section 30-47-5(D). "Neglect" is "the grossly negligent . . . failure to take any reasonable precaution that is necessary to prevent damage to the health or safety of a resident[.]" Section 30-47-3(F)(2). A "resident" is "any person who resides in a care facility or who receives treatment from a care facility." Section 30-47-3(I). The definition of "care facility" in effect at the time of Jared's death includes a "private residence that provides personal care[.]" Section 30-47-3(B) (1990).[2]

{33} We see no basis on which to bring Defendant under the Act based on her lone statement about social security or based on the fact that she had a contract with LINKS for Jared's care or that she had a contract with LINKS for Journey's care during the period preceding Jared's death. In regard to social security benefits, there exists no evidence in the record showing any detail whatsoever as to social security benefits, their purpose for Jared, or any restrictions on their use that might apply to Defendant in this case. The State does not point out where in the record it provided any argument, much less evidentiary detail, with regard to social security. Further, while the State mentions public funding and government benefits in its answer brief, the State presents nothing beyond those bare words, no argument, and no persuasive authority as to how receipt by Defendant of government funds to spend for Jared in any way relates causally to Jared's death. The State relies on *Davis*, 1998-NMCA-148, as authority to hold Defendant under the statute. *Davis* does not assist the State because, unlike in *Davis*, here there is no evidence of any particular law or regulation, no evidence of any detail of receipt of funds, no evidence of what funds were to be used for, and no evidence of any fiduciary or other legal obligation on Defendant's part that would show that a failure on her part relating to expenditure of funds was in any way related to Jared's death.

{34} The State offers only *Davis* to support its argument relating to the LINKS contract. In regard to LINKS, even if a current contract were to give rise to a relationship sufficient to bring Defendant under the Act's coverage, we see no basis on which to straddle Defendant with any continuing responsibility based on an expired contract. *See State v. Villa*, 2003-NMCA-142, ¶ 10, 134 N.M. 679, 82 P.3d 46 (holding that there was insufficient evidence to charge the defendant with violation of a permit when the permit was technically not in effect), *aff'd in part, rev'd in part on other grounds by* 2004-NMSC-031, 136 N.M. 367, 98 P.3d 1017.

{35} Importantly, even if the LINKS contract relating to Jared were to have been renewed and to have been in force at the time of Jared's death, we are not convinced that it

[2] The Act also contains reporting provisions that are not relevant here.

would be the sole basis or even a controlling factor in determining Defendant's legal responsibility under the Act. Defendant's criminal liability must exist solely based on an omission—a failure to act when she had a legal responsibility to act. *See* Deborah A. Goodall, *Penal Code Section 22.04: A Duty to Care for the Elderly*, 35 Baylor L. Rev. 589, 594 (1983) (stating that "authorities have long agreed that before an omission can constitute an offense[,] there must first be a duty to act"); *see also People v. Beardsley*, 113 N.W. 1128, 1129 (Mich. 1907) ("The law recognizes that under some circumstances the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, will make the other chargeable with manslaughter. This rule of law is always based upon the proposition that the duty neglected must be a legal duty, and not a mere moral obligation. It must be a duty imposed by law or by contract, and the omission to perform the duty must be the immediate and direct cause of death." (citation omitted)). A legal responsibility to act is implicit from the wording in the Act of the criminal behavior—"the grossly negligent . . . failure to take any reasonable precaution that is necessary to prevent damage to the health . . . of a resident[.]" Section 30-47-3(F)(2). The Act is intended to apply to persons in a private residence setting who take on the responsibility as caregivers to care for severely developmentally disabled and other similarly incapacitated adults, including the aged, who are in need of frequent, if not daily, personal assistance and care to stave off harm.

{36} Here, Jared, although an adult child, was essentially a child of young years, unable to care for himself. Children are protected under existing child abuse and neglect criminal laws. *See* NMSA 1978, § 30-6-1 (2009). But those protections end when a child reaches eighteen years of age. *See* § 30-6-1(A)(1). *But see Cohn v. Cohn*, 1997-NMCA-011, ¶¶ 6, 8, 123 N.M. 85, 934 P.2d 279 (holding that "parents have a common law continuing duty to [financially] support a severely disabled child if . . . the child was so disabled before reaching the age of majority"). Defendant undeniably accepted full responsibility for Jared's care. By Defendant's own admission, Jared was "one hundred percent dependent" on her for his life.

{37} We do not read the Act as intended by the Legislature to broadly cover persons who volunteer to essentially just sporadically, or even daily, check in on neighbors or friends or relatives who live alone or perhaps are left alone for hours but who are able to care for themselves. Visitors, neighbors, or other persons who may volunteer to make occasional observations, or parents covered by criminal child abuse statutes, are not the aim of the Act. The aim is to apply to persons who, like Defendant, take on the responsibility of continual, steadfast, and faithful watch and care of someone, like Jared, who cannot care for himself or herself, and who are grossly negligent in carrying out that responsibility by failing, as the Act states, to take any reasonable precaution to prevent damage to health. *See* § 30-47-3(F)(2).

{38} We conclude that, under the Act and the circumstances in this case, the jury could reasonably find that Defendant's home was a "care facility" and Jared was a "resident." Had the Legislature intended to limit its coverage, as Defendant argues, to those caregivers with current contractual obligations or to institutions whose sole purpose is to provide care, the Legislature could have included such limiting language. For criminal liability for neglect, the Act does not expressly require or even refer to any contractual, employment, or financial arrangement between a care facility, care provider, or

particular entity, on the one hand, and an individual caregiver who has the hands-on and immediate responsibility of care and of taking reasonable precautions necessary to prevent damage to a resident's health or safety. "[T]he Legislature knows how to include language in a statute if it so desires." *Chatterjee v. King*, 2011-NMCA-012, ¶ 15, 149 N.M. 625, 253 P.3d 915. We hold that the Legislature intended the Act to cover the circumstances in this case.

The Void-for-Vagueness Issue

{39} We review claims of unconstitutional vagueness de novo. *See State v. Laguna*, 1999-NMCA-152, ¶ 24, 128 N.M. 345, 992 P.2d 896. "A strong presumption of constitutionality underlies each legislative enactment, and the party challenging constitutionality has the burden of proving a statute is unconstitutional beyond all reasonable doubt." *Id.* We will review the vagueness challenge to a criminal statute whether or not it was raised in the district court. *Id.* ¶¶ 23-24.

{40} The test for unconstitutional vagueness is two-pronged and is set forth in *Laguna*. *Id.* ¶¶ 25-26. The questions to be answered are (1) whether the statute gives fair notice to persons of ordinary intelligence as to the conduct it prohibits, and (2) whether the statute sets standards and guidelines sufficient to avoid arbitrary and discriminatory enforcement. *Id.* Defendant argues that the Act is void for vagueness as applied to the facts of this case on both grounds.

{41} Defendant argues that "[n]o person of ordinary intelligence would have understood the [Act] to render [Defendant] responsible for [the] persons living in her home who were not receiving care as specifically overseen or [prescribed] by a care provider." Defendant's point here is that near and at the time of Jared's death, she was "not employed by LINKS as a personal care provider for Jared[,]" and Jared was not receiving services through LINKS.

{42} Defendant argues that for her "or any other person of ordinary intelligence to understand how the statute applies to her, she must ascertain various definitions, cross-reference, and match them to each other and distinguish them from the other inapplicable provisions[.]" Defendant particularly complains that by using "whoever commits neglect of a resident" in Section 30-47-5, "the statute does not even require the neglect to occur within or by a person employed by a care facility." Because the Act requires only that the neglected person be a resident of a care facility, Defendant explains, "the person charged with neglect could be a visitor at a care facility and could even commit the neglect in an arena outside of a care facility[.]" Defendant contends that under the Act, as applied to this case, she "would not comprehend that the prohibited behavior applies to her as a mother [unless it also applied] to all persons not employed at institutions." Defendant concludes that if the Act can be read so expansively as to allow prosecution of any person who neglects or abuses any person who qualifies as a resident, even where the abuse or neglect takes place outside the context of a defined care facility, police and prosecutors could potentially enforce the statute in an arbitrary and discriminatory manner. Additionally, Defendant maintains that no person of ordinary intelligence reading the Act would understand that a person in Defendant's position and circumstance, caring for an individual outside a professional health-care environment, would be on notice of (1) a need to provide the type of medical care that would have prevented Jared from acquiring sepsis,

(2) a need to accurately determine a course of action in order to stop ulcer infection, or (3) a need to ascertain the precise point at which she should have sought a physician.

{43} A defendant will not succeed in a void-for-vagueness challenge "if the statute clearly applied to his [or her] conduct." *Laguna*, 1999-NMCA-152, ¶ 24. We review a defendant's void-for-vagueness challenge "in light of the facts of the case and the conduct which is prohibited by the statute." *Id.* (internal quotation marks and citation omitted). Defendant acknowledged that Jared was one hundred percent dependent on her for his life. Evidence of the extent to which Jared was dependent on a caregiver was presented through the testimony of two doctors, Dr. Koewler and Dr. Poe, among other witnesses. In 2003, Jared was evaluated by Dr. Koewler, a clinical psychologist. Dr. Koewler concluded that Jared had severe mental retardation, possibly had pervasive developmental disorder (autism), and that Jared needed continued supervision because he could not care for himself, and he further testified that these conditions would have been the same in 2007. Dr. Poe, who evaluated Jared in 2006, testified that he determined Jared was incapable of caring for himself to the extent that he was totally dependent on another person for certain tasks, including taking medications, bathing and hygiene, and cognitive functioning.

{44} There was no evidence that Jared received care from anyone other than Defendant or that Jared resided at any private residence or care facility other than Defendant's home. Coverage under the Act is not limited to individuals receiving care that was specifically overseen or prescribed by a professional care provider. Considering the facts of this case in light of the wording of Section 30-47-3(B), which includes in the definition of "care facility" a "private residence that provides personal care," we conclude that a reasonably intelligent person would understand the Act to apply to a person in Defendant's position and circumstance. Jared's health needs were daily necessities. Defendant's responsibility of care was a constant, steadfast, and faithful one that she acknowledged and undertook. She was the sole provider of Jared's personal care.

{45} Contrary to Defendant's assertions, the Act does not require a caregiver to accurately determine the precise moment at which a particular medical treatment is necessary. Rather, it requires only that the caregiver take "reasonable precaution" as "necessary to prevent damage to the health or safety of [the] resident[.]" Section 30-47-3(F)(2). Evidence was presented at trial that Jared's death was caused by sepsis which, in turn, was caused by the extensive, severe pressure ulcers that covered Jared's body, a number of which were so deep as to expose bone and had become infected due to the filthy conditions in which Jared was living. The ulcers on Jared's body developed over an "extended period of time" ranging from a few days to weeks or even months. A person of ordinary intelligence could determine that, among the forms of reasonable precaution under the circumstances of this case, simple precautions for the caregiver to take would have been to regularly check Jared's physical condition, to keep Jared's environment and Jared himself free of fecal matter, filth, and other conditions obviously harmful to health, and to seek medical advice or treatment for apparent conditions that the caregiver was not professionally capable of handling on her own.

{46} Defendant also claims that the Act's provisions are confusing to a reader and allow expansive interpretation which could result in

arbitrary and discriminatory enforcement. We see no reasonable basis on which to read the language of Section 30-47-4(D) to "encourage or permit police officers, prosecutors, judges, or juries to engage in arbitrary or discriminatory enforcement or to permit standardless or *ad hoc* determinations." *Laguna*, 1999-NMCA-152, ¶33. Defendant's complaint that the Act "does not even require the neglect to occur within or by a person employed by a care facility" does not provide a basis on which to conclude vagueness, such that, "an officer, prosecutor, judge, or jury would be unable to distinguish between innocent conduct and conduct threatening harm." *Id.* (internal quotation marks and citation omitted). We believe that a reasonable officer, prosecutor, judge, or jury would be capable of reading the purpose of the Act in tandem with its proscriptions and reasonably determine whether the facts of this or any other case fell within its scope. In conclusion, we hold that the Act is not void for vagueness under either prong of the *Laguna* test. *See Laguna*, 1999-NMCA-152, ¶¶ 25-26.

The Sufficiency of Evidence Issue

{47} Defendant contends that the State failed to present sufficient evidence for a conviction. First, Defendant contends that the State presented insufficient evidence to prove that her home was a care facility. Next, she contends that the State did not show that she failed to take a precaution. And finally, Defendant claims that she exercised sound medical discretion.

> [W]e apply a substantial evidence standard to review the sufficiency of the evidence at trial. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In performing this review, we must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict. [We do] not weigh the evidence or substitute [our] judgment for that of the fact finder as long as there is sufficient evidence to support the verdict.

State v. Chavez, 2009-NMSC-035, ¶ 11, 146 N.M. 434, 211 P.3d 891 (alteration omitted) (internal quotation marks and citations omitted).

{48} Defendant's sufficiency of the evidence arguments pertain to two elements in Instruction No. 4. Those elements are:

> 2. [Defendant's] residence was a care facility; [and]
>
> 3. [Defendant], subject to [Jared's] right to refuse treatment and subject to [Defendant's] right to exercise sound medical discretion, was grossly negligent in her failure to take any reasonable precaution that was necessary to prevent damage to [Jared's] health[.]

Defendant contends that the jury did not have sufficient evidence to conclude that her home was a care facility because (1) she was not employed by LINKS to care for Jared at the time of his death, and (2) there was no evidence that she agreed to act as Jared's caregiver and beneficiary as was proved in *Davis*, 1998-NMCA-148.

{49} Based on our analyses under the coverage and vagueness sections of this Opinion and viewing the evidence in the light most favorable to the verdict, we determine that a reasonable inference could have been drawn by the jury that Defendant had undertaken the responsibility of being Jared's caregiver in her private residence as contemplated in the Act. *Cf. Davis*, 1998-NMCA-148, ¶¶ 17, 22 (considering the sufficiency of the evidence challenge in light of, among other things, the defendant's statements that he was responsible for the victim's various daily living needs). We therefore reject Defendant's contention that the jury did not have sufficient evidence that Defendant's home was a care facility as defined in the Act.

{50} Defendant argues that, under the third element of Instruction No. 4, the State did not show that Defendant failed to take a "precaution that was necessary to prevent damage to Jared['s] health[.]" Defendant argues that none of the State's witnesses indicated an actual precaution that Defendant should have taken that could have saved Jared's life. On the contrary, the State presented testimony from a forensic pathologist, Dr. Nine, who performed Jared's autopsy, regarding the degree of filth on Jared's body, that, according to Dr. Nine, contributed to and likely worsened the infected pressure ulcers and contributed to Jared's death. Dr. Nine also proffered the common-sense axiom that open wounds should not be exposed to feces and dirt so as to lessen the likelihood of infection.

{51} Indulging, as we must, "all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict[,]" *Chavez*, 2009-NMSC-035, ¶ 11, we determine that from evidence presented at trial, the jury could infer that Defendant should have taken the reasonable precautions of providing Jared a clean and healthy environment and keeping clean the open sores that covered Jared's body. The jury could reasonably infer from the evidence that the lack of such precautions contributed to Jared's death. Further, evidence was presented from which the jury could infer that had Jared received medical attention when the pressure ulcers began to develop, they could have been treated and managed.

{52} Defendant asserts that Section 30-47-3(F) requires the State to prove that Defendant failed to exercise sound medical discretion, and she argues that the State failed to prove this element. Section 30-47-3(F)(2) defines "neglect" to mean "subject to the resident's right to refuse treatment and subject to the caregiver's right to exercise sound medical discretion, the grossly negligent . . . failure to take any reasonable precaution that is necessary to prevent damage to the health . . . of [Jared.]" We do not read this section to place a burden on the State to prove, as an element of the violation of Section 30-47-5(D), that Defendant failed to exercise sound medical discretion. Defendant does not develop any argument or cite any authority to support her contention, and we therefore reject it. The appellate courts "have long held that to present an issue on appeal for review, an appellant must submit argument *and authority* as required by rule." *State v. Desnoyers*, 2002-NMSC-031, ¶ 11, 132 N.M. 756, 55 P.3d 968 (internal quotation marks and citation omitted), *abrogation on other grounds recognized by State v. Forbes*, 2005-NMSC-027, 138 N.M. 264, 119 P.3d 144; *see* Rule 12-213(A)(4).

{53} As part of or related to the sound medical discretion issue, Defendant argues that she was not trained in the detection of pressure ulcers and the only action she could

soundly take, and did take, was giving Jared medicine and planning to take him to the emergency room despite Jared's resistance to changing locales and to unfamiliar medical professionals. Having waited too late to act, she contends, "does not [render] her decisions less than sound because even physicians [cannot] always save people and pressure ulcers can be difficult to treat in any event."

{54} The record reflects that Defendant gave Jared acetaminophen, excedrin, and pepto bismol, determined that he did not have a fever, and contacted her brother to ask for help taking Jared to the hospital if he did not feel better by the next day. According to Defendant, the actions she took were the only actions she could soundly take.

{55} As to all of Defendant's arguments, the evidence at trial indicated that the pressure ulcers that covered Jared's body developed over a number of days, weeks, or months. Of the eleven distinct ulcers Dr. Nine identified on Jared's body, at least six had progressed to stage four, which Dr. Nine indicated is the most severe level of ulceration which reaches deep into the muscle and often involves the bone. Dr. Nine identified stage four ulcers on Jared's left foot and left ankle that exposed bone, as well as ulcers on Jared's right chest region that exposed the bones of his ribs. Based on the fact that Jared's body was covered with ulcers and discoloration, and based on the fact that Defendant admitted to having felt his head, "tummy," and hands for a fever, it was reasonable for the jury to infer that Defendant noticed the condition of Jared's skin. Notwithstanding Defendant's lack of training in the detection of pressure ulcers, the jury could make a reasonable inference that Defendant's decision to administer acetaminophen, pepto bismol, and excedrin to Jared under these circumstances and to postpone the decision about whether to seek medical care was not the exercise of sound medical discretion. Therefore, viewing the evidence in a light most favorable to the verdict and indulging all reasonable inferences in favor of the verdict, *Chavez*, 2009-NMSC-035, ¶ 11, we hold that there was sufficient evidence to support the jury's determination that Defendant was grossly negligent in her failure to take any reasonable precaution that was necessary to prevent damage to Jared's health. *See* § 30-47-3(F)(2).

Mid-Trial Voir Dire

{56} Defendant's final claim on appeal is that the district court erred by not conducting mid-trial voir dire of the jury when a local newspaper published a story with "an inflammatory headline containing implications of certain guilt." In Defendant's view, the article caused her to suffer "heightened and distinct" prejudice because it referred to Jared "rotting in his own waste for an extended period of time" and that Jared was "left to die[.]" The article is not part of the record on appeal.

{57} We review Defendant's claim of error regarding mid-trial voir dire for an abuse of discretion. *See, e.g.*, *State v. Holly*, 2009-NMSC-004, ¶¶ 2, 22, 145 N.M. 513, 201 P.3d 844 (explaining that district courts retain "some degree of discretion" in determining whether to conduct mid-trial voir dire under the ABA Standards for Criminal Justice, Fair Trial, and Free Press). In *Holly*, our Supreme Court indicated that to determine whether mid-trial publicity is inherently prejudicial, courts should consider the following factors:

> (1) whether the publicity goes beyond the record or contains information that would be inadmissible at trial, (2) how closely related the material is to matters at

> issue in the case, (3) the timing of the publication during trial, and (4) whether the material speculates on the guilt or innocence of the accused. In addition, the trial court should consider the likelihood of juror exposure by looking at (1) the prominence of the publicity, including the frequency of coverage, the conspicuousness of the story in the newspaper, and the profile of the media source in the local community; and (2) the nature and likely effectiveness of the trial judge's previous instructions on the matter, including the frequency of instruction to avoid outside materials, and how much time has elapsed between the trial court's last instruction and the publication of the prejudicial material. It is significant whether the trial court merely told the jury to disregard such material or whether the jury was properly instructed to avoid looking at such material altogether.

Id. ¶ 20. In *Holly*, the Court determined that an inference of prejudice to the defendant was justified when, in a small community, an article was featured on the front page of the newspaper which discussed details of the defendant's case that "may or may not have come out at trial." *Id.* ¶¶ 25-27. The Supreme Court determined, however, that the error was harmless owing to the fact that "most of the information in the article found its way into the trial record from other sources" and because the overwhelming weight of the incriminating evidence against the defendant at trial rendered unlikely the proposition that the article influenced the jury's verdict. *Id.* ¶¶ 30-31.

{58} Here, Defendant claims that the facts in the article go beyond the evidence presented at trial and that the jury's thirteen hours of deliberation indicate that the weight of evidence of Defendant's guilt presented in this case, unlike the evidence in *Holly*, was "far from overwhelming." The State contends that the facts alleged in the newspaper article were presented at trial. Moreover, the State contends that the district court took effective measures to prevent juror exposure to publicity during trial by admonishing the jurors at every recess to avoid listening to, watching, or reading any outside material regarding the trial.

{59} Our review of the record indicates that the district court instructed the jury at the beginning of the trial to avoid media coverage of the case. Thereafter, it consistently reminded the jury to avoid media coverage of any kind. And, on the day the article in question was printed, the district court instructed jurors to altogether avoid the newspaper in which it was printed.

{60} The record also reflects that evidence of the statements made in the article, as described to this Court in Defendant's brief in chief, were presented at trial and Defendant refuted one of the statements. Specifically, Defendant contends that the article "alleged that [Defendant] stayed in a motel the night before [Jared's] death and left [him] rotting in his own waste for an extended period of time." At trial, an audio-visual interview was played for the jury during which Defendant stated that "I went to my mom's house Saturday night" and then explained that her brother agreed to help her take Jared to the emergency room if he did not feel better. Additionally, testimony of the investigating officer who photographed the scene of Jared's death reported that there was human feces, some of which was dry and hardened indicating that it had been there for some time, throughout the rooms of the house,

including in Jared's bedroom and in the bathroom where his body was discovered. Photographs taken of Defendant's home and of Jared's body which were admitted into evidence also reflect the fact that Jared had lived and died covered in and surrounded by his own waste.

{61} Since Defendant has not presented this Court with a record containing the article in question, we indulge "every presumption . . . in favor of the correctness and regularity of the trial court's judgment." *State v. Rojo*, 1999-NMSC-001, ¶ 53, 126 N.M. 438, 971 P.2d 829 (alteration omitted) (internal quotation marks and citation omitted). When there is a doubtful or deficient record, we presume the district court's judgment was correct. *Id.* Given the facts presented at trial compared with Defendant's account of the reported news articles and given the district court's repeated instructions to the jury to avoid media coverage of this case, the facts support the presumption that the district court did not err under the circumstances. We see no abuse of discretion in the court's denial of Defendant's motion to conduct mid-trial voir dire.

CONCLUSION

{62} For the foregoing reasons, we reject Defendant's constitutional vagueness attack and interpret the Act to cover and the evidence to support Defendant's grossly negligent failure to take any reasonable precaution necessary to prevent Jared's death and therefore affirm Defendant's conviction.

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

JONATHAN B. SUTIN, Judge

WE CONCUR:

CELIA FOY CASTILLO, Chief Judge

RODERICK T. KENNEDY, Judge

Certiorari Granted, February 6, 2012, No. 33,380

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-018

Filing Date: November 17, 2011

Docket No. 30,136

JAMES M. PALENICK,

Plaintiff-Appellant,

v.

CITY OF RIO RANCHO,

Defendant-Appellee.

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OPINION

SUTIN, Judge.

{1} After the City of Rio Rancho (the City) was informed by the New Mexico Attorney General that its termination of Plaintiff James Palenick as its City Manager violated the Open Meetings Act (the Act), NMSA 1978, §§ 10-15-1 to -4 (1974, as amended through 2009), the City, in a meeting eleven months after the termination, passed a resolution attempting to retroactively cure the violation. Plaintiff sued on two counts: Count I, to enforce the Act, and Count II, for debt and money due under the employment agreement for the period between the initial termination and the later-attempted cure. We refer to Plaintiff's claim for debt and money due as a claim for breach of contract. The district court dismissed Plaintiff's claim in Count I seeking to enforce the Act on the ground that the court lacked subject matter jurisdiction. On Count II, the breach of contract claim, the court determined that the City violated the Act. The court nevertheless held against Plaintiff on his breach of contract claim, holding that the City's cure in the later meeting of its prior invalid action applied retroactively, resulting in an effective earlier termination. A related issue is whether Plaintiff waived his contention that the City violated the Act when he accepted severance benefits, pursuant to his employment agreement, when he was initially terminated, believing at the time that the City had violated the Act. The district court held that Plaintiff's acceptance of the benefits immediately after his termination constituted a waiver of his breach of contract claim. A further issue involves the district court's denial of Plaintiff's claim under the Act for attorney fees. We hold that the City's later attempt to make its invalid termination valid was not effective. We also hold that Plaintiff's acceptance of severance benefits did not constitute a waiver of his right to salary and benefits pursuant to his employment agreement. We further hold that Plaintiff is not entitled to attorney fees or costs under the Act.

BACKGROUND

{2} Plaintiff and the City signed an employment agreement (the agreement) dated November 8, 2006, employing Plaintiff as the City Manager at the pleasure of the City's governing body and permitting the governing body to terminate Plaintiff with or without cause. The agreement provided that, if the

governing body terminated Plaintiff without just cause, he would be entitled to receive certain severance benefits, including a cash payment calculated on his years of service. At a December 13, 2006, meeting at which Plaintiff was present, the governing body voted to terminate Plaintiff's employment, and Plaintiff immediately concluded that the vote had been taken in violation of the Act.

{3} The following day, Plaintiff delivered a letter to the City requesting payment of severance benefits, based on the governing body's action to remove him; the demand did not mention the Act or reserve any rights to later sue the City based on a violation of the Act. A few days later, Plaintiff clarified his demand in another letter, but this too did not mention the Act. In a letter sent several days later, the City informed Plaintiff that "effective December 13, 2006[,] you will no longer be considered [an] active employee"; Plaintiff did not object to this statement. Plaintiff received severance benefits.

{4} In September 2007, the Attorney General informed the City that, because of discussions regarding Plaintiff's employment status that predated the meeting on December 13, 2006, the City violated the Act in terminating Plaintiff's employment at that meeting and that the violation invalidated the governing body's action terminating Plaintiff. These discussions, referred to in the Attorney General's letter, took place among certain City officials that included the mayor, deputy mayor, and various city councilors. At a meeting on November 14, 2007, the governing body adopted a resolution to address the Attorney General's concerns. In part, the resolution stated that "[i]f at all relevant, any and all prior actions undertaken in terminating [Plaintiff's] employment with the City and set forth in writing are hereby ratified and approved." By this resolution, the governing body intended to ratify and approve its prior action terminating Plaintiff's employment effective December 13, 2006.

{5} On December 14, 2007, Plaintiff sent a letter to the City stating, among other things, that his termination was invalid as reflected in the Attorney General's findings. Plaintiff filed suit against the City in January 2008. In Count I, Plaintiff sought "a judgment for violation of the . . . Act" by issuing an injunction invalidating the termination, awarding attorney fees and costs under Section 10-15-3(C), and such other relief as the court deemed proper. In Count II, he asserted a claim for debt and money due on the grounds that the City had violated the Act; his termination was invalid; he remained employed under the agreement; and he was entitled to unpaid salary and benefits, interest, attorney fees, and costs based on the City's continuous breach of the agreement.

{6} In April 2009, the court entered an order dismissing Plaintiff's Count I with prejudice on the ground that the court did not have subject matter jurisdiction over the claim. The district court did not explain its rationale for holding that it lacked subject matter jurisdiction. Plaintiff does not argue on appeal that the court erred in dismissing Count I. Accordingly, we do not address or discuss the propriety of this order.

{7} In its findings of fact and conclusions of law entered in October 2009, the court not only confirmed the dismissal of Count I, but it also dismissed Count II (breach of contract). The dismissal of Count II was based on the court's conclusion of law that the meeting on December 13, 2006, terminating Plaintiff's employment violated the Act, but that the City's resolution adopted at its November 14, 2007, meeting "retroactively ratified, rectified, and approved its prior action on December 13,

2006[,] terminating [Plaintiff's] employment and cured any alleged violations of the . . . Act." The district court also found and concluded that, upon his termination in December 2006 and demand for severance benefits, Plaintiff elected to receive and did receive his severance benefits and that his "election to proceed with his demand for severance [was] a waiver of any and all rights to claim a breach of the [e]mployment [a]geement based on violations of the . . . Act." Count II was also dismissed with prejudice. Following a hearing on Plaintiff's motion for a new trial, the court entered a final judgment in favor of the City.

{8} Plaintiff contends on appeal that his termination could have been effective only as of the date of the corrective action taken by the City on November 14, 2007, that he was employed by the City and entitled to his salary and benefits until that time, and that he did not waive his right to the salary and benefits he sought. He also contends that he is entitled to costs and reasonable attorney fees permitted under the Act.

The Retroactive Cure Issue

{9} We review questions of interpretation of statutes de novo. *State v. Rivera*, 2004-NMSC-001, ¶ 9, 134 N.M. 768, 82 P.3d 939. Public entities can cure violations of the Act. *See, e.g., Bd. of Educ. of Santa Fe Pub. Sch. v. Sullivan*, 106 N.M. 125, 125, 740 P.2d 119, 119-20 (1987) (stating that the board was entitled to correct the procedural defect of failing to comply with the Act); *Kleinberg v. Bd. of Educ. of Albuquerque Pub. Sch.*, 107 N.M. 38, 44, 751 P.2d 722, 728 (Ct. App. 1988) (recognizing that "the procedural defect could be corrected through a reinstatement of the termination proceedings"). But no authority in New Mexico supports the City's attempt to retroactively make the prior invalid action valid and effective as of the date it was taken. Section 10-15-3(A) plainly states that no board action is valid if the action is not taken in accordance with Section 10-15-1. No provision in the Act states or implies that, when a public entity acts to "cure" an invalid employment termination by taking a later action, the later action can be applied retroactively. To permit retroactive application not only removes incentive to comply with the Act in employment termination circumstances, it undermines the Act and essentially renders Section 10-15-3(A) meaningless. We cannot see in the Act any purpose or balancing of interests that should bar Plaintiff from seeking relief despite the City's violation. We hold that the district court erred in determining that the City's November 14, 2007, resolution retroactively rectified, ratified, and approved the invalid December 13, 2006, action taken in violation of the Act thereby making the termination valid and effective as of December 13, 2006.

The Waiver Issue

{10} The issue of waiver here is one of law that we review de novo. *Concerned Residents of Santa Fe N., Inc. v. Santa Fe Estates, Inc.*, 2008-NMCA-042, ¶ 22, 143 N.M. 811, 182 P.3d 794 (reviewing an issue of waiver de novo).

{11} We have difficulty affirming the district court's determination that Plaintiff waived his right to any salary and benefits because he demanded and received a severance payment when he was first terminated, believing at the time that the City had violated the Act. There appears, indeed, at least at first glance backwards, to be an irreconcilable inconsistency in permitting a terminated employee to have severance benefits but also demand salary. Yet, looking back, we are convinced that the circumstances

do not permit a determination of waiver or relinquishment of a known right or waiver by estoppel. There appears to be no dispute that had Plaintiff been validly terminated on December 13, 2006, he would have been entitled to the severance benefits he received. There appears to be no question that, upon his termination on November 14, 2007, he was entitled to severance benefits if he had not already received them. Thus, under one or the other of the termination actions taken by the City, it was liable for severance benefits. Under these circumstances, we see no basis upon which Plaintiff should be barred on a waiver or estoppel ground from seeking relief under Count II.

The City's Argument That the District Court was Right for the Wrong Reason

{12} The City argues that, notwithstanding the court's determination that the City violated the Act, Plaintiff could not prevail because he failed to prove an essential element of his breach of contract claim, namely, that the City violated the Act. The City argues that Plaintiff "did not . . . explain the facts and circumstances surrounding the alleged . . . violation or otherwise [show] how the [Act] was actually violated." Thus, according to the City, we should affirm the district court's dismissal of Plaintiff's breach of contract claim on the ground that it was right even if its reasoning was mistaken. *See Tsosie v. Found. Reserve Ins. Co.*, 77 N.M. 671, 676, 427 P.2d 29, 32 (1967) (stating that "[a] court will not be reversed when it has arrived at the correct result for a wrong reason"). We reject this argument. The City did not appeal the district court's determination that the City violated the Act. Nor has the City cited any authority that supports its attempt to collaterally undermine that determination by attempting to show that it lacked a sufficient evidentiary basis. Thus, we see no basis on which the City can argue that the violation was never proved.

{13} We note, as well, that immediately after the evidence closed, at the point the court initially indicated that the Act had not been violated, Plaintiff sought a new trial. The request was based on the fact that he did not present evidence of the City's violation of the Act because of an earlier court ruling that the sole issue to be tried was whether the City's cure had retroactive effect. Plaintiff points out that before trial, the court limited the issue at trial to that relating to retroactivity and, therefore, Plaintiff did not concentrate on evidence establishing the violation. We also note that Plaintiff argues that the facts relating to the violation were before the court in the summary judgment proceedings before trial, that the facts were undisputed, and that evidence was also presented during trial.

The Attorney Fees Issue

{14} The circumstances relating to the attorney fee issue are a bit confusing. As we discussed in the background section of this Opinion, the district court dismissed Count I of Plaintiff's complaint with prejudice for lack of subject matter jurisdiction. That claim sought relief under the Act based on the City's violation of the Act. Plaintiff has not challenged that dismissal on appeal. Yet, at trial on the breach of contract claim, the court considered whether the City violated the Act. At the close of trial, the court stated that, based on the evidence before the court, "there [was] insufficient evidence to show that there was a violation of the . . . Act." But in its findings of fact and conclusions of law, the court concluded that "[t]he City's action resulting from the December 13, 2006[,] meeting concerning [Plaintiff's] termination was in violation of the . . . Act." Then, in its

order denying Plaintiff's motion for a new trial, the court found that the City violated the Act when it terminated Plaintiff on December 13, 2006.

{15} The City argues that, because the court dismissed Plaintiff's Count I claim under the Act for failure to comply with jurisdictional requirements, Plaintiff cannot successfully assert entitlement to attorney fees or costs under the Act. Distinguishing wrongful employment termination jurisprudence from that involving enforcement of the Act, the City also argues that Plaintiff cannot recover attorney fees or costs for enforcement of the Act because, although premised on a violation of the Act, Plaintiff's breach of contract claim was not an action to enforce the Act. Plaintiff argues that the court ultimately determined that the City violated the Act, that this issue was part of Plaintiff's claim for relief, and that the court's determination was sufficient to bring Plaintiff within the Act's allowance of attorney fees and costs. The City did not appeal the court's ruling that the City violated the Act.

{16} We resolve this enigmatic issue against Plaintiff. In his complaint, Plaintiff sought attorney fees and costs in Count I expressly and specifically pursuant to Section 10-15-3(C) of the Act. While he also asked for attorney fees and costs in his breach of contract claim, Plaintiff did not mention entitlement to the fees and costs under the Act. In briefing the subject matter jurisdiction issue, he distinguished his enforcement claim and his breach of contract claim, with the following argument, which was his sole argument on the merits of the issue:

> As [Plaintiff] argued when he opposed [the City's] first motion for summary judgment, his complaint contains claims for violation of the . . . Act *and* debt and money due. [Plaintiff] seeks damages for breach of his employment contract under Count II, Debt and Money Due. He seeks attorney fees and costs, but no damages, under the . . . Act. The [c]ourt should again reject the lack of subject matter jurisdiction argument.

Under the law of this case as established in the court's rulings, and given the peculiar circumstances and unattacked ruling on subject matter jurisdiction, we determine that, while the court could properly determine that the City violated the Act when considering Plaintiff's claim for breach of contract, having dismissed Count I with prejudice, the court could not properly enforce the Act by awarding attorney fees and costs under the Act.

CONCLUSION

{17} We reverse the district court's dismissal of the breach of contract claim in Count II and remand for further proceedings on whether Plaintiff is entitled under the employment agreement to salary and benefits for any period following December 13, 2006, and if so, for a determination of the amount he is entitled to receive. We affirm the district court's denial of Plaintiff's request for attorney fees and costs.

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

JONATHAN B. SUTIN, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

MICHAEL E. VIGIL, Judge

[redacted]

[redacted]

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-019

Filing Date: December 28, 2011

Docket No. 30,234

GLENDA GENTRY,

Petitioner,

v.

TIMBERON WATER AND SANITATION DISTRICT DIRECTOR ARDEN SHUG, in his official and individual capacity; DIRECTOR JOE MAINELLO, in his official and individual capacity; DIRECTOR RICHARD DYSART, in his official and individual capacity; DIRECTOR JACK DOLL, in his official and individual capacity; GENERAL MANAGER MARTIN MOORE, in his official and individual capacity; and SECRETARY YVONNE ROSS, in her official and individual capacity,

Respondents-Appellees,

v.

DIRECTOR VIRGIL BEAGLES,

Intervenor-Appellant.

[redacted]

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OPINION

BUSTAMANTE, Judge.

{1} This case began as an election contest filed by Glenda Gentry against the Timberon Water and Sanitation District (TWSD), but has now evolved into a fight about who should pay for the costs incurred by the winner of the election in defending the election result. Virgil Beagles—who won the election but was not joined in the action filed by Gentry—intervened on his own behalf. Gentry's case was eventually dismissed when she failed to appear at trial. In the meantime, however, Beagles filed a cross-claim against TWSD asserting a contract action and a novel class-of-one equal protection theory after TWSD refused to pay the legal fees he

incurred in defending his seat. The district court denied Beagles' claim for legal fees. We affirm.

I. BACKGROUND

{2} Beagles defeated Gentry in a special election held by the TWSD. On October 22, 2008, Gentry petitioned to invalidate the special election, asserting violations of the TWSD bylaws and the election code. The petition named the board members of the TWSD in their individual and official capacities as parties, but it did not include Beagles as a party. Gentry and her attorney received a demand that Beagles be added to the complaint, but Gentry refused to amend the complaint even though, pursuant to NMSA 1978, Section 1-14-1 (1969), and Rule 1-087(C) NMRA, Beagles was arguably a required party to the election contest action.

{3} On November 10, 2008, before TWSD filed an answer, Beagles filed a motion to intervene, to dismiss, for judgment on the pleadings, and for sanctions. Before he was accepted as a party, Beagles filed various motions to excuse judges and for discovery and otherwise acted as if he were a party. In addition, two judges recused themselves from the case. The motion to intervene was granted on June 11, 2009, and on July 8, 2009, Beagles filed his answer and cross-claim against TWSD. Count I of the cross-claim asserted a breach of contract claim against TWSD based on its formally adopted policy concerning the "need to indemnify the Directors . . . against pending and threatened litigation in their official capacity as well as individual capacity, arising out of, or secondary to ongoing litigation." It appears that Beagles did not pursue the breach of contract theory below. Instead, he appears to have used the existence and terms of the indemnification policy to support his equal protection claim in Count II of the cross-claim. Count II of the cross-claim alleged that TWSD violated Beagles' equal protection rights by not providing him representation and that Beagles was entitled to attorney fees pursuant to 42 U.S.C. § 1988 (2006).

{4} Beagles also made repeated demands on TWSD to provide him with legal representation in the litigation in his official and personal capacity. The requests were denied. Both the general counsel for TWSD and the firm hired to represent TWSD in the litigation declined Beagles' demand, citing conflicts of interest. Beagles confirmed at trial, and the district court found, that he had a conflict of interest with the firm representing TWSD in the litigation. The district court also found that Beagles "had a reasonable good faith belief TWSD might settle the litigation by agreeing to a new election without his interests being represented prior to the time he filed his motion to intervene."

{5} The hearing on the merits of the case was held on November 3, 2009. Gentry did not appear and did not put on a case, and the district court dismissed her case with prejudice. All that remained at that point was Beagles' claims against TWSD. After hearing testimony about when TWSD had paid for legal fees for board members in the past, the district court ruled against Beagles.

II. DISCUSSION

{6} Though difficult to parse, we glean three arguments from Beagles' briefs: (1) that TWSD's refusal to pay his legal fees violates the Equal Protection Clause, U.S. Const. Amend. XIV, § 1; (2) that the district court erred in adopting or rejecting certain proposed findings of fact; and (3) that the district court erred in denying attorney fees Beagles incurred pursuing his equal protection claim.

Though dealt with separately by Beagles, the first two arguments are inextricably intertwined. We will address class-of-one equal protection claims descriptively and then determine whether the district court applied the concept correctly in light of the facts it found. This latter discussion necessarily includes consideration of whether there is substantial evidence to support the district court's findings of fact.

{7} We note as a prefatory matter that the district court accepted Beagles' notion of class-of-one equal protection. Beagles thus does not argue that the district court refused to accept his legal theory. Further, TWSD did not argue below, and does not argue here, that class-of-one equal protection claims should not be recognized by New Mexico. As such, we see no reason not to accept the concept as part of New Mexico's law.

A. Class-of-One Equal Protection Claims

{8} An equal protection claim arises when a state actor treats similarly situated groups or persons differently. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike."). The first step in an equal protection challenge is to select the appropriate level of scrutiny. *See Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 12, 137 N.M. 734, 114 P.3d 1050.

> If legislation impacts important but not fundamental rights, or sensitive but not suspect classifications, intermediate scrutiny is warranted and we require the [s]tate to demonstrate that the law is substantially related to an important government purpose. If a law draws suspect classifications or impacts fundamental rights, we apply strict scrutiny and require the [s]tate to demonstrate that the provision at issue is closely tailored to a compelling government purpose.

Id. (footnote omitted) (citation omitted). Otherwise, rational basis scrutiny applies, and the law or action is valid so long as it is "rationally related to a legitimate government purpose." *Id.*

{9} The Supreme Court acknowledged the class-of-one equal protection theory in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). A class-of-one suit exists when "[a] plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.* at 564. Perhaps sensitive to Justice Breyer's warning that class-of-one claims had the potential to turn "ordinary violations of city or state law into violations of the Constitution," *Id.* at 565 (Breyer, J., concurring in the result), courts have proceeded cautiously in allowing class-of-one claims. The two elements that must be proven are (1) that "a public official inflicts a cost or burden on one person without imposing it on those who are similarly situated in material respects," and (2) that there is no "conceivable basis other than a wholly illegitimate motive" for the official's actions. *Jicarilla Apache Nation v. Rio Arriba Cnty.*, 440 F.3d 1202, 1209 (10th Cir. 2006). The Tenth Circuit has further noted that a showing that similarly situated persons were treated differently is "especially important in class-of-one cases." *Jennings v. City of Stillwater*, 383 F.3d 1199, 1213 (10th Cir. 2004). Similarly, the Second Circuit observed that "[i]n order to succeed on a 'class of one' claim, the level of similarity between plaintiffs and the persons with whom they compare themselves must be

extremely high." *Neilson v. D'Angelis*, 409 F.3d 100, 104 (2d Cir. 2005), *overruled on other grounds by Appel v. Spiridon*, 531 F.3d 138, 139-40 (2d Cir. 2008) (per curiam).

{10} To conclude that Beagles "ha[d] not presented evidence sufficient to satisfy his burden in a class-of-one case," the district court was required to find either (1) that Beagles was not similarly situated to others who had been indemnified by TWSD in the past; or (2) that it was reasonable for TWSD to decline to indemnify a board member who had not been sued, but who instead chose to intervene. The court concluded that TWSD's decision not to pay Beagles' attorney fees was "not wholly arbitrary." We agree.

{11} It is clear that claimants relying on a class-of-one theory shoulder a heavy burden of production as to both similarity of circumstance and rationality of motive. Beagles has acknowledged the nature of his burden in his briefing in this Court. Beagles focuses on two circumstances that he argues prove that he was similarly situated to other TWSD elected and appointed officers. First, Beagles points out that, when he filed a previous election contest against Gentry, TWSD paid for his trial expenses. Second, Beagles points out that TWSD indemnified the board members named as defendants in this case.

{12} The district court accepted Beagles' assertions of factual similarity, at least in part, but refused to agree that the similarities were sufficient to result in an equal protection violation. For example, the district court found that in the prior election contest, TWSD paid an attorney to represent all the defendants—including Gentry—in their official and individual capacities through the trial stages of the contest. In that prior case TWSD lost and was ordered to hold a special election between Gentry and Beagles. TWSD decided to comply with the order rather than appeal. Gentry, however, sought to appeal individually. TWSD refused to pay Gentry's fees for the appeal. The district court also concluded that Beagles was not similarly situated to the indemnified board members in this case because, unlike them, he was never sued, but nevertheless chose to intervene on his own. There is no question that the factual distinctions noted by the district court are accurate.

{13} The question is whether the legal distinctions the court drew are appropriate. We agree with the district court's ruling that Beagles' action set him apart from the other directors in this case and in the previous matter and made his situation dissimilar. The district court concluded that TWSD reasonably paid fees for directors and officers when their interests were aligned with TWSD's and reasonably refused to pay such fees when TWSD's interests diverged from that of its officers and directors. The district court's diversion of interests concept encompasses in a straightforward manner TWSD's refusal to pay Gentry's appellate fees when TWSD decided not to appeal in the earlier case. The district court's application of its diversion of interests concept to the payment of trial level fees is more subtle, but we agree with it also.

{14} The district court found that TWSD's refusal to pay Beagles' "fees in this case is similar to its treatment of Gentry in her individual appeal." The district court also found that "Beagles pursued his personal interests and own litigation strategy by intervening, excusing Judge Wilson, and filing other motions and did not coordinate with or even communicate in advance with the [d]istrict and other [r]espondents." The district court also found that "Beagles did not

ascertain whether the [d]istrict would answer or defend the suit before intervening." The record supports the district court's findings that Beagles did not communicate with TWSD's counsel about its litigation strategy either before he intervened or after.

{15} The parties agree, and the district court concluded, that Beagles was a necessary party and that Gentry's case would have been dismissed had she not joined Beagles as a defendant.[1] At trial, TWSD indicated that it would have been happy to win the case in this manner. A dismissal would have meant that Beagles' seat on the board was no longer contested. Both Beagles and TWSD should therefore have been against intervention. Though Beagles feared that if he did not intervene the parties might reach a settlement requiring a new election, he did not bother to inquire whether TWSD would assert the failure to join a necessary party as a defense before he intervened.

{16} The district court's ruling was bolstered by its findings that many of the legal fees incurred by Beagles were for unnecessary or unreasonable tactics—tactics that apparently only caused delay and expense for TWSD. Even if Beagles had been similarly situated, for example as a named defendant to this suit, his decisions to pursue tactics contrary to the interests of TWSD were adequate to provide a rational basis for TWSD to treat him differently. We therefore affirm the district court's decision denying Beagles' equal protection claim.

[1] The relevant rule states only that "[t]he party against whom the action is filed shall be known as the contestee." Rule 1-087(C). We express no opinion as to whether Beagles was a required party.

B. Attorney Fees

{17} Beagles' final argument is that the district court abused its discretion in denying his attorney fees under § 1988. Section 1988 allows a prevailing party to recover reasonable attorney fees for proceedings successfully brought under § 1983. § 1988(b). Because Beagles has not prevailed, he is not entitled to attorney fees.

III. CONCLUSION

{18} For the foregoing reasons, we affirm the district court.

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

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

CELIA FOY CASTILLO, Chief Judge

CYNTHIA A. FRY, Judge

Certiorari Denied, November 23, 2011, No. 33,271

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-020

Filing Date: September 20, 2011

Docket No. 29,295

LYDIA and PATRICK NELLIS, for themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

FARMERS INSURANCE COMPANY OF ARIZONA,

Defendant-Appellant.

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Albuquerque, NM

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Goldberg, Ives & Duncan, P.A.
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OPINION

BUSTAMANTE, Judge.

{1} We are presented with yet another factual and legal "twist" in a series of class action cases challenging the manner in which insurance companies document and collect charges imposed when insureds opt to pay their premiums in installments rather than in a lump sum. After certifying the case as a class action, the district court entered summary

judgment in favor of the Class on the merits of its breach of contract claim. Farmers Insurance Company of Arizona (Farmers) asked the district court to reconsider its decision, relying on *Nakashima v. State Farm Mutual Auto. Ins. Co.*, 2007-NMCA-027, 141 N.M. 239, 153 P.3d 664, an opinion issued by this Court after the district court entered its summary judgment in this case. The district court denied Farmers' motion. Concluding that *Nakashima* controls, we reverse.

I. THE FACTUAL SETTING

{2} The factual underpinnings of the case are deceptively simple. Farmers provides automobile insurance coverage to its customers. The parties agree that Farmers' standard practice is to offer policies with a six-month term and to require payment of the premium in a lump sum for the entire term. Customers who prefer—for whatever reason—to pay in smaller increments must make arrangements to pay their premium through Prematic Service Corporation (Prematic). It is "not possible for a Farmers' insured to pay" premiums on a monthly basis without going through Prematic. The parties also agree that insureds who choose to pay through Prematic must pay a monthly service charge or fee. The issues in the case revolve around the nature of this service charge or fee—whether it is itself a premium—and whether imposing the fee, whatever its nature, is allowable under the terms of the insurance policy Farmers issues.

{3} The Class is composed of persons who chose to pay their premiums on a monthly basis during the class period, which commenced in April 1997. The mechanics of how insureds enter into a Prematic agreement have changed over the years. The most dramatic change occurred in February 2001. Prior to that date insureds signed a written payment plan agreement with Prematic. Signature of the written agreement and payment of two months of premiums led to assignment of a Prematic account number which was in turn noted on the Declarations sheet of the insured's policy.

{4} Starting in February 2001, a written agreement was no longer required and thereafter rarely used. Instead, insureds were enrolled "in the Prematic monthly premium payment plan program by entering the insured's information utilizing the Farmers policy processing computer system." In both scenarios, the entire process was handled by Farmers agents. Once the insured's information was entered into the computer, the system assigned a Prematic account number which, as before, appeared on the insured's Declarations sheet labeled as such. But the first time the insured would see a Prematic Monthly Plan Agreement under the new procedure was with the first monthly bill. The monthly bills reflected the service charge as an amount separate from, and in addition to, the policy premium. The policy premium reflected on the initial bills was an amount equal to one-sixth of the six-month premium shown on the Declarations sheet. The Declarations sheet only included the six-month premium and a reference to "Prematic" next to the spot where "Total" premium would otherwise appear. The spot next to the line for "Fees" was blank. A representative example of the Declarations sheet is attached to this opinion.

{5} Whether the Prematic arrangement was embodied in a written document or simply noted in a computer program, the parties agree that the agreement was—in fact, had to be—in place *before* a Farmers agent would issue a policy of insurance.

{6} Once an insured made arrangements to

pay monthly, Farmers issued a policy that included endorsement E0022, somewhat oddly titled the "Monthly Payment Agreement," a copy of which is attached to this Opinion. On its face, endorsement E0022 purports to amend the policy period to "one [c]alendar month"continuing for "successive monthly periods if the premium is paid when due." Monthly premiums are subject to future adjustment to match the "then current rate on the semi-annual or annual anniversary of the policy." Endorsement E0022 also includes an integration clause: "This endorsement is part of your policy. It supersedes and controls anything to the contrary. It is otherwise subject to all other terms of the policy." The parties spend much time and effort disputing the meaning and effect of this language.

II. THE PROCEDURAL POSTURE

A. The Complaint

{7} The "Class Action Complaint for Breach of Contract" was filed in April 2003. The complaint alleged that Farmers' insureds who "buy insurance on a monthly basis must pay service charges" to Prematic as agent for Farmers. The complaint also alleged that the service charges "are designed to cover the additional administrative expense generated" by buying insurance on a monthly basis. As such, the "service charges are a portion of the total cost of the insurance purchased" by Class members. There is no assertion in the complaint that Class members were not informed about the service charges before or at the time they agreed to buy insurance coverage from Farmers.

{8} The complaint asserted that imposition of the service charges is a breach of contract because the "[p]olicies do not specify any service charge to be paid by a policyholder who buys insurance on a monthly basis." The only mention of "fees" in the policy is on the Declarations sheet and, according to the complaint, it provides "that there are no 'Fees' payable with respect to the Policies." Thus, the Class members "have been charged premium (i.e., service charges) in addition to the premium specified in the Policies."

{9} In addition, the complaint asserts that the service charges constituted premium under New Mexico and Arizona statutory provisions which require that "premiums" be specified in the policy itself. *See* NMSA 1978, § 59A-18-3 (1984) (defining premium as "the consideration for insurance . . . by whatever name called"); NMSA 1978, § 59A-16-24(B) (1984) ("No person shall wil[l]fully collect as premium, administration fee or other charge for insurance or coverage any sum in excess of the premium or charge applicable thereto as specified in the policy[.]"); Ariz. Rev. Stat. Ann. § 20-1113(B)(6) (1954) (requiring that "[e]very policy shall specify . . . [t]he premium."). The complaint alleged that Farmers breached these statutory provisions when it imposed the service charges without including them in its policies and that "Farmers' violation of this statutory requirement is a breach of contract."

B. The Cross-Motions for Summary Judgment

{10} After the district court certified the Class, the parties filed cross-motions for summary judgment, firm in their mutual conviction that Farmers' policy forms were not ambiguous and that there were no material issues of fact preventing a summary decision. The Class's argument in support of summary judgment was essentially an expanded version of its complaint: that is, the service charges of necessity constitute premiums; they are not detailed in the policy itself; all premiums must appear on the policy itself; ergo, to impose

them is a breach of the contract represented by the policy.

{11} The Class articulated three points in support of its position that the service charges constituted premiums. First, the Class refined its argument that the service charge was designed to pay for the "additional administrative and overhead expenses associated with monthly billing," thereby increasing the cost of insurance. It argued that this fact did not convert the charges into "installment fees" because Farmers' insureds were not buying six months of insurance at a time and then paying for it in six installment payments. Rather, under the terms of endorsement E0022, insureds were buying insurance in monthly increments. This feature, the Class argued, distinguished the facts here from the situation in cases like *Blanchard v. Allstate Insurance Co.*, 99-2460, pp. 6-7 (La. App. 1 Cir. 10/18/00); 774 So. 2d 1002, 1005-06, which held that Allstate's installment fees were not premium, in part because they were paid "for the privilege of paying the premium[s] over time."

{12} Second, the Class argued that, as a matter of contract law, there could be no consideration supporting imposition of the service charges, given that the policy allowed—or required—a month's premium for a month's worth of coverage. And, in any event, the Class argued, the parol evidence rule precluded proof of any agreements—including the Prematic agreement—which may have been entered into before the policies were issued.

{13} Third, the Class argued that Farmers could not escape liability simply because the service charges were paid to Prematic. The Class's position was that Prematic and Farmers were so inextricably linked through corporate ties and function—what could be more essential to the insurance business than efficient collection of premiums?—that they should be dealt with as one and the same entity. Or, the Class argued, at the very least, Prematic was Farmers' agent because policies could be cancelled for non-payment of service charges and because Prematic sent out notices of cancellation to Farmers' insureds. *See* NMSA 1978, § 59A-18-29(A) (1984) ("The insurer or agent shall give the named insured written notice of such cancellation[.]")

{14} Farmers argued in contrast that: (1) the service charges were not premium, either under the provisions of the policy itself or under New Mexico's statutory definition, and thus could not be considered consideration for insurance coverage, and (2) the Prematic invoices—which are referred to on the Declarations sheet—"are incorporated by reference into the policy documents and clearly and separately set forth the service fees which Plaintiffs claim were not set forth in the policy documents." Farmers used the reference to "Prematic" on the Declarations sheet to negate the potential effect of its policy's integration clause: "To construe the documents to exclude the Prematic invoices would be unreasonably inconsistent with the language in the policy documents. Construed together, as they must be, the policy documents set forth service fees due and payable."

{15} Interestingly, while Farmers asserted that Prematic was an entity "separate and apart from Farmers," it did not argue that this fact was of any particular consequence or material to the issues presented by the motions for summary judgment.

C. The Trial Court's Decision

{16} Analyzing the case as framed by the parties—including the notion that the policy is

not ambiguous—the district court found in favor of the Class. The district court correctly identified "[t]he primary areas of disagreement between the parties [to be] whether service fees are incorporated into the contract and whether they are considered 'premium.'" The district court first concluded that "the payment plan that imposes a service charge is not part of the insurance contract." The district court rejected Farmers' argument that the monthly invoices from Prematic, which did reflect the service charges, were or could be incorporated into the policy given that the invoices were not attached to the policy when delivered. Rather, the invoices were mailed some ten days after a policy is issued.

{17} The district court noted that the space next to the word "Fees" on the Declarations sheet is blank and concluded that this blank space "means there are no fees associated with this policy." The district court rejected Farmers' argument that the "Fee" line and the references to "Prematic" on the Declarations sheet serve "in the monthly payment context to remind the customer that he/she has chosen the monthly billing method and to refer to those documents for the 'Total' amounts payable." The district court emphasized that the policy itself did not contain any indication that the "total premium amount is a function of the number of payments made."

{18} The district court also concluded that the service charges constitute premiums and that Farmers' collection of them was a violation of Section 59A-16-24(B). The district court rested its decision on three grounds, each in response to Farmers' argument. First, the charges could not be installment fees because the policy as issued was for only one month, with no obligation to pay past each month. Thus, there was of necessity no continuing obligation to support the notion of installment payments. Second, the district court held that Farmers could cancel a policy for failure to pay service charges. As a result, "it would appear that the service charge is consideration for the insurance contract." Last, as in *Smoot v. Physicians Life Ins. Co.*, 2004-NMCA-027, ¶ 12, 135 N.M. 265, 87 P.3d 545, the service charges had the effect of increasing the cost of purchasing insurance and, as such, constituted premiums.

D. The Motion for Reconsideration

{19} Farmers asked the district court to reconsider its ruling after this Court decided *Nakashima*. Farmers altered its argument considerably to match the *Nakashima* approach to the issues, emphasizing for the first time the significance of the Prematic agreement. Farmers noted that all of its insureds desiring to pay on a monthly basis had to enter into a Prematic agreement, including payment of an associated service charge, before a policy would be issued and argued that the Prematic agreement was a contract separate from the policy. Farmers recognized it had changed its argument, noting that "[i]t is not surprising that the Prematic [a]greement was not the focus of the earlier cross-motions for summary judgment given that *Nakashima* established the pivotal significance of that separate agreement."

{20} The district court denied the motion to reconsider without a hearing, distinguishing *Nakashima* on its facts and reading it to be limited to the language of the policy at issue in that case. The letter ruling did not discuss the Prematic agreement.

III. ANALYSIS

A. Standard of Review

{21} All of the issues raised by this appeal

are subject to de novo review. *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582 ("Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. . . . We review these legal questions de novo." (citation omitted)). If no material facts are in dispute, we "are not required to view the appeal in the light most favorable to the party opposing summary judgment." *City of Albuquerque v. BPLW Architects & Eng'rs, Inc.*, 2009-NMCA-081, ¶ 7, 146 N.M. 717, 213 P.3d 1146. This approach seems particularly appropriate where, as here, the parties file cross-motions for summary judgment. In addition, as in *Nakashima*, we are called on to construe an insurance policy as well as statutory provisions. Both issues are questions of law that we review de novo. *Richardson v. Farmers Ins. Co.*, 112 N.M. 73, 74, 811 P.2d 571, 572 (1991) ("The question of whether an ambiguity exists [in an insurance policy] is a question of law to be decided by the court."); *Smith & Marrs, Inc. v. Osborn*, 2008-NMCA-043, ¶ 10, 143 N.M. 684, 180 P.3d 1183 ("We review a district court's interpretation of an unambiguous contract de novo." (internal quotation marks omitted)); *Nakashima*, 2007-NMCA-027, ¶ 5; *Morgan Keegan Mortg. Co. v. Candelaria*, 1998-NMCA-008, ¶ 5, 124 N.M. 405, 951 P.2d 1066 (noting that interpretation of a statute is a question of law which an appellate court reviews de novo).

{22} We acknowledge one difficulty with the parties' assertion that there are no questions of fact preventing resolution of the case on a purely legal basis. On appeal Farmers argues that summary judgment was improper because Prematic—a separate entity that was not a party to the policy and is not a party in the case—collected and retained the service fees. Farmers made this factual assertion below. Nevertheless, the Class argues that the argument was not properly preserved.

{23} "To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court." *Woolwine v. Furrs, Inc.*, 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987). "Absent [a] citation to the record or any obvious preservation, we will not consider the issue." *Crutchfield v. N.M. Dep't of Taxation & Revenue*, 2005-NMCA-022, ¶ 14, 137 N.M. 26, 106 P.3d 1273. The rules of preservation are no different for review of summary judgment than for review of other final orders. *See Spectron Dev. Lab. v. Am. Hollow Boring Co.*, 1997-NMCA-025, ¶¶ 31-32, 123 N.M. 170, 936 P.2d 852. "We review the case litigated below, not the case that is fleshed out for the first time on appeal." *Id.* ¶ 32 (quoting *In re T.B.*, 1996-NMCA-035, ¶ 13, 121 N.M. 465, 913 P.2d 272 (alteration in original) (internal quotation marks omitted)).

{24} Farmers disputed the Class's argument that Prematic is its alter ego or agent and consistently described the two as distinct entities performing separate functions. But Farmers never argued that this asserted separateness made breach somehow impossible or even that the dispute about the nature of the relationship between Farmers and Prematic constituted a material issue of fact precluding summary judgment. Even in its motion for reconsideration relying on *Nakashima*, Farmers did not assert that the nature of its corporate and legal relationship with Prematic was a matter of consequence. We agree with the Class that Farmers failed to preserve the argument in the form it is made on appeal. Accordingly, this Opinion will treat Prematic and Farmers as if their legal relationship is not pertinent or material, in

short, essentially as if they are the same entity.

B. Nakashima's New Approach

{25} We start our analysis with a review of *Nakashima*, a case with similar, though not identical, facts in which we agreed with the district court's conclusion that the plaintiff there "expressly agreed to the installment fees by entering into a separate contract with [the d]efendant to pay her premium in installments and further that the fees associated with paying in installments are not premium." 2007-NMCA-027, ¶ 8. We then consider whether the factual differences between the two cases counsel or require a different result here. Acknowledging that the differences alter the legal analysis somewhat, we yet conclude that summary judgment in favor of the Class was improper.

{26} The plaintiff in *Nakashima* was a long-time insured of State Farm under a series of six-month policies. *Id.* ¶ 2. At some point, she asked if she could pay her premium in installments rather than in a lump sum. *Id.* ¶ 3. She signed a form supplied by her State Farm agent that enrolled her in a payment plan which allowed her to pay her premium in monthly installments. The plan included an installment charge or fee that was imposed each month. *Id.*

{27} The parties in *Nakashima* agreed that the monthly installment fee was disclosed to the plaintiff and that she was aware of it. *Id.* ¶ 6. Further, the plaintiff in *Nakashima* did not dispute that the installment plan she agreed to was a separate agreement between her and State Farm. *Id.* ¶ 9. Despite adequate disclosure and the existence of the separate agreement, the plaintiff argued that State Farm breached its contract because the installment fees were actually part of the premium for the policy and, as such, they were required to be included in the "total premium" number stated on the policy. *Id.* ¶ 8. This requirement flowed, the plaintiff argued, from the terms of the policy itself and from applicable statutory provisions. *Id.* ¶¶ 10, 22. Having rejected the plaintiff's arguments in *Nakashima*, we now examine our rationale and how it applies here. We start with our statutory analysis and then move to the contract issues related to the form and content of the policy.

1. Installment Payment Fees Are Not Premiums Under the Insurance Code.

{28} Mirroring the argument made by the plaintiff in *Nakashima*, the Class asserts that Farmers' collection of the Prematic installment charges is contrary to the Insurance Code. Specifically, the Class argues that the Code's definition of "premium" in Section 59A-18-3 covers installment fees. *Nakashima* squarely rejected this argument stating:

> We agree with the district court that [the d]efendant's installment fees are not consideration for insurance and that such fees are not charged in connection with the procurement of insurance. Rather, as discussed previously, the installment fees are associated with the privilege of paying a premium in installments and are not for the actual purchase of insurance itself.

2007-NMCA-027, ¶ 23. *Nakashima* also squarely rejected the argument that installment fees should be deemed an "administration fee," which must be specified in the policy under Section 59A-16-24(B). *Nakashima*, 2007-NMCA-027, ¶ 33.

{29} There is nothing in the factual circumstances of this case that would render

these holdings inapplicable here. The Class acknowledged in its complaint that the fees reflect and are intended to cover the increased costs associated with monthly billing and payment. This acknowledgment by itself is sufficient to bring this case within the rationale and holding of *Nakashima* with regard to the statutory basis of the claim. *See id.* (distinguishing administration fees that must be stated in a policy from "fees related to the payment option selected by the policyholders"). As the Class implicitly acknowledges in its briefing, other aspects of its argument—lack of consideration, interpretation, and parol evidence issues—are more properly dealt with as part of its common law breach of contract claims. Whatever the merits of these arguments, they do not affect the basic nature of the fees as charges flowing from the Class's decision to pay monthly rather than in a six-month lump sum.

{30} *Nakashima* based its decision in part on the rather restrictive concept that insurance rates are "associated with the transfer of risk." 2007-NMCA-027, ¶ 20. The Class asks us to revisit this discussion in *Nakashima* because it improperly links the concept of premium to charges "directly relat[ed] to the insurer's actuarial risk of loss." We acknowledge that *Nakashima* connected premiums to the cost of risk. But the discussion was not intended to be comprehensive or to indicate that the cost of risk was the sole factor determining the level of premiums. Obviously, there are other factors at work—including administrative overhead and profit—which are folded into the final numbers quoted by insurers as premium. Acknowledgment of that fact does not alter the core concept that installment fees generally—and the Prematic service charges in particular—are designed and intended to "cover the costs associated with a payment plan." *Id.*

{31} The Class relies heavily on *Troyk v. Farmers Group, Inc.*, 90 Cal. Rptr. 3d 589 (Ct. App. 2009) in support of its position that the fees should be deemed premium under the statute. *Troyk* involved the same family of companies, including Prematic Service Corporation, and the same monthly payment plan agreement we examine here. *Id.* at 598. *Troyk* examined whether the service charges constituted "premium" under California's statutory scheme, specifically Cal. Ins. Code § 381(f) (2005)—the California counterpart to Section 59A-18-3—and concluded that the Prematic service charges were premium under the statute. *Troyk*, 90 Cal. Rptr. 3d at 604. The court in *Troyk* decided that the conversion of the policy from a six-month to a one-month term by endorsement E0022 was decisive. The court concluded that the service charge tied to monthly payment expenses for a one-month policy should be included in the overhead charges normally included by insurer to arrive at a "premium" figure. *Id.* at 605-07. In so doing, the court in *Troyk* decided that the Prematic service charges were not true installment fees. *Troyk* distinguished *Nakashima* as a case involving "true installment payments of premium." *Troyk*, 90 Cal. Rptr. 3d at 608.

{32} While we understand the analytical path the court in *Troyk* followed, we do not believe it can be squared with *Nakashima*. The most salient aspect of *Nakashima*'s approach is its recognition of a process by which insureds can enter into separate enforceable agreements for payment of premiums in a mode other than in a lump sum. Unlike *Nakashima*, which focused on the process, *Troyk* focused on the end result of the agreement for monthly payments. The mechanism used in the policy to achieve and reflect the prior agreement allowing monthly payments does not transform the Prematic service charges into something inherent to the

policy. As the Class agrees, the service charges are designed to cover the additional cost of monthly billing and payment. To adopt *Troyk*'s rationale, we would have to reverse *Nakashima*, at least in part. We see no reason to do so.

2. There Is Consideration to Support the Prematic Service Charges

{33} In *Nakashima*, State Farm and its insured apparently agreed on an insurance contract—usually for a six-month term—and the associated premium *before* any installment arrangements were made. 2007-NMCA-027, ¶¶ 3, 9. The installment fee and the monthly premium in *Nakashima* were not stated in the policy but were included in the installment plan form signed by the insured. *Id.* ¶ 3. The Declarations page of the policy referenced the payment plan once the plan was approved. *Id.* ¶ 11. Though *Nakashima* does not say explicitly, we infer that the policy continued to be for a six-month term even after an installment plan was approved.

{34} Farmers' Prematic agreement takes a different approach. The parties agree that a Prematic agreement must be entered into before Farmers will issue a policy that allows monthly payments. Once the Prematic agreement is in place, Farmers issues a policy which, pursuant to E0022, is for successive one-month terms. The practical effect of this approach is that Farmers' insureds pay for the "privilege of purchasing coverage in smaller quantities" rather than for deferring payment.

{35} The Class, like the plaintiff in *Nakashima*, argues that the installment fees cannot be collected because the policy as issued reflects the installment plan and allows monthly payments and, as a result, there is no consideration to support the Prematic agreement. *Id.* ¶¶ 11,13. In response to the first argument, *Nakashima* makes the common sense observation that "if Plaintiff had not entered into a separate agreement to pay her premium in installments, such references to a payment plan would not have appeared on her policy." *Id.* ¶ 11. In response to the second argument, we held that the insurer's agreement to forgo a lump sum payment and the insured's gain of the right to pay monthly in exchange for a fee was adequate consideration. *Id.* ¶ 13.

{36} We fail to see why our responses in *Nakashima* are inadequate to meet the Class's argument. Endorsement E0022, the mechanism used by Farmers to reflect monthly payments, would not have been attached to the Class's policies absent a Prematic agreement being in place. The Prematic agreement did not result in an increase of the six-month premium quoted; the premium simply got divided into six payments. The Prematic agreement did include fees but, given that the gross amount of the premium did not change, the fees can only reasonably be seen as intended to cover the costs inherent to monthly rather than lump sum payments.

{37} We conclude that the differences between the installment plan we dealt with in *Nakashima* and the Prematic agreement are not material and do not demand a different result. The plans are structured differently but achieve the same ends for the same conceptual price.

3. The Parol Evidence Rule Does Not Prevent Enforcement of the Prematic Agreement

{38} The applicability of the parol evidence rule is the one area in which the factual differences between *Nakashima* and this case require a markedly different analysis. The plaintiff in *Nakashima* asserted that the

integration (or merger) clause of her policy prevented enforcement of any other agreements. *Id.* ¶ 12. We rejected the argument, noting that integration clauses only cover "antecedent and contemporaneous agreements" and do "not foreclose the possibility of future agreements." *Id.* Because in *Nakashima* the installment plan was entered into after the policy was agreed to, the parol evidence rule simply did not apply. *Id.*

{39} The facts here are reversed: the Prematic agreement must be entered into first and then the policy is issued. Even though the two events—entry into the Prematic agreement and issuance of the policy—occur almost simultaneously, the sequence may be conceptually significant under the parol evidence rule. As a result, *Nakashima*'s solution and rationale does not apply here and we must engage in a different analysis.

{40} Contract law is the law of exchange; it provides the set of rules that govern how and the extent to which agreements between parties are honored and enforced. The law of contract asks and answers the following questions: (1) Have the parties through their behavior created legally recognizable expectations in one another? (2) If so, how should those expectations be characterized and understood? (3) Have the understandings between the parties been faithfully carried out? (4) If not, what should the law do about it? The parol evidence rule touches on the first and second questions by providing substantive limits on the evidence parties are allowed to submit to prove the extent of the enforceable agreement they have reached. As such, it is advisable to be as precise as possible when stating and applying the concept. Application of the rule has proven—to put it mildly—difficult. "Few subjects connected with the interpretation of contracts present so simple and uniform a statement of principle, bedeviled by such a perplexing and harassing number of difficulties in its application, as the parol evidence rule." 4 *Samuel Williston, A Treatise on the Law of Contracts* § 632A, at 984 (3d ed. 1961).

{41} We begin with two definitions that express the rule from different perspectives but to the same end. The Restatement (Second) of Contracts § 213 (4th ed. 2008), expresses the concept in terms of "discharge":

> (1) A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.
>
> (2) A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.

{42} Corbin defines the rule in terms of the agreement and expectations of the parties. "When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." 6 Arthur Linton Corbin, *Corbin on Contracts* § 573, at 72 (interim ed. 1960). As Corbin notes, this is the essence of the so-called "parol evidence rule." Corbin, *supra* § 579 at 120 (internal quotation marks omitted).

{43} However expressed, the purpose of the rule is to prevent proof of understandings and agreements that the parties did not intend to survive. Application of the rule for any other purpose is not utile or proper.

{44} An agreement can be completely or partially integrated. Section 210 of the Restatement states:

> (1) A completely integrated agreement is an integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement.
>
> (2) A partially integrated agreement is an integrated agreement other than a completely integrated agreement.
>
> (3) Whether an agreement is completely or partially integrated is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.

Restatement (Second) of Contracts § 210 (4th ed. 2008). Where there are no issues of fact concerning the wording of a document or the circumstances under which it was agreed to by the parties, courts will decide whether the document or documents are integrated and the level of integration as a matter of law. *See Denny's Rests., Inc. v. Sec. Union Title Ins. Co.*, 859 P.2d 619, 624 (Wash. Ct. App. 1993); *cf. also Mark V, Inc. v. Mellekas*, 114 N.M. 778, 781, 845 P.2d 1232, 1235 (1993) (allowing the meaning of contract terms to be decided as a matter of law when the facts are not in dispute). In accord with the following discussion, we hold that the Farmers' policy is partially integrated and, as such, does not preclude proof and enforcement of the Prematic agreement.

{45} As a factual matter, the Class relies on the merger clauses in the policy and endorsement E0022 to argue that the policy is fully integrated. The policy states, "This policy with the Declarations includes all agreements between you and us relating to this insurance. No other change or waiver may be made in this policy except by endorsement, new Declarations[,] or new policy issued by us." Endorsement E0022 states "This endorsement is part of your policy. It supersedes and controls anything to the contrary. It is otherwise subject to all other terms of the policy."

{46} The Class also points out that the line next to the word "Fees" on the Declarations sheet is blank and argues that this means there are no fees imposed under the policy. We note that the Class does not acknowledge the two references to "Prematic" on the Declarations sheet and does not try to explain what they might mean. Rather, the Class asserts that the plain meaning of the policy forecloses any need for further interpretation.

{47} As a legal matter, the Class seems to argue that insurance policies should be treated as completely integrated contracts as a matter of law. The Class quotes from *W. Farm Bureau Mutual Ins. Co. v. Barela*, 79 N.M. 149, 151, 441 P.2d 47, 49 (1968) that "[a] contract of insurance which has been embodied in a formal written instrument, termed a 'policy,' merges all prior or contemporaneous parol agreements touching the transaction." *Western Farm* restates the parol evidence rule, but it does not address what kind of evidence may be admissible to determine whether a particular contract is integrated or the extent and subject matter of the integration. The Class also seemingly seeks to exclude the most basic facts surrounding the issuance of the policies. In its Answer Brief, the Class acknowledges Farmers' argument that it would not have issued "month-to-month" policies to the Class without a Prematic agreement. Citing *Am.*

Inst. of Mktg. Sys., Inc. v. Keith, 82 N.M. 699, 702, 487 P.2d 127, 130 (1971) for the proposition that extrinsic evidence concerning or related to the subject of a contract is inadmissible, the Class asserts "Even if Farmers' position were factually correct, it would not help Farmers insofar as the parol evidence rule is concerned."

{48} The gist of the Class's argument is that the parol evidence rule requires exclusion of extrinsic evidence on the issue and that the question of integration can and should be resolved in a vacuum, reviewing the document in isolation. The Class's approach is contrary to New Mexico law, the Restatement, and other authority concerning interpretation of contracts.

{49} As a general matter, our courts have long recognized the value of extrinsic evidence to aid in the interpretation of contracts. New Mexico abandoned the strict plain meaning, "four-corners" approach to contract interpretation in *C.R. Anthony Co. v. Loretto Mall Partners*, 112 N.M. 504, 508, 817 P.2d 238, 242 (1991) and *Mark V, Inc.*, 114 N.M. at 781, 845 P.2d at 1235. Even before the advent of *C.R. Anthony* and *Mark V*, however, our Supreme Court held that the parol evidence rule did not preclude the introduction of extrinsic evidence designed to "determine the circumstances under which the parties contracted and the purpose of the contract." *Levenson v. Mobley*, 106 N.M. 399, 403, 744 P.2d 174, 178 (1987); *see Wilburn v. Stewart*, 110 N.M. 268, 270, 794 P.2d 1197, 1199 (1990) (holding that parol evidence offered for the purpose of showing misrepresentation that conflicts with the terms of the contract is admissible in appropriate circumstances); *Empire W. Cos. v. Albuquerque Testing Labs., Inc.*, 110 N.M. 790, 794, 800 P.2d 725, 729 (1990) (holding that extrinsic evidence consisting of an earlier, rejected proposal was admissible as evidence of the purpose and scope of the contract actually entered into). These cases reflect agreement with Corbin's assertion that the "terms of any contract must be given a meaning by interpretation before it can be determined whether an attempt is being made to vary or contradict them." 5 Arthur Linton Corbin, *Corbin on Contracts* § 24.10, at 82 (rev. ed. 1998).

{50} The Class's reliance on *Keith* is thus misplaced. Under the approach utilized in *Levenson*, *Wilburn*, and *Empire West*, *Keith* would be decided differently; that is, the extrinsic evidence would have been admissible to help determine the level and scope of integration of the contract.

{51} The Restatement also recognizes that extrinsic evidence can be used to assess whether a writing has been adopted as an integrated agreement. Section 214 of the Restatement provides in pertinent part:

> Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish
>
> (a) that the writing is or is not an integrated agreement;
>
> (b) that the integrated agreement, if any, is completely or partially integrated;
>
> (c) the meaning of the writing, whether or not integrated[.]

Comment a. to the section observes that "[t]he preliminary determination is made in accordance with all relevant evidence, including the circumstances in which the writing was made or adopted. It may require

preliminary interpretation of the writing." Thus, under the Restatement—and our case law—the full panoply of evidence concerning the Prematic agreement, the issuance of the policy with endorsement E0022, as well as all the features of the Declarations sheet and the rest of the policy is available to resolve the issue of the level and scope of integration of the policy.

{52} Considering the totality of the circumstances, we conclude that the policy is only partially integrated; to do otherwise would be to thwart the intent of the parties. Fortunately for our analysis, the factual circumstances are not subject to dispute; we are not required to assess the credibility of the extrinsic evidence describing what happened before and after the policies were issued. The Class members requested the option to pay monthly. Farmers agreed to allow monthly payments if the Class members entered into a Prematic agreement. The Class members did so, and Farmers issued its policy. The policy included endorsement E0022 providing for a rolling one-month term. The policy also reflected the Prematic agreement twice on the Declarations sheet. In this context, it is not reasonable to conclude that either Farmers or the Class intended to preclude recognition and enforcement of the Prematic agreement.

{53} Rather, it is more plausible that the parties intended the merger clauses to accommodate the Prematic agreement either: (1) as a separate agreement dealing with the payment of premium and accompanying monthly service charges—a view that would square with *Nakashima*'s treatment of installment plans in similar circumstances; or (2) as a separate agreement that is actually part of a larger comprehensive arrangement between the parties that should be construed together. *See Harp v. Gourley*, 68 N.M. 162, 170, 359 P.2d 942, 947 (1961); *Master Builders, Inc. v. Cabbell*, 95 N.M. 371, 373-74, 622 P.2d 276, 278-79 (Ct App. 1980). We need not decide here which approach is analytically preferable because either will suffice.

CONCLUSION

{54} For the reasons stated above, we reverse the summary judgment entered by the district court and remand for dismissal of the case.

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

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

CYNTHIA A. FRY, Judge

[redacted]

FARMERS

DECLARATIONS

COMPANY NAME:

FARMERS INSURANCE COMPANY OF ARIZONA, PHOENIX, ARIZONA
A STOCK INSURANCE COMPANY, HEREIN CALLED THE COMPANY

TRANSACTION TYPE: REINSTATEMENT

The Effective Date is from TIME APPLIED FOR. * * * * The policy may be renewed for an additional policy term of six months each time the Company offers to renew by sending a bill for the required renewal premium, and the insured pays said premium in advance of the respective renewal date. The Policy is issued in reliance upon the statements in the Declarations

INSURED'S NAME & ADDRESS
PATRICK NELLIS
LYDIA NELLIS
9809 DOROTHY PL NE
ALB. NM 87111 3510

POLICY NO: 16 14522-15 79
POLICY EDITION 01
EFFECTIVE DATE 07-31-2002
EXPIRATION DATE 01-31-2003
EXPIRATION TIME 12:00 NOON Standard Time
PREMATIC NO HQ00246

ISSUING OFFICE
P O. BOX 29054
PHOENIX, AZ 85038

AGENT Kimberly B Sanchez
AGENT NO 16 16 323 AGENT PHONE. (505) 275-1000

DESCRIPTION OF VEHICLE

Year	Make	Model	Vehicle Identification Number	Rating Points Citations/Accidents MAJOR MINOR ACCIDENTS
1995	GMC	PU SIERRA C1500 2WD	1GTEC14R8SZ540374	0

COVERAGES

* ENTRIES IN THOUSANDS OF DOLLARS. (SEE REVERSE SIDE FOR COVERAGE DESIGNATIONS)

Bodily Injury Each Person	Bodily Injury Each Occurrence	P.D. Each Occurrence	Uninsured Motorist Bodily Injury Each Person	Uninsured Motorist Bodily Injury Each Occurrence	Uninsured Motorist P.D. Each Occurrence	Medical/ No Fault	Comprehensive Deductible	Collision Deductible	Towing Premium	Other Prem	Non-Auto Liab	Non-Auto Medical
* 30	* 60	* 25	* NC	* NC	NC	XXX XXX	NC	500	500	NOT COV	NC	NC
										4.10		

PREMIUM BY COVERAGE

123.20		XXXXXXXXXX		41.10	76.50	4.10

ENDORSEMENT NUMBERS

E0022 E0107 E1140 E1154
E1200 E1248 E1401 H1105
S1606 S1609 S1654

MESSAGES / RATING INFORMATION

CAR SYMBOL(V).
SEE ENDORSEMENT E0022.
PLEASURE USE:ANNUAL MI. MORE THAN 5000, AGE 60-69.
THE TERRITORY IS 14.
PLEASE CONTACT YOUR FARMERS AGENT FOR A FREE FARMERS FRIENDLY REVIEW TO ENSURE THAT YOUR FAMILY IS PROPERLY PROTECTED AND THAT YOU ARE RECEIVING ALL OF THE DISCOUNTS/CREDITS AND PACKAGE POLICIES AVAILABLE.

DISCOUNTS / RATING PLAN

ANTI-THEFT
ACCIDENT-FREE
MULTIPLE CAR
HOMEOWNER
30/60

POLICY ACTIVITY (Submit amount due with enclosed invoice)

$	Previous Balance
244.90	Premium
	Fees
	Payments or Credits
PREMATIC	Total

ANY "TOTAL" BALANCE OF CREDIT $2.00 OR LESS WILL BE APPLIED TO YOUR NEXT BILLING. BALANCES OVER $2.00 ARE DUE UPON RECEIPT.

LIENHOLDER OR OTHER INTEREST:

GMAC
PO.BOX 2525H
HUDSON OH 44236-0025

Countersignature

Authorized Representative

08-09-2002

EXHIBIT 3

[redacted]

FARMERS

MONTHLY PAYMENT AGREEMENT

E0022
1st Edition

In consideration of the premium deposit, we agree to the following

(1) The policy period is amended to one Calendar month. It will commence with the effective date shown in the Declarations

(2) The policy shall continue in force for successive monthly periods if the premium is paid when due. The premium is due no later than on the expiration date of the then current monthly period.

(3) The monthly premium shall be subject to future adjustment. Such adjustment will apply the then current rate on the semi-annual or annual anniversary of the policy whichever is indicated in the Declarations as applicable

This endorsement is part of your policy. It supersedes and controls anything to the contrary. It is otherwise subject to all other terms of the policy.

E0022 1st EDITION 7 95 1 98 E0022M1

EXHIBIT 3 TP 00 26

Certiorari Denied, January 19, 2012, No. 33,351

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-021

Filing Date: September 27, 2011

Docket No. 31,031

ROBIN WAKELAND,

Petitioner-Appellant,

v.

NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS and GILMAN LAW OFFICES, LLC,

Respondents-Appellees.

Robin Wakeland
Albuquerque, NM

Pro Se Appellant

Gilman Law Offices, LLC
James K. Gilman
Albuquerque, NM

for Appellee

Lucy Salsbury Payne
Albuquerque, NM

for Appellee N.M. Department of Workforce Solutions

OPINION

VANZI, Judge.

{1} Robin Wakeland's uncertainty about the proper procedure for seeking appellate review in this case caused her to file a notice of appeal and a docketing statement rather than a petition for writ of certiorari. Because Wakeland's docketing statement provides information sufficient to evaluate it as a petition for writ of certiorari, we will accept it as a non-conforming petition; however, the petition was untimely, and the fact that it was untimely is a procedural defect that will only be excused in unusual circumstances. Wakeland's uncertainty about the proper procedure is not an unusual circumstance that will excuse the late filing, so we deny her non-conforming petition as untimely.

BACKGROUND

{2} Wakeland sought unemployment compensation benefits after she was fired from her job. The New Mexico Department of Workforce Solutions (the Department) denied the unemployment benefits based on evidence

that Wakeland had been terminated because she wilfully violated the terms and conditions of her employment. Wakeland appealed to the district court pursuant to NMSA 1978, Section 51-1-8(N) (2004), which provides for an appeal as of right to the district court by means of a petition for writ of certiorari that the district court is required by statute to grant, so long as it is timely. The district court affirmed in an order filed on December 22, 2010, and Wakeland appealed to this Court by filing a notice of appeal in the district court on January 3, 2011, and a docketing statement in this Court on January 28, 2011.

{3} Because it appeared that Wakeland did not have an appeal as of right to this Court and that she should have sought review by means of a petition for writ of certiorari, we asked the parties to brief the question whether the procedural defects warranted either dismissal of the appeal or denial of the non-conforming petition.

DISCUSSION

Wakeland Is Not Entitled to an Appeal as of Right

{4} Wakeland asserts that she is entitled to an appeal as of right to this Court from the district court's decision affirming the Department. Our law is clear, however, that she is not. In Section 51-1-8(N), the Legislature chose to provide an appeal as of right to the district court from the Department's decision. The Legislature did not provide for an appeal as of right to this Court from the decision of the district court. Both Section 51-1-8(N) and Rule 1-077(L) NMRA, which govern unemployment compensation appeals, state that an aggrieved party may appeal the district court's order or judgment in accordance with the Rules of Appellate Procedure. Rule 12-505 NMRA governs "review by the Court of Appeals of decisions of the district court . . . from administrative appeals pursuant to . . . Rule 1-077." Rule 12-505(A)(1). Rule 12-505(B) requires a party to seek discretionary review in this Court by means of a petition for writ of certiorari.

{5} Wakeland raises a number of arguments in support of her claim that she must be provided with an appeal as of right, even if Rule 12-505 is to the contrary. These include (1) an argument that our Supreme Court is without authority to issue a rule of procedure that gives the Court of Appeals discretion to decline to review this matter on the merits; (2) an argument that she is denied equal protection and due process by being limited to a petition for writ of certiorari rather than being permitted the processes allowed for an appeal as of right; and (3) an argument that by issuing an order in this case, this Court has already assumed jurisdiction, such that it cannot now decline to review her appeal on its merits. We have reviewed these arguments and conclude that Wakeland has not demonstrated that she is entitled to an appeal as of right.

A Non-Conforming Document Will Be Accepted as a Petition for Writ of Certiorari if the Document Provides Sufficient Information to Assess Its Merits as a Petition

{6} Because Wakeland is not entitled to an appeal to this Court as of right, she was required to seek discretionary review by means of a petition for writ of certiorari. She did not do so and instead filed a notice of appeal and a docketing statement. Wakeland asserts that this Court should exercise its discretion to accept these non-conforming documents and review her arguments on their merits.

{7} Generally, New Mexico courts have not been stringent about the form and content requirements of documents filed in an effort to seek appellate review, so long as the information provided in the non-conforming document is adequate to convey the basic intent of the party filing the document. *See Govich v. N. Am. Sys., Inc.*, 112 N.M. 226, 230, 814 P.2d 94, 98 (1991) (holding that a notice of appeal was effective despite its failure to meet the requirements for form and content because it met the jurisdictional time and place of filing requirements and the opposing party was not prejudiced by the defects in the notice); *Marquez v. Gomez*, 111 N.M. 14, 15, 801 P.2d 84, 85 (1990) (holding that a docketing statement was effective as a substitute for a notice of appeal where the docketing statement was sufficient to convey the intent to appeal, it met the time and place of filing requirements for a notice of appeal, and the opposing party was not prejudiced); *Johnson v. Johnson*, 74 N.M. 567, 569, 396 P.2d 181, 182 (1964) (holding that a motion for leave to appeal was effective as a notice of appeal). This liberal approach has been adopted in order to further a policy of hearing appeals on their merits rather than dismissing them on technical grounds. *See, e.g.*, *Govich*, 112 N.M. at 230, 814 P.2d at 98 (stating that the appellate court's "policy of facilitating the right of appeal by liberally construing technical deficiencies in a [document] otherwise satisfying the time and place of filing requirements").

{8} Despite this liberal policy, in *Roberson v. Board of Educ. of City of Santa Fe*, 78 N.M. 297, 298-99, 430 P.2d 868, 869-70 (1967), our Supreme Court held that a notice of appeal is not an adequate substitute for a petition for writ of certiorari. In *Roberson*, a teacher was fired from her job by the board of education of the city of Santa Fe. *Id.* at 298, 430 P.2d at 869. The petitioner appealed to the state board of education, which affirmed. *Id.* Although there was no statute or rule permitting an appeal from this decision, the petitioner filed a notice of appeal with the district court. *Id.* The district court issued a writ of certiorari to the state board. *Id.* The city and state boards of education filed a motion to quash the writ and a motion to dismiss based on the petitioner's improper filing of a notice of appeal rather than a petition for writ of certiorari. *Id.* at 298-99, 430 P.2d at 869-70. The district court dismissed the matter because the petitioner was not entitled to an appeal as of right, and she failed to present a proper petition for writ of certiorari. *Id.* at 299, 430 P.2d at 870. The petitioner appealed to the New Mexico Supreme Court but never perfected the appeal, so the matter was not reviewed at that time. *Id.* Then the petitioner filed a proper petition for writ of certiorari in the district court, arguing that this petition related back and was a continuation of the issues raised by her notice of appeal. *Id.* The district court again dismissed, and the petitioner sought review in the New Mexico Supreme Court. *Id.*

{9} The Supreme Court held that the petitioner's notice of appeal could not substitute for a petition for writ of certiorari. *Id.* It stated that it was "amply clear" that "the notice of appeal [was] not sufficient" because "a formal application showing a prima facie case for relief is a prerequisite to issuance of certiorari" and a notice of appeal does not meet these requirements. *Id.* at 300, 430 P.2d at 871 (internal quotation marks and citation omitted). While the Court stated that it was not holding that "any particular nicety of pleading or precision of drafting is required," it would not construe the notice as a petition because "the record here discloses a total absence of any pleading which remotely approximates a petition or which contains any of the elements required as a minimum to

merit such a description in a proceeding wherein certiorari is sought." *Id.* Accordingly, the Court concluded that the petitioner's later-filed petition for writ of certiorari did not revive the issues raised by the notice of appeal since the notice itself did not properly bring the case before the district court. *Id.* However, because at that time there was no statute or rule setting a time limit for the filing of a petition for certiorari and because laches did not bar the filing of the petition that the petitioner filed after she filed her improper notice of appeal, our Supreme Court held that the petition was properly filed and should not have been dismissed. *Id.* at 300-03, 430 P.2d at 871-74.

{10} Despite our Supreme Court's decision in *Roberson*, this Court has issued several opinions indicating that we may, in our discretion, elect to treat a timely filed notice of appeal as a petition for writ of certiorari. In *West Gun Club Neighborhood Ass'n v. Extraterritorial Land Use Auth.*, 2001-NMCA-013, ¶ 3, 130 N.M. 195, 22 P.3d 220, this Court chose to treat a notice of appeal filed within the then-twenty-day period for filing petitions for writ of certiorari as a petition for such a writ. In doing so, *West Gun Club* relied on *Hyden v. New Mexico Human Servs. Dep't.*, 2000-NMCA-002, 128 N.M. 423, 993 P.2d 740. *Hyden*, however, was not directly applicable since the issue in *Hyden* was about timeliness, not about the form or content of the documents that were filed. *Id.* ¶ 4. In *Hyden*, the question was whether unusual circumstances justified granting an extension of time to file two petitions for writ of certiorari when the parties had failed to meet the time of filing requirement that is a mandatory precondition to the exercise of this Court's jurisdiction. *Id.* ¶¶ 6-7, 14-15. Although the parties had filed notices of appeal, *Hyden* did not hold that a notice of appeal would be accepted as a substitute for a petition for writ of certiorari. In fact, the Court did not accept the notices filed in that case, but instead permitted the parties an extension of time to file proper petitions. *Id.* ¶¶ 4, 18.

{11} In *Dixon v. State, Taxation & Revenue Dep't.*, 2004-NMCA-044, ¶ 9, 135 N.M. 431, 89 P.3d 680, this Court accepted a timely notice of appeal as a substitute for a petition for writ of certiorari without considering whether the notice substantially complied with the form and content requirements of Rule 12-505. In *Dixon*, two parties filed notices of appeal within the then-twenty-day period for filing petitions for writs of certiorari. *Id.* ¶ 10. Relying on *Hyden*, this Court imported the "unusual circumstances" test that is generally employed when determining whether to accept an untimely filed notice of appeal or petition for writ of certiorari and used it as part of the analysis for determining whether to accept a document that was timely but improper in its form and content. *Dixon*, 2004-NMCA-044, ¶ 9. *Dixon* determined that "unusual circumstances" warranted accepting the notices of appeal as petitions for writ of certiorari, where this Court had previously accepted notices of appeal in lieu of petitions in past administrative appeals involving one of the parties. *Id.*

{12} Finally, in *Glynn v. State, Taxation and Revenue Dep't.*, 2011-NMCA-031, ¶ 11, 149 N.M. 518, 252 P.3d 742, *cert. denied*, 2011-NMCERT-003, 150 N.M. 619, 264 P.3d 520 (No. 32,862, Mar. 8, 2011), this Court again elected to accept a notice of appeal filed within the then-twenty-day period for petitions for writ of certiorari as a substitute for a petition. This Court did not expressly rely on the "unusual circumstances" test, but did state that it would choose to accept the non-conforming document due to the "uncertainty

regarding the district court's order and the uncertainty regarding the correct procedure for appealing a district court's decision involving both its appellate and original jurisdiction[.]" *Id.*

{13} Neither *West Gun Club*, *Dixon*, nor *Glynn* cited to *Roberson*. Although *Roberson* did not discuss the effect of the filing of a non-conforming document that addresses the merits of the issues raised on appeal, we conclude that *Roberson* is in fact controlling when the only document filed is a notice of appeal. Further, we take this opportunity to clarify *West Gun Club*, *Dixon*, and *Glynn*, and to explain that it is the docketing statement, not the notice of appeal, that we may accept as a substitute for a petition for writ of certiorari.

{14} *Roberson* has not been overruled, and neither has it been abrogated by our Supreme Court's more recent cases setting forth a liberal policy for accepting notices of appeal that are deficient as to form or content. *Roberson* simply holds that, because a notice of appeal contains no information about the issues raised on appeal, it cannot substitute for a petition for writ of certiorari since it does not substantially comply with the content requirements for a petition. 78 N.M. at 300, 430 P.2d at 871. A petition must contain a statement of the issues sought to be reviewed and a discussion of the facts material to the questions presented. Rule 12-505(D)(2)(b) and (c). Furthermore, in order to warrant review, a petition must show the existence of: (1) a conflict between the district court order and a prior appellate opinion of either this Court or the Supreme Court; (2) a conflict between the district court order and any statutory provision, ordinance, or agency regulation; (3) a significant question of law under the New Mexico or United States Constitutions; or (4) an issue of substantial public interest that should be determined by the court. Rule 12-505(D)(2)(d). "The critical issue under [Rule 12-505(D)(2)(d)] is whether the case presents issues of significant importance to justify the granting of a writ of certiorari[.]" *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 16, 133 N.M. 97, 61 P.3d 806. In contrast, there is very little that is required to be included in a notice of appeal, *see* Rule 12-202 NMRA, such that a notice of appeal will rarely demonstrate that discretionary appellate review is warranted.

{15} In addition, the policy considerations that favor a liberal construction of a notice of appeal are not at issue when a party seeks discretionary appellate review. A notice of appeal is filed when a party is entitled to an appeal as of right. *See* Rule 12-202 (governing appeals as of right from the district court); Rule 12-601 NMRA (governing appeals as of right from administrative entities and special statutory proceedings). Under such circumstances, our courts have expressed concern that a strict adherence to formal requirements might unduly infringe on the absolute right to one appeal provided by Article VI, Section 2 of the New Mexico Constitution. *See Govich*, 112 N.M. at 230, 814 P.2d at 98. But this concern is not at issue here. Whether to grant a petition for writ of certiorari to review the district court's decision in an administrative appeal rests in the sound discretion of this Court. *Paule v. Santa Fe Cnty. Bd. of Cnty. Comm'rs*, 2005-NMSC-021, ¶ 14, 138 N.M. 82, 117 P.3d 240. Article VI, Section 2 only applies to appeals from the district court's exercise of its original jurisdiction. *City of Las Cruces v. Sanchez*, 2007-NMSC-042, ¶ 9, 142 N.M. 243, 164 P.3d 942. It does not apply to appeals to this Court from the district court's decision on appeal from an administrative agency ruling. *See VanderVossen v. City of Espanola*, 2001-NMCA-016, ¶¶ 7-16, 130 N.M. 287, 24 P.3d

319 (explaining that the absolute right to one appeal contained in Article VI, Section 2 of the New Mexico Constitution does not apply to review by the Court of Appeals of a district court's decision on appeal from an administrative agency's zoning decision). To the degree that the principle underlying Article VI, Section 2 might support acceptance of a notice of appeal in lieu of a petition for writ of certiorari, the principle is not applicable here because the parties have already had an appeal as of right to the district court. *Cf. Schultz ex rel. Schultz v. Pojoaque Tribal Police Dep't*, 2010-NMSC-034, ¶¶ 17, 19, 148 N.M. 692, 242 P.3d 259 (applying the policy established in Article VI, Section 2 to an appeal from a workers' compensation decision to the Court of Appeals, even though a workers' compensation proceeding is a special statutory proceeding that does not originate in the district court).

{16} Although a notice of appeal contains almost no substantive information related to a party's claims of error, a docketing statement is quite different. A docketing statement must contain a statement of the nature of the proceeding, a statement of the issues presented by the appeal, a summary of all facts material to a consideration of the issues, and a list of authorities supporting each claim of error, among other information. Rule 12-208(D) NMRA. If a docketing statement complies with these requirements, this Court should generally be able to assess whether the issues raised meet one of the four criteria for granting a petition for writ of certiorari pursuant to Rule 12-505(D)(2)(d). Furthermore, because the filing of the docketing statement triggers the filing of the record proper, Rule 12-209(B) NMRA, this Court will generally have access to the materials that must be attached to a petition for writ of certiorari. *See* Rule 12-505(D)(3) (stating that a petition shall have attached the final order or judgment of the district court and any findings or decisions leading to the order or judgment, a copy of the administrative decision, and a copy of the statements of appellate issues filed in the district court). Accordingly, although *Roberson* generally precludes the acceptance of a notice of appeal in lieu of a petition for writ of certiorari, it does not preclude our acceptance of a docketing statement. A docketing statement will generally substantially comply with Rule 12-505 so as to permit this Court to review it as a substitute for a petition for writ of certiorari under a liberal standard of construing documents in order to reach their merits.

{17} We recognize that there is some degree of unfairness in accepting a non-conforming document such as a docketing statement in lieu of a petition for writ of certiorari. For instance, a docketing statement has no page or type-volume limitations, whereas a petition for writ of certiorari does. *Compare* Rule 12-208, *with* Rule 12-505(E). Furthermore, the filing of a notice of appeal and a docketing statement incorrectly suggests to this Court that an appeal is as of right, whereas a petition for writ of certiorari alerts the Court to the fact that its review is discretionary. However, we do not believe that these possible inequities warrant the rejection of a non-conforming document that, liberally construed, substantially complies with Rule 12-505. To the degree that an opposing party believes it may be prejudiced by the filing of a docketing statement or other non-conforming document when a petition for writ of certiorari is the appropriate means for seeking appellate review, that party is permitted to file a motion with this Court to require the party seeking review to file a proper petition for writ of certiorari; it can file a notice with this Court to alert the Court to the fact that the appeal is not as of right; it can

file a response to what may otherwise be construed as a petition explaining why the writ should not be granted; or it can do any combination of these. *See* Rule 12-309 NMRA (setting out the requirements for motions filed in this Court); Rule 12-505(I) (permitting a response to a petition for writ of certiorari).

A Non-Conforming Petition for Writ of Certiorari Must Meet the Timeliness Requirement of Rule 12-505(C), and an Untimely Filing Will Only Be Excused in Unusual Circumstances

{18} Our Supreme Court has held that the time requirement for filing a petition for writ of certiorari is a mandatory precondition to the exercise of an appellate court's jurisdiction to review a petition on its merits. *See Gulf Oil Corp. v. Rota-Cone Field Operating Co.*, 85 N.M. 636, 636, 515 P.2d 640, 640 (1973) (per curiam) (holding that, as with the time requirement for a notice of appeal, the timely filing of a petition for writ of certiorari is a mandatory precondition to the exercise of an appellate court's jurisdiction that will not be excused absent unusual circumstances). Therefore, a non-conforming document such as a docketing statement must be filed within thirty days of the order to be reviewed, as is required for a petition. *See* Rule 12-505(C) (stating that a petition for writ of certiorari must be filed with the clerk of this Court within thirty days of the entry of the final action of the district court). When a party seeks to benefit from this Court's willingness to consider a docketing statement as a substitute for a petition for writ of certiorari, the party often will not meet this requirement due to the differences between the procedural rules governing an appeal as of right and the rules governing discretionary review. The time for filing the docketing statement in this Court is triggered by the filing of a notice of appeal. *See* Rule 12-208(B) (stating that the docketing statement shall be filed within thirty days after the filing of the notice of appeal). The notice of appeal must generally be filed within thirty days of the judgment or order appealed from. *See* Rule 12-201(A)(2) NMRA. Therefore, a party who erroneously files a notice of appeal and docketing statement instead of a petition for writ of certiorari is likely to miss the thirty-day requirement of Rule 12-505(C), even though the notice of appeal and docketing statement would have been timely if the appeal were as of right.

{19} In those unusual cases where a party happens to file both the notice of appeal and the docketing statement early so that the docketing statement is filed in this Court within thirty days of the district court's order and therefore meets the time requirement of Rule 12-505(C), this Court will construe the docketing statement as a petition for writ of certiorari without requiring any showing of unusual circumstances, since the non-conforming document is timely and substantially complies with the content requirements of Rule 12-505 under a liberal interpretation. This approach is consistent with the policy of not exalting form over substance when the mandatory preconditions to the exercise of this Court's jurisdiction have been met. *See Govich*, 112 N.M. at 230, 814 P.2d at 98.

{20} But consistent with the rule that a timely filing of a petition for writ of certiorari is a mandatory precondition to the exercise of this Court's jurisdiction, in those cases in which a docketing statement is not filed in this Court within thirty days of the district court's order or judgment, this Court will not excuse the untimely filing of the non-conforming document absent a showing of the kind of unusual circumstances that would justify an

untimely petition. *See Gulf Oil Corp.*, 85 N.M. at 636, 515 P.2d at 640 (refusing to excuse the late filing of a petition for writ of certiorari where there were no unusual circumstances justifying the untimely filing). Our Supreme Court has explained that it is "[o]nly the most unusual circumstances beyond the control of the parties—such as error on the part of the court," that will warrant overlooking the requirement that a document must be timely filed as a mandatory precondition to the exercise of a court's jurisdiction. *See Trujillo v. Serrano*, 117 N.M. 273, 278, 871 P.2d 369, 374 (1994) (holding that there would be unusual circumstances to excuse the late filing of a notice of appeal to the district court if the untimely filing was caused by the magistrate court and remanding for a finding of fact on this issue). Our Supreme Court has also held that unusual circumstances may warrant waiving the mandatory timeliness requirement when the filing is not very late, and there are other unusual circumstances that were not caused by the court system but that were not within the control of the party seeking appellate review. *See Chavez v. U-Haul Co.*, 1997-NMSC-051, ¶¶ 19-22, 124 N.M. 165, 947 P.2d 122 (hearing an appeal when the notice was filed fifty-eight minutes late, the appellant filed the notice pro se, his trial counsel had been in the process of arranging for substitute counsel, and after trial it was not clear which attorney would be responsible for prosecuting the appeal); *see also Schultz*, 2010-NMSC-034, ¶ 21 (holding that unusual circumstances required excusing the mandatory timeliness requirement where the notice of appeal was received two days late because the appellant had mailed the notice four days prior to the due date, and the fact that the United States Postal Service took more than four days to deliver the document from Albuquerque to Santa Fe was an unusual circumstance outside of the appellant's control).

{21} Although we may have applied the unusual circumstances test more liberally than this in *Dixon* and, arguably, in *Glynn*, that is because in both of those cases, we considered the relevant non-conforming document to have been timely filed, and we therefore only determined whether to accept a timely document that was improper as to form. As we have clarified in this opinion, a non-conforming document that substantially complies with Rule 12-505 will be accepted as a petition for writ of certiorari without a showing of unusual circumstances. It is only when the non-conforming document does not meet the mandatory timeliness requirement of Rule 12-505 that the stringent unusual circumstances standard comes into play.

{22} In considering whether to exercise this Court's discretion to waive the mandatory timeliness requirement for a late, non-conforming document that is to be construed as a petition for writ of certiorari, this Court is mindful of the fact that, unlike cases in which a party has an appeal as of right, review in this Court of the district court's order on appeal from an administrative agency is discretionary. *Paule*, 2005-NMSC-021, ¶ 14. Because Article VI, Section 2 of the New Mexico Constitution does not apply to appeals to this Court from the district court's decision on appeal from an administrative agency ruling, *see VanderVossen*, 2001-NMCA-016, ¶¶ 7-16, and because the parties have already had an appeal as of right, we need not consider the policy of a party's absolute right to one appeal in determining whether unusual circumstances warrant accepting an untimely document when a timely petition for writ of certiorari should have been filed. *Cf. Schultz*, 2010-NMSC-034, ¶¶ 19, 21.

Wakeland's Non-Conforming Petition for Writ of Certiorari Was Late, and No Unusual Circumstances Excuse the Late Filing

{23} Because Wakeland's docketing statement contains information that is sufficient to determine whether the issues she raises meet the requirements for granting a petition for writ of certiorari, we construe her docketing statement as a petition. However, because her non-conforming petition was not filed within thirty days of the district court's order, this Court will excuse the late filing only if it was due to unusual circumstances beyond her control.

{24} Wakeland filed her notice of appeal and docketing statement well within the deadlines provided under Rules 12-201 and 12-208. Wakeland argues that she should be excused for following those rules, rather than Rule 12-505, because she was not on notice that Rule 12-505 applied. Wakeland points out that nothing in Section 51-1-8 or Rule 1-077 specifically refers to Rule 12-505.

{25} Simply being confused or uncertain about the appropriate procedure for seeking review is not the sort of unusual circumstance beyond the control of a party that will justify an untimely filing. *See Trujillo*, 117 N.M. at 278, 871 P.2d at 374 (stating that "[o]nly the most unusual circumstances beyond the control of the parties—such as error on the part of the court[,]" will warrant overlooking the requirement that a document must be timely filed as a mandatory precondition to the exercise of a court's jurisdiction). *But see Glynn*, 2011-NMCA-031, ¶ 11 (finding unusual circumstances based on a party's uncertainty about the proper procedure for seeking review where the relevant document was considered to have been timely filed and the only question was whether unusual circumstances excused the filing of a document was non-conforming as to form and content). In very limited circumstances, this Court has held that uncertainty in the law will excuse the late filing of a petition. In *Hyden*, we held that unusual circumstances excused the late filing of two petitions for writ of certiorari where the law was so uncertain that the uncertainty essentially rose to the level of court-created error. 2000-NMCA-002, ¶¶ 14-17. There, the Legislature had enacted a comprehensive statute that significantly changed the way appeals could be taken from certain administrative agency decisions. *Id.* ¶ 2. The newly-enacted statute provided for a direct appeal to the district court and for discretionary review in the Court of Appeals by means of a petition for writ of certiorari. *Id.* The statute, however, provided no deadline within which to file a petition and stated that the relevant procedure would be "governed by rules adopted by the Supreme Court." *Id.* ¶ 17. The court rule, which contained the time for filing, was not enacted until several months later, and it was not published in the most readily available legal sources. *Id.* We view *Hyden* as applicable to those limited circumstances where the legal uncertainty involves a sea change in the relevant procedure and where the uncertainty relates to the time of filing itself—a situation that does not exist here. Wakeland does not assert that she was unaware of the time for filing a petition for writ of certiorari; instead, she contends that she did not know that she was supposed to file such a petition. The fact that Wakeland did not know that any further appellate review would be governed by Rule 12-505 does not excuse the late filing in this case.

{26} We note that any uncertainty about whether review in this Court should be had as an appeal as of right or pursuant to discretionary review can always be addressed

by filing both a timely notice of appeal in the district court and a timely petition for writ of certiorari in this Court. The party seeking review is free to explain the basis of their uncertainty about the proper procedure in their petition and to inform this Court that a notice of appeal has been timely filed in the district court. In the event the Court determines that the appeal, or some portion of the appeal, is of right, the party can request that the Court enter an order construing the petition as a docketing statement for those issues that are appealed as of right.

CONCLUSION

{27} Wakeland's non-conforming petition for writ of certiorari was not filed within thirty days of the district court's order and was therefore untimely. As her uncertainty about the proper procedure for seeking review is not an unusual circumstance that will excuse the late filing, we deny the petition.

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

LINDA M. VANZI, Judge

WE CONCUR:

CELIA FOY CASTILLO, Chief Judge

CYNTHIA A. FRY, Judge

Certiorari Denied, January 19, 2012, No. 33,348

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-022

Filing Date: November 17, 2011

Docket No. 30,199

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

ANDY L. VALERIO,

Defendant-Appellee.

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Albuquerque, NM

for Appellant

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Santa Fe, NM

for Appellee

OPINION

FRY, Judge.

{1} Defendant was charged by criminal complaint in magistrate court with two misdemeanor counts of criminal sexual contact. After the magistrate court declined to dismiss the charges on the basis of alleged deficiencies in the criminal complaint, Defendant filed an emergency petition for a writ of prohibition in district court, which was subsequently granted. We conclude that the writ of prohibition was not appropriate because the magistrate court had subject matter and personal jurisdiction in this case, and Defendant failed to establish that he did not have an adequate remedy at law. We therefore reverse and remand for further proceedings in the magistrate court consistent with this Opinion.

BACKGROUND

A. Magistrate Court Proceedings

{2} On January 12, 2009, the State filed a criminal complaint in magistrate court charging Defendant with two misdemeanor counts of criminal sexual contact in violation of NMSA 1978, Section 30-9-12(A), (D) (1993). The complaint indicated that the alleged illegal contact occurred between February 1, 2007, and April 30, 2008. It also included the following statement: "I swear or affirm under penalty of perjury that the facts set forth above are true to the best of my information and belief. I understand it is a criminal offense subject to the penalty of imprisonment to make a false statement in a criminal complaint." Following this statement, however, there was no signature. Instead, the complaint concluded with the prosecutor's signature. Defendant was arraigned on the basis of this complaint on April 23, 2009, and he pleaded not guilty to both charges.

{3} On May 20, 2009, the State filed an amended criminal complaint in magistrate court. Although the charges remained the same, the amended complaint reduced the time period that the alleged contact occurred by one year to reflect that the alleged contact occurred between February 1, 2007, and April 30, 2007. The amended complaint also included the statement quoted above, and it was now signed by an individual that the parties agree was Officer Matthew Martinez. In addition, the amended complaint, like the original, was signed by the prosecutor.

{4} On June 24, 2009, Defendant filed the first of two motions to dismiss the case due to alleged deficiencies in the first criminal complaint and the amended complaint. Initially, he moved to dismiss due to the lack of a valid charging document, arguing that the first criminal complaint failed to comply with Rule 6-201 NMRA because it did not include a sworn statement of facts. *See* Rule 6-201(A)(1) (providing that one method of commencing a criminal action in magistrate court is by the filing of "a complaint consisting of a sworn statement containing the facts"). Defendant filed a similar motion to dismiss on July 6, 2009, in which he argued that the State had failed to file a bill of particulars and also had "failed to allege specific and sufficient facts to commence a criminal action."

{5} In response to Defendant's motions, the

State argued that all necessary facts were sufficiently set forth in the complaint through the statutes cited in it; alternatively, the State argued that even if the first complaint was defective, the proper remedy was to allow the State to amend that complaint pursuant to Rule 6-303 NMRA—which the State had already done—rather than to dismiss the case. *See* Rule 6-303(A) (stating that "[t]he court may at any time prior to a verdict cause the complaint or citation to be amended with respect to any . . . defect, error, omission[,] or repugnancy if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced"). After a hearing, the magistrate court denied both motions filed by Defendant in which he had alleged that the first criminal complaint was defective due to the lack of a sworn statement.

{6} Despite the earlier denial, Defendant later filed two more motions to dismiss, arguing that the State had failed to file a valid complaint because the first criminal complaint was defective and the amended complaint was filed outside the applicable statute of limitations. Defendant argued that the failure to timely commence prosecution was a "jurisdictional bar to the continued prosecution of [Defendant]." The magistrate court again denied Defendant's dismissal motions following a hearing. Defendant then proceeded to file an emergency petition for a writ of prohibition in the district court. The magistrate court proceedings were stayed pending the outcome of the writ proceedings in district court.

B. Writ of Prohibition

{7} In his petition to the district court for an emergency writ of prohibition, Defendant raised two arguments, only one of which is relevant to this appeal. Defendant argued that the magistrate court lacked personal jurisdiction to hear Defendant's case due to the alleged expiration of the statute of limitations. Specifically, he argued that the first complaint contained a "critical defect" due to the failure to include a sworn statement, and that it therefore could not form the basis for initiating criminal proceedings against him. With respect to the amended complaint, Defendant argued that it, too, was invalid because it "was filed after the applicable [two-]year statute of limitations on commencing an action for [a] misdemeanor, [as] defined by [NMSA 1978, Section 30-1-8(C) (2009)]." *See* § 30-1-8(C) (providing that for misdemeanors, a "person shall not be prosecuted, tried or punished in any court of this state unless . . . [the] complaint is filed . . . within two years from the time the crime was committed"). Defendant concluded that the State's failure to file a valid complaint within the prescribed time period robbed the magistrate court of jurisdiction and required dismissal of the case.

{8} In response to Defendant's petition, the State argued that a writ of prohibition was not the proper remedy and that Defendant was "using the writ as a substitute for an appeal." Asserting that a writ of prohibition is an extraordinary remedy that is available only under "exceptional circumstances," the State contended that Defendant had failed to establish why an ordinary appeal was not an adequate remedy in this case, and further argued that he had not demonstrated any prejudice to him on the merits as a result of any deficiency in the complaints.

{9} On January 20, 2010, the district court held a hearing at which it granted Defendant's petition for a writ of prohibition. The court found that the first criminal complaint was invalid and that the amended complaint was filed after the statute of limitations ran. Concluding that the magistrate court "cannot

proceed with this case because it lacks jurisdiction," the district court ordered that the "case be remanded to [m]agistrate [c]ourt for the entry of an order dismissing the case." This appeal followed.

DISCUSSION

{10} The State argues that the district court erred in granting the writ of prohibition because (1) Defendant had an adequate remedy at law and (2) the magistrate court's determination regarding the validity of the initial complaint and the alleged expiration of the statute of limitations did not implicate its jurisdiction, and a writ proceeding was therefore improper. Although the State claims that the magistrate court correctly resolved the merits of the underlying dispute concerning the statute of limitations, it asserts that it is sufficient for purposes of this appeal to address only whether the writ of prohibition was a proper remedy. We agree and therefore limit our analysis accordingly.

A. The District Court's Order Was Final and Appealable

{11} As a preliminary matter, we determine whether the district court's order issuing the writ of prohibition is a final, appealable order. Defendant argues that the State's appeal is moot because the State filed its notice of appeal in this case prior to the entry of the order of dismissal by the magistrate court. The district court's order granting the writ of prohibition was filed on January 25, 2010, and the State filed its notice of appeal from that order on the next day, January 26, 2010. The following day, on January 27, 2010, the magistrate court entered an order dismissing the case with prejudice based on the district court's order. Defendant's argument appears to be that an appeal in this case could only have been properly filed from the magistrate court's order and not from the district court's order, which was filed two days earlier.

{12} The right to appeal is generally restricted to final judgments and decisions. *State v. Begay*, 2010-NMCA-089, ¶ 11, 148 N.M. 685, 241 P.3d 1125. For purposes of appeal, "[a] final order is commonly defined as an order that decides all issues of fact and law necessary to be determined or which completely disposes of the case to the extent the court had the power to dispose of it." *Id.* With respect to criminal cases, a final judgment is "one which either (1) adjudicates the defendant to have been convicted of a criminal offense and imposes, suspends[,] or defers sentence[;] or (2) dismisses all of the charges against the defendant." *State v. Garcia*, 99 N.M. 466, 471, 659 P.2d 918, 923 (Ct. App. 1983). We also note that "finality is to be given a practical, rather than a technical, construction." *Begay*, 2010-NMCA-089, ¶ 11 (internal quotation marks and citation omitted).

{13} We conclude that the district court's order is a final, appealable order. It is clear that the district court's order, in effect, dismissed all charges against Defendant because the district court determined that the initial complaint was invalid and that the amended complaint was filed outside the statute of limitations period. The order also effectively disposed of all issues in the case by finding that the magistrate court could not proceed with the case because it "lack[ed] jurisdiction" as a result of the invalid complaints.

{14} In addition, although the district court order's decretal language directed that the case "be remanded to [m]agistrate [c]ourt for the entry of an order dismissing the case," the remand instruction did not render the order

non-final. Although ordinarily an order remanding a case for further proceedings is not considered final for purposes of appeal, *id.* ¶ 13, we have previously determined that a remand order is final in certain circumstances, such as here, where the remand directs the lower tribunal to perform a task requiring no exercise of discretion. *See State v. Montoya*, 2005-NMCA-005, ¶ 5, 136 N.M. 674, 104 P.3d 540 (holding that a district court order remanding to magistrate court to impose the original sentence was a final judgment because the magistrate court lacked the authority to make any substantive determination regarding the defendant's sentence on remand and was limited to the "purely ministerial act of imposing the original sentence"). Here, Defendant does not dispute that the magistrate court on remand was left with no discretion to revisit the issue of the validity of the complaints or the statute of limitations and could only perform the ministerial task of entering an order dismissing the charges against Defendant. We agree with the State that it would be pointless to require the State to challenge the writ proceedings by appealing the magistrate court's order because that appeal would be to the very court that issued the writ of prohibition and ordered the magistrate court to dismiss the charges. *See* NMSA 1978, § 35-13-2(A) (1996) (stating that "[a]ppeals from the magistrate courts shall be tried de novo in the district court"). Thus, we conclude the district court order for purposes of this appeal is a final order.

{15} We are not persuaded by Defendant's arguments to the contrary. Defendant's primary contention is that the State should have sought a stay of the district court's order once it filed the notice of appeal and that, without such a stay, the magistrate court properly acted in dismissing the charges. However, Defendant relies on civil case law and the rules of civil procedure governing district courts in support of his argument, and we are not convinced that this authority should be applied in the criminal context. The State's appeal is not moot, and we therefore proceed to the merits of this appeal.

B. The Writ of Prohibition Was Not a Proper Remedy

{16} District courts have the authority under Article VI, Section 13 of the New Mexico Constitution to issue writs of prohibition to courts of inferior jurisdiction. *See* N.M. Const. art. VI, § 13 ("The district courts, or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition and all other writs, remedial or otherwise in the exercise of their jurisdiction; provided, that no such writs shall issue directed to judges or courts of equal or superior jurisdiction."). The State contends that a writ of prohibition was an improper remedy in this case for two reasons: (1) the magistrate court had proper subject matter and personal jurisdiction in this case, and (2) Defendant had an adequate remedy at law. We address each of these arguments in turn.

1. The Parties' Arguments Concerning the Magistrate Court's Jurisdiction

{17} In his petition for a writ of prohibition, Defendant relied on *State v. Kerby*, 2007-NMSC-014, 141 N.M. 413, 156 P.3d 704, to argue that a criminal statute of limitations is jurisdictional in nature and, therefore, the magistrate court's alleged erroneous ruling on the statute of limitations issue in this case functioned as a "jurisdictional bar to the continued prosecution" of Defendant. The district court found this reasoning persuasive, as reflected in the court's order finding that the magistrate

court lacked jurisdiction to proceed further in the case. On appeal, Defendant makes a similar argument in favor of the correctness of the district court's decision to enter a writ of prohibition. He contends that a court does not have "the authority to try a person in violation of a limitations statute" and that criminal statutes of limitations implicate the "fundamental jurisdiction of a trial court to proceed with a prosecution." The State argues that *Kerby* is inapposite because it held that criminal statutes of limitations are not jurisdictional. The State also contends that any alleged legal error committed by a court regarding the statute of limitations does not deprive that court of its jurisdiction to act.

{18} We need not engage in a careful review of *Kerby* for two reasons. First, the discussion in *Kerby* regarding the statute of limitations is not precisely applicable to the circumstances in this case because *Kerby* involved the question whether a criminal defendant may waive the protection of the statute of limitations, a question not raised here. *Id.* ¶¶ 12-19. Second, the inquiry in the present case is whether the district court misconstrued the term "jurisdiction" as it applies in the context of writs of prohibition, which is a question not addressed in *Kerby*.

{19} Our Supreme Court has stated a number of times that a writ of prohibition is "an extraordinary writ, issued by a superior court to an inferior court to prevent the latter from exceeding its jurisdiction, either by prohibiting it from assuming jurisdiction in a matter over which it has no control, or from going beyond its legitimate powers in a matter of which it has jurisdiction." *In re Extradition of Martinez*, 2001-NMSC-009, ¶ 7, 130 N.M. 144, 20 P.3d 126 (internal quotation marks and citation omitted). *See generally* Richard C. Bosson & Steven K. Sanders, *The Writ of Prohibition in New Mexico*, 5 N.M. L. Rev. 91, 101-12 (1974). The Court has defined jurisdiction in this context as "the court's power to entertain and hear the suit," *see id.* at 101 (internal quotation marks and footnote omitted), and has further explained that the jurisdictional test is "not whether the court had a right to decide the issue in a particular way, but did it have the right to decide it at all." *In re Extradition of Martinez*, 2001-NMSC-009, ¶ 7 (quoting *State ex rel. Kermac Nuclear Fuels Corp. v. Larrazolo*, 70 N.M. 475, 481, 375 P.2d 118, 122 (1962)). Thus, the critical inquiry required in this case is one of subject matter and personal jurisdiction—i.e., whether the magistrate court had "jurisdiction over the subject matter of the dispute and over each of the parties to the dispute." *Id.*

{20} In this case, the parties do not dispute that the magistrate court had jurisdiction to make determinations regarding the sufficiency of the complaints or the alleged expiration of the statute of limitations. It is also undisputed that the magistrate court had jurisdiction to try Defendant on the two misdemeanor charges. Defendant properly filed his motions to dismiss, and the magistrate court held at least two hearings on this matter before determining that the complaints were valid and did not violate the statute of limitations. Defendant does not argue on appeal that the magistrate court lacked subject matter or personal jurisdiction at any point during these proceedings. Thus, we conclude that a writ of prohibition was not appropriate because the magistrate court had proper subject matter jurisdiction and personal jurisdiction. *See In re Extradition of Martinez*, 2001-NMSC-009, ¶¶ 8-11 (determining that a writ of prohibition was not proper where the district court had both subject matter and personal jurisdiction to hear the defendant's arguments that he should not be extradited as a result of an alleged technical deficiency in his warrant); *Kermac*, 70 N.M. at 476, 481-82, 375 P.2d at

119, 122-23 (determining that where district court had personal and subject matter jurisdiction in a workers' compensation case, it was improper to issue a writ of prohibition on the issue of, among other things, the statute of limitations).

{21} Defendant's primary argument is not that the magistrate court lacked subject matter or personal jurisdiction, but that its "erroneous" determination on the statute of limitations issue functioned as a "jurisdictional bar to the continued prosecution" of Defendant. However, as we have explained, the jurisdictional test is not whether the court had a right to decide the issue *in a particular way*, but whether it had the right to decide the issue at all. *See Kermac*, 70 N.M. at 481, 375 P.2d at 122 (stating that the correct rule for the issuance of a writ of prohibition is that "jurisdiction being present of both the subject matter and the parties, ordinarily prohibition will not issue, and further that the question was not whether the court had a right to decide the issue in a particular way, but did it have the right to decide it at all"). The fact that the magistrate court may have reached an erroneous ruling regarding the statute of limitations in this case—when it had both subject matter and personal jurisdiction—does not give any basis for a writ of prohibition. Thus, because the magistrate court had jurisdiction and authority to make a determination regarding the validity of the complaints and the statute of limitations—even if it was in error—a writ of prohibition was not appropriate.

2. Defendant Had an Adequate Remedy at Law

{22} We also address the State's argument that the writ of prohibition was not appropriate because Defendant had an adequate remedy at law that he could utilize to correct any allegedly erroneous rulings made by the magistrate court. The State contends that Defendant could have appealed "from the magistrate[court's] ruling upon entry of a final judgment after trial or upon a conditional guilty plea" under Article VI, Section 27 of the New Mexico Constitution. *See* N.M. Const. art. VI, § 27 ("Appeals shall be allowed in all cases from the final judgments and decisions of the probate courts and other inferior courts to the district courts, and in all such appeals, trial shall be had de novo unless otherwise provided by law."). The State further claims that the issuance of the writ of prohibition by the district court amounted to "a piecemeal interlocutory appeal."

{23} It is well established that the extraordinary writ of prohibition is generally available only in cases where there is no adequate remedy at law. *See* 63C Am. Jur. 2d *Prohibition* § 14 (2011) ("In the absence of any statutory provision to the contrary, it is the general rule that prohibition, being an extraordinary writ, cannot be resorted to when the ordinary and usual remedies provided by law are adequate and available." (footnote omitted)); *see also State ex rel. Miller v. Tackett*, 68 N.M. 318, 324, 361 P.2d 724, 728 (1961) ("We recognize the oft-repeated rule that a writ of prohibition is not a writ of right, but instead, is one of sound judicial discretion that is issued or withheld according to the circumstances of each particular case, and which is used with great caution in the furtherance of justice, where it is plain that the court, officer, or person against whom it is sought is about to exercise some judicial or quasi judicial power; the exercise of which is clearly unauthorized by law and will result in injury for which no other adequate remedy exists" (internal quotation marks and citation omitted)); *cf. Cobb v. State Canvassing Bd.*, 2006-NMSC-034, ¶ 20, 140 N.M. 77, 140 P.3d 498 (referring to the general principle

that all extraordinary writs are "available only in cases wherein other remedies fail or are inadequate" (internal quotation marks and citation omitted)).

{24} We agree with the State that Defendant had an adequate remedy by way of a de novo appeal to the district court following the entry of a final judgment in the magistrate court. Rule 6-703(A) NMRA ("A party who is aggrieved by the judgment or final order in a criminal action may appeal, as permitted by law, to the district court of the county within which the magistrate court is located."). Defendant has failed to explain how this remedy was inadequate or otherwise unavailable to him under the circumstances of this case. His only argument appears to be that he would be prejudiced by having to "await conviction" for "crimes that evoke strong public opinion" and "then await the outcome of a de novo appeal in [d]istrict [c]ourt." We are not persuaded. Although the magistrate court denied his motions to dismiss, there is no indication that further criminal proceedings would result in convictions. Nor are we persuaded that the time involved in going through trial and a de novo appeal in this case is a burden significant enough to merit the exercise of a writ of prohibition. *See State ex rel. Harvey v. Medler*, 19 N.M. 252, 260, 142 P. 376, 378 (1914) (stating that "as a general rule, the writ of prohibition cannot be used to correct mere irregularities, or to perform the functions of an appeal or writ of error").

{25} Defendant also argues that a de novo appeal from a final judgment in magistrate court is not an adequate remedy for any statute of limitations violation because, like double jeopardy, the statute of limitations in a criminal case is intended to limit exposure to prosecution altogether, not simply to provide an alternative basis for reversal in a de novo appeal. Defendant does not cite any authority equating double jeopardy protections to the bar provided by the statute of limitations. Therefore, we decline to consider the issue. *See In re Adoption of Doe*, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (explaining that appellate court will not consider an issue if no authority is cited in support of the it).

{26} To hold that a writ of prohibition proceeding is appropriate in any case where the trial court may have erroneously ruled on a statute of limitations issue—or, for that matter, any other dispositive issue that might obviate the need for trial—is contrary to the purposes underlying the use of extraordinary writs and our general policy disfavoring the use of piecemeal appeals. "[N]either the writ of prohibition nor the writ of superintending control should be used as a substitute for a decision on direct or interlocutory appeal." *Chappell v. Cosgrove*, 1996-NMSC-020, ¶ 6, 121 N.M. 636, 916 P.2d 836; *see also* 7 Wayne R. LaFave et al., *Criminal Procedure* § 27.4(b), at 50 (3d ed. 2007) ("Even in those jurisdictions that [utilize a writ proceeding to] reach a broad range of issues . . ., courts continue to stress that the writs should be sparingly allowed. This reluctance reflects both the apprehension that the writs could be used so frequently that their use would imperil the policies that limit the right of appeal, particularly the final judgment rule, and the concern that the writs not become a form of open-ended discretionary review for orders not appealable as of right."). Defendant clearly has an adequate remedy at law. For this reason, and because the magistrate court properly exercised its jurisdiction, we conclude that the district court improperly issued the writ of prohibition.

CONCLUSION

{27} Based on the foregoing, we reverse

the district court's order granting the writ of prohibition. We also reverse the magistrate court's order dismissing all charges against Defendant as a result of the district court's order on the writ of prohibition, and we remand with instructions that the magistrate court reinstate all charges against Defendant. Defendant may appeal the magistrate court's determinations regarding the validity of the initial complaint and the statute of limitations upon entry of a final, appealable order or judgment by the magistrate court.

{28} IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:

CELIA FOY CASTILLO, Chief Judge

JONATHAN B. SUTIN, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-023

Filing Date: January 19, 2012

Docket No. 29,850

UTTI ATHERTON, LAURA JARAMILLO, JOHN DOE 1-99, and JANE DOE 1-99,

Plaintiffs-Appellants,

and

NEW MEXICO ATTORNEY GENERAL,

Plaintiff,

v.

MICHAEL J. GOPIN,

Defendant-Appellee.

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for Appellee

OPINION

BUSTAMANTE, Judge.

{1} Plaintiffs prevailed in their Unfair Practices Act (UPA) action against Defendant. NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2009). As a consequence, they were entitled to an award of attorney fees. Section 57-12-10(C). The district court refused to apply a multiplier factor to the lodestar fee it approved, concluding that New Mexico only allows multipliers in class actions and "common fund" situations. Disagreeing, we reverse and remand for reconsideration of Plaintiffs' request.

I. BACKGROUND

{2} Plaintiffs won partial summary judgment, including judgment that Defendant had violated the UPA. Subsequently, the parties agreed to settle the lawsuit for approximately $5200 plus attorney fees. The order provided that "Defendant shall pay the [n]amed Plaintiffs' attorney fees, the amount of which will be agreed upon by counsel for the [n]amed Plaintiffs and Defendant within ten days, or failing such agreement, the amount of attorney fees shall be decided by the [c]ourt."

{3} The parties could not agree on an amount for the attorney fees, and Plaintiffs filed a motion to award attorney fees. Plaintiffs requested an hourly rate of $195 per hour plus tax. Using this rate, Plaintiffs calculated that fees of $35,759.10 were owed. In addition, Plaintiffs requested a multiplier of 1.5. The district court awarded Plaintiffs $39,608.40 in attorney fees but denied Plaintiffs' request for a multiplier. The court based its denial of the multiplier on a finding that "[u]nder New Mexico state law irrespective of [Tenth] Circuit cases, a multiplier for attorney fees in fee-shifting cases such as the case at bar is limited to class actions and common fund cases."

II. DISCUSSION

{4} Plaintiffs argue that the district court erred as a matter of law by refusing to consider the use of a multiplier in awarding attorney fees. They seek remand for a new determination of allowable fees in which all relevant factors, including whether contingency risk warranted the use of a multiplier, are considered. Defendant counters that use of a multiplier under these circumstances is "without precedent" and contrary to federal law.

A. The District Court May Consider a Multiplier in UPA Cases

{5} A plaintiff who prevails under the UPA is entitled to recover attorney fees. Section 57-12-10(C). The UPA does not limit the fees in any way. *Id.* We review the award of attorney fees for abuse of discretion, but we review de novo whether this decision was based on a misapprehension of the law. *See N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶¶ 6-7, 127 N.M. 654, 986 P.2d 450.

{6} Although the UPA imposes no limitations on attorney fees, the fees requested must be reasonable. *See Jones v. Gen. Motors Corp.*, 1998-NMCA-020, ¶ 24, 124 N.M. 606, 953 P.2d 1104. "Historically, New Mexico courts have also used the factors now found in Rule 16-105 of the Rules of Professional Conduct to examine the reasonableness of attorney fees." *In re N.M. Indirect Purchasers Microsoft Corp.*, 2007-NMCA-007, ¶ 76, 140 N.M. 879, 149 P.3d 976. These factors include:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) *whether the fee is fixed or contingent.*

Rule 16-105(A) NMRA (emphasis added). "The factors are not of equal weight, and all of the factors need not be considered." *Microsoft*, 2007-NMCA-007, ¶ 78.

{7} One way of arriving at a reasonable fee is the "lodestar" method, which was the method chosen by the court in this case. *See Rivera-Platte v. First Colony Life Ins. Co.*, 2007-NMCA-158, ¶ 78, 143 N.M. 158, 173 P.3d 765 (recognizing the district court's discretion to use either the percentage of recovery method or the lodestar method to calculate attorney fees). In this method, the court determines a fee that approximates a reasonable hourly rate multiplied by the number of hours reasonably incurred in the representation. *See Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1672 (2010). This value serves as a starting point for the calculation of a reasonable fee. *Microsoft*, 2007-NMCA-007, ¶ 34. The lodestar method is "ordinarily used in statutory fee-shifting cases because it provides adequate fees to attorneys who undertake litigation that is socially beneficial." *Id.* "An award based on a lodestar may be increased by a multiplier if the lower court finds that a greater fee is more reasonable after the court considers the risk factor and the results obtained." *Id.*

{8} We have previously applied a reasonableness standard to attorney fees under the UPA. *See Jones*, 1998-NMCA-020, ¶ 24. In *Jones*, the district court denied an individual plaintiff's UPA claim, finding that he could not recover because he had failed to prove damages. *Id.* ¶ 22. We reversed, noting that the statute allowed recovery of the greater of damages or $100. *Id.* ¶¶ 23, 26. We further held that, in addition to the statutory damages of $100, the plaintiff was "entitled to reasonable attorney fees and costs," including the costs of his appeal. *Id.* ¶ 24. Two policies supported this decision: enabling individual plaintiffs to pursue their claims, however small, and encouraging individuals to enforce the UPA on behalf of the general citizenry. *See id.* ¶ 25. Accordingly, even though the plaintiff was only entitled to $100 of statutory damages, the allowable attorney fees were "not nominal[, but] should reflect the full amount of fees fairly and reasonably incurred by [the p]laintiff in securing an award under the UPA." *Id.* Absent this incentive, prospective plaintiffs might have difficulty pursuing their claims and enforcing the UPA on behalf of the public. *Id.*

{9} The district court erred in concluding that it could not consider the use of a multiplier in this case. As we have observed, the UPA contains no limitation on the award of attorney fees. *Jones*, which allowed attorney fees to be awarded to an individual in a UPA case, emphasized that even when the damage award was small, the attorney fees "should reflect the full amount of fees fairly and reasonably incurred" by the prevailing plaintiff. *Id.* Rule 16-105, which our cases have looked to for guidance regarding the reasonableness of attorney fees, *see Microsoft*, 2007-NMCA-007, ¶ 76, includes "whether the fee is fixed or contingent." Rule 16-105(A)(8). Furthermore, we have previously approved of the use of a multiplier. *See, e.g.*, *Microsoft*, 2007-NMCA-007, ¶¶ 34, 75 (condoning the use of a multiplier in a lodestar calculation used as a cross-check of a percentage of recovery award). In some cases, multipliers may be necessary to ensure that plaintiffs can enforce their rights under the UPA. *See Perdue*, 130 S. Ct. at 1673 (rejecting "any contention that a fee determined by the lodestar method may not be enhanced in any situation" and recognizing that there may be circumstances in which "the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee"). That we have not yet explicitly approved of the use of a multiplier outside of the class action or "common fund" setting is not authority for the district court's conclusion that a multiplier should not be considered outside of those contexts. *See Sloan v. State Farm Mut. Auto. Ins. Co.*, 2004-NMSC-004, ¶ 12, 135 N.M. 106, 85 P.3d 230 ("[C]ases are not authority for propositions not considered." (alteration in original) (internal quotation marks and citation omitted)). Accordingly, we hold that the district court has discretion to apply a multiplier to the lodestar value. *See Microsoft*, 2007-NMCA-007, ¶¶ 73-75 (holding that the district court did not abuse its discretion when, in using the lodestar method as a cross-check against the percentage method used, the court applied a multiplier to enhance the lodestar); *see also Ketchum v. Moses*, 17 P.3d 735, 746 (Cal. 2001) ("[T]he trial court is not *required* to include a fee enhancement to the basic lodestar figure for contingent risk, exceptional skill, or other factors, although it retains the discretion to do so in the appropriate case. . . .").

B. Defendant's Other Arguments Are Not Persuasive

{10} Defendant's other arguments against the use of a multiplier are unavailing. First, Defendant argues that federal cases precluded the district court from applying a multiplier except in rare or exceptional circumstances. However, the cases cited by Defendant involve the interpretation of federal fee-shifting statutes not at issue in this case. *See Perdue*, 130 S. Ct. at 1669-70 (discussing fee-shifting under 42 U.S.C. § 1988 (2000)); *City of Burlington v. Dague*, 505 U.S. 557, 559 (1992) (discussing fee-shifting under 42 U.S.C. § 6972(e) (1984) and 33 U.S.C. § 1365(d) (1987)). Defendant identifies no reason why we are bound by these cases in interpreting the UPA, nor can we perceive one. *See Dague*, 505 U.S. at 562 (noting that United States Supreme Court case law relates to "federal fee-shifting statutes").

{11} Defendant does point to language that "[a]n enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation." *Perdue*, 130 S. Ct. at 1667. Defendant contends the risk of non-payment is included in the lodestar. Plaintiffs maintain that the lodestar rate was the fee counsel "normally charges in non-contingent matters as his lodestar." We decline to decide this factual question in the first instance. We

simply note that, to the extent that the lodestar rate does not take into account the factors that justify a multiplier, the district court has discretion to apply a multiplier in a UPA case.

{12} Second, Defendant claims that Plaintiffs affirmatively waived the right to ask for a multiplier by not asking for it prior to the execution of the settlement agreement. At that time, Plaintiffs had indicated to Defendant that attorney fees amounted to $38,242. But Defendant, in the stipulated order of partial dismissal, did not agree to pay this or any other fixed amount. Instead, he agreed that fees would be litigated if the parties could not agree to a specific amount within ten days.

{13} A waiver is "the intentional relinquishment or abandonment of a known right." *J.R. Hale Contracting Co. v. United N.M. Bank at Albuquerque*, 110 N.M. 712, 716, 799 P.2d 581, 585 (1990). It may be express or implied. *Id.* at 716-17, 799 P.2d at 585-86. Additionally, waiver by estoppel is present where a party's actions reasonably lead the other party to believe waiver has occurred and that other party is prejudiced by the belief. *Id.* at 717, 799 P.2d at 586.

{14} Plaintiffs did not waive their right to ask for a multiplier. Defendant does not explain how the record shows, explicitly or implicitly, that Plaintiffs abandoned their right to pursue a multiplier. Based on our review of the record, and in particular the stipulated order of partial dismissal, we conclude that it does not. Nevertheless, Defendant asserts that he was "reasonably misled" by Plaintiffs' statement that attorney fees amounted to $38,242 and that this constituted waiver by estoppel. We disagree. We do not believe that such a statement, made during settlement negotiations and with the knowledge that fees would be litigated if no agreement was reached, could reasonably be viewed as the abandonment of the right to ask for a multiplier should the settlement negotiations prove unsuccessful.

{15} Third, Defendant argues that, had the district court applied a multiplier, it would have abused its discretion. However, since the district court has yet to apply a multiplier, we decline to consider this argument.

C. Plaintiffs Are Entitled to Attorney Fees

{16} Finally, Plaintiffs have also requested that we award attorney fees for this appeal. Our cases have repeatedly stated that awards of appellate attorney fees are appropriate in UPA cases. *See, e.g.*, *Jones*, 1998-NMCA-020, ¶ 24. Accordingly, on remand, the district court should award to Plaintiffs the reasonable attorney fees and costs of this appeal.

III. CONCLUSION

{17} For the foregoing reasons, we remand for the district court to make a new determination of attorney fees, including fees for this appeal, to be awarded to Plaintiffs.

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

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

RODERICK T. KENNEDY, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-024

Filing Date: February 10, 2012

Docket No. 28,167

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

MICHAEL SOUTAR,

Defendant-Appellant.

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for Appellee

Jacqueline L. Cooper, Chief Public Defender
Eleanor Brogan, Assistant Appellate Defender
Santa Fe, NM

for Appellant

OPINION

CASTILLO, Chief Judge.

{1} Convicted of racketeering and several state securities violations, Michael Soutar (Defendant) now appeals his convictions. He challenges the court's revocation of his plea deal, the nature of the jury instructions, and the sufficiency and admission of evidence used to convict him. For reasons explained below, we affirm.

I. BACKGROUND

{2} Defendant was tried and convicted of multiple violations of the New Mexico Securities Act of 1986, NMSA 1978, Sections 58-13B-1 to -57 (1986, as amended through 2003) (repealed 2009), and one count of racketeering in violation of NMSA 1978,

Section 30-42-4 (2002). These convictions arose out of Defendant's formation of Santa Fe International Development, a Limited Liability Company (the LLC), under which Defendant operated a business called the Santa Fe Market (the Market).

{3} Defendant acted as general manager of the Market and advertised it as a facility near the Plaza in Santa Fe where artists could lease space, sell their products, and keep eighty-five percent of their proceeds, relinquishing the remainder to the Market. Defendant attracted several investors who bought interests in the LLC through investment contributions. These investments were significant, in the range of $25,000 and up.

{4} The Market failed, and the investors lost all of their money. The victims alleged that they had been defrauded. Defendant was indicted in December 2004 on nine counts of securities violations for unlawfully selling interests in the LLC, one count of racketeering based on the securities violations, and numerous other charges including escape from jail, forgery, and fraud.

{5} Defendant entered into plea negotiations with the State. He represented that he had $125,000 at his disposal from a third party and informed the State that he was willing to provide this money to the victims as an initial lump-sum restitution payment if an acceptable plea agreement was reached. Defendant further indicated that, if no plea was reached and Defendant was required to stand trial, this money would have to be put toward the costs of his defense. Defendant also informed the district court of the existence of these funds and his desire to compensate the victims as part of a plea agreement.

{6} In October 2006, a plea hearing was held, and the district court accepted and entered a plea and disposition agreement. The agreement included a provision requiring Defendant to make restitution but did not specifically reference a lump-sum payment. Defendant agreed to plead no contest to three counts of fraudulent practices in connection with the sale of securities, one count of escape from jail, and one count of racketeering. Immediately after accepting the agreement, the district court proceeded to orally sentence Defendant. The sentence imposed—twelve years' confinement with all but three years suspended, entitlement to good time, and a five-year probationary period—was consistent with the terms of the agreement.

{7} Seventeen days after the plea hearing, the State filed a "motion for reconsideration of sentence or to withdraw [the] plea." The State alerted the court to the fact that Defendant had failed to live up to his commitment to make restitution.

{8} At the hearing on that motion, Defendant confirmed that he was either unable or unwilling to make an initial lump-sum payment. The district court informed Defendant that the only reason it had accepted the plea was because it understood that the terms of the agreement required Defendant to make restitution and that restitution involved a substantial, initial lump-sum payment. Defendant responded that, while the plea agreement did include a restitution provision, it did not include any reference to a lump-sum payment. Defendant further argued that double jeopardy and other legal principles precluded the court from withdrawing the plea or altering the orally imposed sentence. The court disagreed, withdrew the plea, and ordered Defendant to stand trial.

{9} At the close of trial, Defendant proposed several instructions that the court denied. Defendant was convicted of one count of

racketeering and three counts each of fraudulent practices in connection with the sale of securities in violation of Section 58-13B-30; selling unregistered securities in violation of Section 58-13B-20; and selling securities without a license in violation of Section 58-13B-3. He was sentenced to eighteen years' confinement for these offenses and an additional sixteen years' confinement as a habitual offender for a total period of thirty-four years' confinement.

II. DISCUSSION

{10} On appeal, Defendant raises five issues. He asserts that the oral sentence the court imposed under the plea agreement was final and binding and that double jeopardy precluded the court from ordering him to stand trial. Second, he contends that the district court abused its discretion when it ordered the plea agreement withdrawn and claims that "after the court accepted the plea agreement[,] it was bound by its terms to sentence [him] to the negotiated sentence." He maintains that the plea agreement did not require him to make an initial lump-sum payment, yet the district court granted the State's request to withdraw the agreement due to his inability to make that payment. Third, he claims two errors regarding the court's denial of his proposed jury instructions. Fourth, he challenges the sufficiency of the evidence underlying his convictions. Fifth, and finally, he asserts that the court erred in admitting evidence of his prior bad acts. We address these issues in turn.

A. Double Jeopardy

{11} "We generally review double jeopardy claims de novo." *State v. Rodriguez*, 2006-NMSC-018, ¶ 3, 139 N.M. 450, 134 P.3d 737. The Double Jeopardy Clause of the United States Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V. However, "[i]n order to successfully claim double jeopardy, a former jeopardy must have occurred—there must have been a previous proceeding in which jeopardy attached." *State v. Angel*, 2002-NMSC-025, ¶ 7, 132 N.M. 501, 51 P.3d 1155. Here, Defendant acknowledges that jeopardy did not attach when the court accepted his plea. *See id.* ¶ 13 (holding that jeopardy does not attach upon a court's acceptance of a guilty plea). Rather, he argues that jeopardy attached at the oral sentencing. We disagree.

{12} Our Supreme Court has previously recognized that "jeopardy attaches when the court enters a judgment and imposes a sentence on the guilty plea." *Id.* ¶ 10. This is because entry of judgment and sentence carries with it an "expectation of finality." *Id.* ¶ 15.

> [T]he analytical touchstone for double jeopardy is the defendant's legitimate expectation of finality in the sentence, which may be influenced by many factors such as the completion of the sentence, the passage of time, the pendency of an appeal or review of the sentencing determination, or the defendant's misconduct in obtaining the sentence.

State v. Hardesty, 915 P.2d 1080, 1085 (Wash. 1996) (en banc).

{13} In our view, Defendant could not have formed an expectation of finality in the oral sentence. An oral sentence is not "a final judgment and is subject to change until reduced to writing." *State v. Rushing*, 103 N.M. 333, 334, 706 P.2d 875, 876 (Ct. App.

1985). As such, our Supreme Court has explained that "a trial court's oral announcement of a result is not final, and parties to the case should have no reasonable expectation of its finality." *State v. Lohberger*, 2008-NMSC-033, ¶ 20, 144 N.M. 297, 187 P.3d 162. Defendant acknowledges this law, but directs us to *State v. Porras*, 1999-NMCA-016, ¶ 14, 126 N.M. 628, 973 P.2d 880, where we held that the defendant had a reasonable expectation of finality in an oral pronouncement of sentence because the defendant had begun serving his sentence. For the reasons that follow, *Porras* is inapplicable here.

{14} As the State observes, Defendant has done nothing to explain how he began serving his sentence after the oral sentence was imposed beyond simply stating that he did so. *See Santa Fe Exploration Co. v. Oil Conservation Comm'n*, 114 N.M. 103, 108, 835 P.2d 819, 824 (1992) (stating that where a party fails to cite any portion of the record to support its factual allegations, appellate courts need not consider its argument on appeal). More critically, the oral sentence arose out of the plea agreement and, as we explain in the following section of this Opinion, Defendant made representations about making an immediate lump-sum restitution payment, a basis upon which the district court accepted the agreement. Later, Defendant either could not or would not provide that payment. Defendant could not have formed an expectation of finality in an oral sentence imposed pursuant to a plea agreement, the terms of which he either could not or would not keep. *See Rushing*, 103 N.M. at 335, 706 P.2d at 877 (holding that the defendant had no reasonable expectation of finality in a sentence obtained through misrepresentations at the time of sentencing). This conclusion is in line with other authorities. *Cf. Brown v. State*, 367 So. 2d 616, 623 (Fla. 1979) ("We hold, therefore, that the [D]ouble [J]eopardy [C]lause does not bar the reprosecution of an accused who willfully refuses to perform a condition of a guilty plea which has been accepted by the trial court on that basis."); 22 C.J.S. *Criminal Law* § 286 (2011) ("The Double Jeopardy Clause does not bar reprosecution of an accused individual who willfully refuses to perform a condition of a guilty plea.").

{15} We conclude that double jeopardy principles did not preclude the district court from ordering Defendant to stand trial. Double jeopardy did not attach at the time of the oral sentencing. Thus, the district court's decision to require Defendant to stand trial did not implicate double jeopardy concerns. We turn now to the plea agreement and explain in greater detail why the court did not err in agreeing to withdraw the plea.

B. Withdrawal of the Plea Agreement

{16} Because the oral sentence was not final, we review the district court's decision to withdraw the plea only for an abuse of discretion. *See State v. Hunter*, 2005-NMCA-089, ¶ 20, 138 N.M. 96, 117 P.3d 254 ("A district court exercises its discretion when deciding whether to permit a pre-sentence plea withdrawal, and we review the court's ruling to determine whether, under the facts offered in support of the motion, the trial court abused its discretion." (internal quotation marks and citation omitted)), *aff'd*, 2006-NMSC-043, 140 N.M. 406, 143 P.3d 168. "A court abuses its discretion when it is shown to have acted unfairly, arbitrarily, or committed manifest error." *Id.* (internal quotation marks and citation omitted).

{17} "A plea agreement is a unique form of contract the terms of which must be interpreted, understood, and approved by the

trial court." *State v. Mares*, 119 N.M. 48, 51, 888 P.2d 930, 933 (1994). "In reviewing and interpreting the agreement a court should construe the terms according to what [petitioner] reasonably understood when he entered his plea." *Id.* (alteration in original) (internal quotation marks and citation omitted).

{18} Defendant's plea agreement included the following provision: "[D]efendant agrees to make restitution on all charges. . . ." Our review of the record reveals that all parties—Defendant, the district court, and the State—understood this provision to require Defendant to make an initial and immediate lump-sum restitution payment. At the plea hearing, the court informed Defendant that the court's primary concern was to ensure that the victims of Defendant's crimes received maximum restitution. Jail time, the court explained, did little to achieve that objective, and the court had significant doubts about Defendant's ability to make incremental payments over time. The court believed that the plea agreement, as the court understood it, satisfactorily addressed its primary concern because it entailed Defendant making a substantial and immediate lump-sum payment. The Court's understanding that the restitution provision in the agreement entailed a lump-sum payment was not based on surmise or assumption but on Defendant's representations.

{19} At the plea hearing—specifically, during plea recommendations and before the court accepted the plea—Defendant made the following statements:

> Defense Counsel: Your honor, we, we, basically have spent a lot of time in trying to get this hammered out. I think that . . . [the plea is] a good resolution for everybody. We are, you know, we have the means over, you know, over the time period, to make the restitution. The intention has always been to make a, an initial lump-sum kind of based on . . . what the funds are available. I mean it's true, all the way back in January or February I made it clear that there was a finite amount of money and that it was impossible to both . . . try the case, and lawyer the case out, and pay restitution.
>
> The Court: What's the ballpark figure that you are talking about as far as an initial lump sum?
>
> Defense Counsel: You know, I need to speak with the person. I mean, you know, basically what we're looking at in terms of an initial lump sum would have been the original amount we had thrown out there was $125,000, but as time has gone along and there have been lawyer fees and everything else that cuts into the initial lump sum, and I just don't know what that is right now.

This excerpt refutes Defendant's contention that "[t]he first mention of an initial lump-sum restitution payment came *after* the plea agreement had been accepted by the court." After accepting the plea, the district court gave Defendant specific instructions regarding the lump-sum payment:

> The Court:Now this is what I want you to do. Between now and the time this case is over, so you now are under an obligation to make restitution.
>
> Defendant: Yes sir.

The Court: Between now and the time you deal with Arizona, I want to see you through your lawyer try to access that money that you talked about and get that paid.

Defendant: Okay. Can I say something? The money that he talked about was last December that we came up with the money. There's been horrendous expense over the last year. And we discussed this up front because I wanted to get the money. That's the money I wanted to get back in their pockets.

Defense Counsel: But there's nonetheless . . .

The Court: There is some available?

Defendant: Oh, sure, absolutely your honor.

The Court: I don't want you to wait on making that payment. . . . In other words, tomorrow I want you to start your efforts. I know it's difficult from jail, but through your lawyer I want you to start your efforts in getting that money transferred so that restitution can be made, immediately. I mean, if you go to Arizona, and they give you another three months there for your felony there, I don't want these people to have to wait another five months.

Defendant: I understand.

The Court: So you start immediately.

Defendant: I understand. That's my whole intention.

{20} This interchange demonstrates that the plea agreement was premised on the understanding that Defendant would make a substantial and immediate lump-sum restitution payment. While this is not specifically stated in the agreement, the record supports the conclusion that Defendant reasonably understood that the restitution provision that is in the agreement entailed this type of lump-sum payment. Defendant was either unable or unwilling to make that payment and, thus, was unable to honor the terms of the agreement. The court did not abuse its discretion in withdrawing the plea.

C. Jury Instructions

{21} Defendant next claims that the district court committed reversible error in denying several of his proposed jury instructions. We review each claimed error in turn but first establish our standard of review. "The propriety of jury instructions given or denied is a mixed question of law and fact." *State v. Lucero*, 2010-NMSC-011, ¶ 11, 147 N.M. 747, 228 P.3d 1167 (internal quotation marks and citation omitted). "[W]e review any factual questions under a substantial evidence standard[,] and we review the application of law to the facts de novo." *State v. Neal*, 2007-NMSC-043, ¶ 15, 142 N.M. 176, 164 P.3d 57 (internal quotation marks and citation omitted). "An appellate court reviews challenged jury instructions to determine whether they correctly state the law and are supported by the evidence introduced at trial." *Gonzales v. N.M. Dep't of Health*, 2000-NMSC-029, ¶ 28, 129 N.M. 586, 11 P.3d 550. "It is not error for a trial court to refuse instructions which are inaccurate." *State v. Salazar*, 1997-NMSC-044, ¶ 57, 123 N.M. 778, 945 P.2d 996. Our review also

involves deciding "whether a reasonable juror would have been confused or misdirected by the jury instruction." *State v. Cunningham*, 2000-NMSC-009, ¶ 14, 128 N.M. 711, 998 P.2d 176 (internal quotation marks and citation omitted). It is not error for a court to refuse an instruction that is confusing or misleading. *State v. Skipworth*, 64 N.M. 175, 178, 326 P.2d 669, 670-71 (1958). "[J]uror confusion or misdirection may stem not only from instructions that are facially contradictory or ambiguous, but from instructions which, through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law." *State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134.

{22} Defendant first argues that the district court erred in denying his proposed instruction defining the term "security." We review the facts underlying this claim. As noted, Defendant was charged with multiple securities violations including three counts of fraudulent practices in connection with the sale of securities, three counts of selling unregistered securities, and three counts of selling securities without a broker's license. One essential element common to all of these offenses is that "[D]efendant sold a security." Defendant proposed an instruction purportedly defining "security"; the suggested instruction read as follows:

Essential Element of "Security" Defined

> For you to find [D]efendant guilty of fraudulent practices in securities as charged in Count I, the State must prove beyond a reasonable doubt all of the elements that show that the instrument [D]efendant sold was a security.
>
> An ownership interest in an LLC is a security if it is:
>
> 1. An investment;
> 2. In a common enterprise;
> 3. With the expectation of profit; and
> 4. To be derived through the essential managerial efforts of someone other than the investor;
> 5. Unless context requires otherwise.
>
> Here, a "common enterprise" means an enterprise in which the fortunes of the investor are interwoven with and dependent upon the efforts and successes of those seeking the investment or of a third party;
>
> OR
>
> 1. An investment by which an offeree furnishes initial value to an offeror;
> 2. A portion of this initial value is subjected to the risks of the enterprise;
> 3. The furnishing of the initial value is induced by the offeror's promises or representations;
> 4. Which give rise to a reasonable understanding that a valuable benefit of some kind over and above the initial value will accrue to the offered;
> 5. As a result of the operation of the enterprise; and
> 6. The offeree does not receive the right to exercise practical and actual control over the managerial

decisions of the enterprise;

7. Unless context requires otherwise.

Each transaction must be analyzed on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole.

The law provides that "context requires otherwise" where the parties have a unique agreement, the instruments do not have equivalent value to most persons, the instruments could not be traded publicly, and the purchaser is motivated by a desire to use or consume an item purchased.

If you find that "context otherwise requires" then the instrument is not a security, and you must find [Defendant] not guilty of fraudulent practices in securities.

The Court denied this instruction and, after consulting with the parties and reviewing UJI 14-4310 NMRA (defining "security"), issued the following instruction:

A "security" is a [sic] ownership right or a creditor relationship and includes any investment contract and a limited liability company interest.

1. Any investment contract means a contract:
   a. Where an individual invests his money;
   b. In an undertaking or venture of two or more people or entities;
   c. With an expectation of profit;
   d. Based primarily on the efforts of others.
2. A limited liability company interest means a member's or assignee's right to receive distributions and a return of capital from the limited liability company[;]
3. Unless the context requires otherwise.

An investment is the use of capital or money to create more money.

Defendant claims that the "court committed reversible error when it denied [his] tendered instruction on the definition of a security." We disagree.

{23} We agree with the State's assessment that Defendant's proposed instruction is both misleading and unclear. Although the instruction is titled "security defined", the instruction does not actually define the term. Rather, it purports to identify the circumstances under which an interest in a limited liability company constitutes a security. Moreover, the bulk of the instruction focuses not on the meaning of "security," but on the meaning of "common enterprise." Finally, the sheer breadth of the instruction is troubling. We conclude that the instruction had great potential to misdirect and confuse the jury. *See State v. Barber*, 2004-NMSC-019, ¶¶ 19-20, 135 N.M. 621, 92 P.3d 633; *State v. Rodarte*, 2011-NMCA-067, ¶¶ 11-14, 149 N.M. 819, 255 P.3d 397, *cert. denied*, 2011-NMCERT-005, 150 N.M. 666, 265 P.3d 717; *Berry v. Fed. Kemper Life Assurance Co.*, 2004-NMCA-116, ¶ 79, 136 N.M. 454, 99 P.3d 1166.

{24} Moreover, the proposed instruction is not a correct statement of the law. In the

definitions section of the New Mexico Securities Act of 1986, "security" is defined as follows: "unless the context requires otherwise, 'security' means . . . any interest in a limited liability company[.]" Section 58-13B-2(X). There is no dispute that Defendant sold interests in a limited liability company. The statute provides that such an interest constitutes a security, unless the context requires otherwise.

{25} Defendant emphasizes the phrase "unless the context requires otherwise" and asserts that a jury must apply the "investment contract test" set out in *S.E.C. v. W.J. Howey Co.* (*Howey*), 328 U.S. 293 (1946) to determine whether an interest in a limited liability company is a security under the New Mexico Securities Act of 1986. In *Howey*, the United States Supreme Court examined the scope of the definition of "security" in the federal Securities Act of 1933, 15 U.S.C. §§ 77a to 77aa (1933, as amended through 2000). *Howey*, 328 U.S. at 294. The federal act expressly defined "security" to include an investment contract. *Howey*, 328 U.S. at 297. The issue before the Court was whether a land sales contract, a warranty deed, and a service contract together constitute an investment contract. *Id.* The Court answered this question in the affirmative and, in doing so, adopted what Defendant refers to as the "investment contract test" so as to bring within the ambit of that Act the "many types of instruments that in our commercial world fall within the ordinary concept of a security." *Id.* at 299 (internal quotation marks and citation omitted). Defendant's argument that *Howey* and the investment contract test are relevant here ignores significant differences between the definition of "security" in the federal Securities Act of 1933 and the New Mexico Securities Act of 1986.

{26} As stated above, the New Mexico statute defines an interest in a limited liability company as a security, unless the context requires otherwise. The definition under the federal statute is substantially different, in that it expressly includes investment contracts in its definition. With this difference in mind, we fail to see how *Howey* and the federal Securities Act of 1933 offer any guidance here. In addition, we have previously held that the term "security" in the New Mexico Securities Act of 1986 was intended to be construed broadly and that it is error to advocate a construction that narrows its applicability. *State v. Sheets*, 94 N.M. 356, 360, 610 P.2d 760, 764 (Ct. App. 1980). Such a narrow construction is precisely what Defendant advocates here. We recognize that the New Mexico statute definition allows consideration of the context, and our analysis should not be understood as an attempt to strip the phrase "unless the context requires otherwise" of any meaning. We simply conclude that this language does not have the meaning Defendant suggests—i.e., that the court was required to instruct the jury that it was to apply the investment contract test stated in *Howey* to determine whether the interests in the LLC that Defendant sold were securities.

{27} We conclude that the district court did not err in denying Defendant's instruction defining "security." That instruction was both confusing and legally inaccurate.

{28} Defendant's second argument is that the court wrongly denied his proposed instructions relating to the charges of the sale of unregistered securities. As noted, Defendant was charged with three counts of selling unregistered securities in violation of Section 58-13B-20. This statute provides the following:

It is unlawful for a person to

offer to sell or sell any security in New Mexico unless:

A. the security is registered under the New Mexico Securities Act of 1986 [Chapter 58, Article 13B NMSA 1978];
B. the security or transaction is exempt under that act; or
C. the security is a federal covered security.

Section 58-13B-20(B). The district court issued three identical instructions, one for each of the three counts charged, setting out the elements of the crime of selling unregistered securities. The court's instruction precisely tracks the language of the uniform instruction for this offense. *See* UJI 14-4301 NMRA. The instruction the court issued states:

> For you to find [D]efendant guilty of the sale of unregistered securities, as charged in Count[s] 2 [5, and 8], the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. [D]efendant sold a security;
> 2. The security was required by the state securities law to be registered with the State of New Mexico prior to the sale;
> 3. The security was not registered as required by the state securities law;
> 4. This happened in New Mexico on [various dates].

{29} Defendant proposed an elements instruction that differed from this instruction and the UJI in that it included as an essential element, adding a requirement that "[t]he sale of the security was not an exempt transaction[.]" He also proposed an instruction setting out what constitutes an "exempt transaction". This instruction informed the jury that if it found Defendant sold securities in the course of exempt transactions, it must acquit him of the crime of selling unregistered securities. This latter instruction was based on UJI 14-4321 NMRA, which courts are instructed to issue if a defendant alleges an exempt sale, and Section 58-13B-27(K), which governs the circumstances under which the sale of a security "by a limited liability company" constitutes an exempt transaction.

{30} The district court denied both instructions. The court observed that Defendant's proposed elements instruction deviated from the UJI and further noted that Defendant was not entitled to the other instruction because the issue of exemption was never raised at trial. On appeal, Defendant claims this ruling was in error. He argues that he was entitled to any instruction for which there was sufficient evidence and that failure to instruct a jury on a defendant's theory of the case is reversible error.

{31} We find no error in the district court's decision to reject Defendant's elements instruction. "When a uniform jury instruction exists, that instruction must be used without substantive modification." *State v. Caldwell*, 2008-NMCA-049, ¶ 24, 143 N.M. 792, 182 P.3d 775. As to the district court's decision to reject Defendant's instruction defining what constitutes an exempt transaction, we observe that Defendant correctly states the rules regarding a defendant's entitlement to instructions. *See State v. Gaines*, 2001-NMSC-036, ¶ 6, 131 N.M. 347, 36 P.3d 438 ("As a general

proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (internal quotation marks and citation omitted)); *State v. Trammel*, 100 N.M. 479, 481, 672 P.2d 652, 654 (1983) ("When evidence at trial supports the giving of an instruction on a defendant's theory of the case, failure to so instruct is reversible error."). However, as the district court observed, at trial Defendant did not advance the theory that the securities at issue were sold during an exempt transaction. The record amply demonstrates this point.

{32} The court expressed surprise when it learned Defendant was requesting an instruction on the exempt transaction issue and stated "[b]ut you're not claiming that." Defendant responded, "Actually, we are." The court replied, "I didn't hear any evidence of that" and then posed the following question to Defendant: "I thought the only evidence we received was that this was not a security; not that it was an exempt security." Defendant responded "I think Your Honor is characterizing correctly the gist of our defense at trial." Nevertheless, Defendant insisted that "I do think there's facts to support the exemption" and that "there's enough information on this record for us to give the defense to the [j]ury." The court disagreed and responded that Defendant "didn't argue [that point] at all in his opening" and further stated that Defendant failed to ask the expert witnesses any questions about whether the transaction qualified as exempt. The State agreed and noted its opposition to the inclusion of the exemption issue in the instructions. The court concluded by stating, "I think there's no evidence to support that [exemption] was ever an issue raised by anybody" and therefore denied the instruction that defined exempt transactions.

{33} Defendant conceded that his trial theory was exclusively that the interests sold were not securities. This concession adequately supports the district court's determination that the issue of exemption was not raised at trial. Having failed to raise the issue of exemption at trial, Defendant is not entitled to an instruction on the issue. *See State v. Skippings*, 2011-NMSC-021, ¶ 10, 150 N.M. 216, 258 P.3d 1008 ("A defendant is entitled to an instruction on his or her theory of the case." (internal quotation marks and citation omitted)); *State v. Boyett*, 2008-NMSC-030, ¶ 12, 144 N.M. 184, 185 P.3d 355 ("Failure to instruct the jury on a defendant's theory of the case is reversible error only if the evidence at trial supported giving the instruction."). We hold that the court did not err in denying Defendant's proposed instruction setting out what constitutes an exempt transaction.

D. Sufficiency of the Evidence

{34} Defendant next claims that "[t]here was insufficient evidence to support [his] convictions." He first challenges the evidence related to the nine securities convictions and then addresses the evidence related to his racketeering conviction. We address his arguments in turn and start with standard of review. "When evaluating the sufficiency of evidence to support a conviction, we view the evidence in the light most favorable to the [s]tate, resolving all conflicts and indulging all permissible inferences to uphold a verdict of conviction." *State v. Castillo*, 2011-NMCA-046, ¶ 24, 149 N.M. 536, 252 P.3d 760 (internal quotation marks and citation omitted), *cert. denied*, 2011-NMCERT-004, 150 N.M. 648, 264 P.3d 1171. "We measure the sufficiency of the evidence against the jury instructions." *Id.*

{35} A closer examination of Defendant's

sufficiency arguments related to his securities convictions reveals that Defendant repeats an argument he has previously made. He argues for the second time that the phrase "unless the context requires otherwise" in the definition of the term "security" in the New Mexico Securities Act of 1986 required the jury to apply the investment contract test set out in *Howey* to determine whether the LLC interest Defendant sold was a security. Defendant claims that the jury was not so instructed and did not perform this analysis. As such, he claims that the evidence was insufficient to support the securities convictions. We have already determined that the *Howey* test and the federal statute from which it is derived are inapposite here. We proceed to the sufficiency arguments concerning the racketeering charge.

{36} The jury was instructed that the essential elements of racketeering include the following:

> 1. . . . Defendant was associated with an enterprise, namely, The Santa Fe Market.
>
> 2. While associated with that enterprise, . . . Defendant intentionally, and, directly or indirectly, participated or conducted the affairs of the enterprise by engaging in a pattern of racketeering activity.
>
> 3. The pattern of racketeering activity includes two or more of the crimes of:
>
> A. Securities Fraud as charged in Counts 1, 4, and 7;
>
> 4. This happened in New Mexico on or between December 17, 2003, and April 22, 2004.

Defendant first argues that if we find insufficient evidence to support Defendant's convictions for fraudulent practices in connection with the sale of securities, we must vacate the racketeering conviction. We have rejected Defendant's contention that there is insufficient evidence to support his varying securities convictions. This argument is unavailing.

{37} Defendant then argues that the State failed to prove "the existence of an enterprise with which [Defendant] associated." We disagree. The New Mexico Racketeering Act defines the term "enterprise" as "a sole proprietorship, partnership, corporation, business, labor union, association or *other legal entity* . . ." NMSA 1978, § 30-42-3(C) (2009) (emphasis added). A limited liability company is a legal entity. *See Martinez v. Roscoe*, 2001-NMCA-083, ¶ 7, 131 N.M. 137, 33 P.3d 887 ("State courts have also required artificial legal entities, including limited liability companies, to be represented by a licensed attorney."). We are persuaded that there was sufficient evidence to establish Defendant associated with an enterprise; namely, the Santa Fe Market. We proceed to the final issue on appeal.

E. Evidentiary Issue

{38} Citing Rule 11-404(B) NMRA, Defendant contends that the court erred in allowing the State to "introduce evidence of his prior convictions, some of which were [more] than ten years old." The State responds that we need not reach the merits of this claim because Defendant failed to adequately develop it. We agree with the State.

{39} This portion of Defendant's brief does not explain the factual underpinnings of his argument. *See Muse v. Muse*, 2009-NMCA-003, ¶ 72, 145 N.M. 451, 200 P.3d 104 ("We will not search the record for

facts, arguments, and rulings in order to support generalized arguments."). Our independent review of the record reveals that Defendant filed a motion to exclude evidence of convictions and prior bad acts not related to fraud, and a motion to exclude evidence of convictions and prior bad acts more than ten years old. Defendant has not explained what the court decided regarding these motions or what evidence of his prior convictions was admitted.

{40} Moreover, we observe that Defendant also filed a motion to limit references to his prior convictions to fact of conviction and crime. There, he concedes that his prior fraud and forgery convictions are admissible, notwithstanding Rule 11-404(B), as evidence of these convictions is an essential element of the three counts of fraudulent practices in connection with the sale of securities with which he was charged. Defendant has not explained how we are to make sense of these conflicting motions. In addition, we observe that evidence of prior bad acts "is admissible under Rule [11-404(B)] if it is probative of a material element at issue." *State v. McGhee*, 103 N.M. 100, 104, 703 P.2d 877, 881 (1985).

{41} We hold that Defendant has not sufficiently developed the contention that the district court admitted evidence in violation of Rule 11-404(B). We decline to further review the matter. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (declining to entertain a cursory argument that relied on several factual assertions that were made without citation to the record).

CONCLUSION

{42} For the foregoing reasons, we affirm Defendant's conviction on all counts.

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

CELIA FOY CASTILLO, Chief Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

LINDA M. VANZI, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-025

Filing Date: September 27, 2011

Docket No. 31,183

DEBORAH BRANSFORD-WAKEFIELD,

Petitioner-Appellant,

v.

STATE OF NEW MEXICO TAXATION AND REVENUE DEPARTMENT MOTOR VEHICLE DIVISION,

Respondent-Appellee.

David Henderson
Santa Fe, NM

for Appellant

Gary K. King, Attorney General

Julia Belles, Special Assistant Attorney General
Santa Fe, NM

for Appellee

OPINION

VANZI, Judge.

{1} In this case, we must decide whether to excuse the late filing of a petition for a writ of certiorari. Because we conclude that the attorney's unspecified illness in this case is not an unusual circumstance that would warrant waiving the timeliness requirement that is a mandatory precondition to the exercise of this Court's jurisdiction, we deny the petition as untimely.

BACKGROUND

{2} Deborah Bransford-Wakefield was arrested by an officer from the Tesuque Tribal Police Department and charged with driving while intoxicated. As a result, the Motor Vehicle Division of the Taxation and Revenue Department (the MVD) began proceedings to revoke her driver's license pursuant to the Implied Consent Act, NMSA 1978, Sections 66-8-105 to -112 (1978, as amended through 2007). Prior to her license revocation hearing, Bransford-Wakefield requested a discovery order from the MVD. The MVD issued the order, and the police department produced documents to Bransford-Wakefield seventeen days before the hearing. The documents indicated that the police had taken a video recording of the encounter with Bransford-Wakefield after the stop, including her field sobriety tests, but Bransford-Wakefield did not learn of the video until the day before the hearing, apparently because she did not review the documents until that time.

{3} At the hearing, the arresting officer testified that he stopped Bransford-Wakefield for failing to come to a complete stop at a stop sign and that when he stopped her, he noticed a strong odor of alcohol. Bransford-Wakefield performed field sobriety tests, but she failed to perform them correctly, and the officer concluded that he had probable cause to arrest her for driving while intoxicated. The officer then administered a breath alcohol test that resulted in a reading of .08. Based on this evidence, the hearing officer concluded that a preponderance of the evidence supported a revocation of Bransford-Wakefield's license pursuant to Section 66-8-112.

{4} The hearing officer considered Bransford-Wakefield's argument that she was denied due process by the police department's failure to provide her with the videotape in discovery. The hearing officer noted that generally there is no constitutional right to discovery in an administrative hearing but that a due process right may be implicated if a party can demonstrate some particularized prejudice resulting from the denial of discovery. The hearing officer expressed concern that Bransford-Wakefield had not exercised due diligence in attempting to obtain the video but stated that even assuming that she had done so, she had not demonstrated that she was prejudiced by not receiving it. The hearing officer noted that even if the video showed that Bransford-Wakefield's performance on the field sobriety tests was better than the way in which it was described by the officer, there was nevertheless substantial evidence to

support revocation of her license that could not by refuted by the video, such as evidence that she denied drinking, smelled of alcohol, had bloodshot eyes, and the result of her breath alcohol test was .08.

{5} The hearing officer also addressed Bransford-Wakefield's argument that the evidence showed that the police officer had no reasonable suspicion to stop her because she testified that she did not drive through the stop sign. The hearing officer found that, based on the officer's testimony, there was reasonable suspicion for the stop.

{6} Bransford-Wakefield appealed to the district court. She raised two issues: (1) whether the police officer had reasonable suspicion to initiate the traffic stop, and (2) whether the police officer's testimony concerning the field sobriety tests was properly admitted even though the video would have been the best evidence of what occurred during the tests. Bransford-Wakefield then filed a motion to supplement the district court's appellate record to take judicial notice of the criminal case that was brought against her as a result of the incident. In the motion, Bransford-Wakefield argued that the finding by the judge in the criminal case—that the officer's testimony regarding the initial reason for the stop was not credible—should reach back to preclude the hearing officer's earlier conclusion that there was reasonable suspicion for the stop, and without reasonable suspicion, the evidence should have been excluded from the license revocation hearing. She also argued that the evidence in the criminal case demonstrated that she was deprived of due process by the failure of the police department to provide her with the video because it was the inconsistencies between the officer's testimony and the video that convinced the judge in the criminal case that the officer's testimony was not credible.

{7} The district court affirmed the decision of the hearing officer. The district court concluded that pursuant to *Glynn v. State, Taxation and Revenue Department*, 2011-NMCA-031, ¶ 18, 149 N.M. 518, 252 P.3d 742, *cert. denied*, 2011-NMCERT-003, 150 N.M. 619, 264 P.3d 520 (No. 32,862, Mar. 8, 2011), it did not matter whether the officer had reasonable suspicion or probable cause for the stop because the exclusionary rule does not apply in an administrative hearing. It also stated that it could neither take judicial notice of the criminal proceeding nor supplement the record on appeal, as it was permitted to review only the evidence presented at the hearing.

{8} The district court's order was filed on March 9, 2011. Pursuant to Rule 12-505(C) NMRA, Bransford-Wakefield was required to file her petition for writ of certiorari with this Court within thirty days after the district court's order, such that the due date was April 8, 2011. Bransford-Wakefield did not file her petition until April 11, 2011. The next day, Bransford-Wakefield filed a motion with this Court to accept the petition as timely filed. This Court sought a response to the motion from the MVD, and Bransford-Wakefield filed a reply, which we have not considered, as a reply is not contemplated by the Rules of Appellate Procedure. *See* Rule 12-309(E) NMRA (providing only that a motion and a response to a motion may be filed as a matter of course).

DISCUSSION

An Attorney's Illness Is Not an Unusual Circumstance That Will Excuse the Untimely Filing of a Petition For Writ of Certiorari

{9} Our Supreme Court has held that the time

requirement for filing a petition for writ of certiorari is a mandatory precondition to the exercise of an appellate court's jurisdiction to review the matter. *Gulf Oil Corp. v. Rota-Cone Field Operating Co.*, 85 N.M. 636, 636, 515 P.2d 640, 640 (1973) (per curiam) (holding that, as with the requirement for a notice of appeal, the timely filing of a petition for a writ of certiorari is a mandatory precondition to the exercise of an appellate court's jurisdiction that will not be excused absent unusual circumstances). When a petition is not filed in this Court within thirty days of the district court's final order, this Court will not excuse the untimely filing absent a showing of unusual circumstances that would justify the untimeliness. *Id.* Unusual circumstances are also required to warrant an extension of time to file a petition when the extension is sought after the filing deadline. *Cassidy-Baca v. Bd. of Cnty. Comm'rs of Cnty. of Sandoval*, 2004-NMCA-108, ¶ 2, 136 N.M. 307, 98 P.3d 316; *Hyden v. N.M. Human Servs. Dep't*, 2000-NMCA-002, ¶ 15, 128 N.M. 423, 993 P.2d 740. Our Supreme Court has defined unusual circumstances as circumstances that are both truly unusual and that are "beyond the control of the parties—such as error on the part of the court." *Trujillo v. Serrano*, 117 N.M. 273, 278, 871 P.2d 369, 374 (1994) (holding that there would be unusual circumstances to excuse the late filing of a notice of appeal to the district court if the untimely filing was caused by the magistrate court and remanding for a finding of fact on this issue).

{10} In considering whether to exercise this Court's discretion to waive the mandatory timeliness requirement for a late petition, this Court is mindful of the fact that, unlike cases in which a party has an appeal as of right, review in this Court of the district court's order on appeal from an administrative agency is discretionary. *Paule v. Santa Fe Cnty. Bd. of Cnty. Comm'rs*, 2005-NMSC-021, ¶ 14, 138 N.M. 82, 117 P.3d 240 (holding that the decision whether to grant a petition for a writ of certiorari to review the district court's decision in an administrative appeal rests in the sound discretion of the Court of Appeals). The absolute right to one appeal set forth in Article VI, Section 2 of the New Mexico Constitution does not apply to appeals to this Court from the district court's decision on appeal from an administrative agency ruling. *See VanderVossen v. City of Espanola*, 2001-NMCA-016, ¶¶ 7-16, 130 N.M. 287, 24 P.3d 319 (explaining that the absolute right to one appeal contained in Article VI, Section 2 of the New Mexico Constitution does not apply to review by the Court of Appeals of a district court's decision on appeal from an administrative agency's zoning decision). Because the parties have already had an appeal as of right, we need not consider the policy of a party's absolute right to one appeal in determining whether unusual circumstances warrant accepting an untimely petition for writ of certiorari. *Cf. Schultz ex rel. Schultz v. Pojoaque Tribal Police Dep't*, 2010-NMSC-034, ¶¶ 14, 19, 148 N.M. 692, 242 P.3d 259 (applying the policy established in Article VI, Section 2 to an appeal as of right from a workers' compensation decision to the Court of Appeals, even though a workers' compensation proceeding is a special statutory proceeding that does not originate in the district court).

{11} Bransford-Wakefield's late motion for an extension asserted that her counsel intended to prepare the petition on the last possible day for filing, Friday, April 8, but became ill on that date and did not realize until Monday, April 11, that the deadline had passed. The motion does not specify what sort of illness counsel had or provide any other explanation for why this illness would constitute an unusual circumstance warranting

the late filing. Although an illness is certainly beyond the control of the parties, it is not the kind of court-created error that is paradigmatic of the sort of unusual circumstance that will generally excuse a late filing. *See Trujillo*, 117 N.M. at 278, 871 P.2d at 374. Furthermore, illness—like many other unanticipated events that might get in the way of drafting and filing a legal document when one waits until the last day to do so—is so common that we cannot conclude that it constitutes an "unusual" circumstance that would warrant excusing the late filing of the petition.

{12} Bransford-Wakefield points out that, excluding the intervening weekend, the petition was filed only one day late. Our Supreme Court has held that unusual circumstances may warrant excusing the late filing of a document that serves as a mandatory precondition to the exercise of this Court's jurisdiction when the document is only a little bit late and there are other unusual circumstances that were not caused by the court system but were not within the control of the party seeking review. *See Chavez v. U-Haul Co.*, 1997-NMSC-051, ¶¶ 19-22, 124 N.M. 165, 947 P.2d 122 (hearing an appeal where the notice was filed fifty-eight minutes late, the appellant filed the notice pro se, his trial counsel had been in the process of arranging for substitute counsel, and after trial it was not clear which attorney would be responsible for prosecuting the appeal); *see also Schultz*, 2010-NMSC-034, ¶ 21 (holding that unusual circumstances required excusing the mandatory timeliness requirement where the notice of appeal was received two days late because the appellant had mailed the notice four days prior to the due date and the fact that the United States Postal Service took more than four days to deliver the document from Albuquerque to Santa Fe was an unusual circumstance outside of the appellant's control). *But see San Juan 1990-A., L.P. v. El Paso Prod. Co.*, 2002-NMCA-041, ¶ 24, 132 N.M. 73, 43 P.3d 1083 (holding that unusual circumstances did not excuse the filing of a notice of appeal one day late when the late filing was due to misinformation provided by the courier service used by the appellant's attorney). However, our Supreme Court cases are distinguishable since they relied on the policy favoring the right to one appeal—a policy that is not at issue here, as the parties have already been afforded an appeal to the district court. *See Chavez*, 1997-NMSC-051, ¶ 20; *see also Schultz*, 2010-NMSC-034, ¶ 19. Because our review of this matter is discretionary, and because an attorney's illness does not constitute an unusual circumstance that would excuse the late filing of a petition for writ of certiorari, we deny the petition as untimely and decline to review it on its merits.

Bransford-Wakefield Has Not Demonstrated That She Is Entitled to an Appeal as of Right as to Any of the Issues Raised on Appeal

{13} Our decision to deny the petition as untimely relies heavily on the fact that the parties have already been afforded an appeal as of right in the district court and on the fact that review in this Court of a petition for writ of certiorari is discretionary. However, as we noted in *Maso v. State Taxation and Revenue Department*, 2004-NMCA-025, ¶ 17, 135 N.M. 152, 85 P.3d 276, *aff'd*, 2004-NMSC-028, 136 N.M. 161, 96 P.3d 286, and *Glynn*, 2011-NMCA-031, ¶¶ 10-11, there are some instances in which a district court, on appeal from an administrative decision, is asked to exercise both its appellate jurisdiction to review the decisions of the administrative entity and its original jurisdiction to determine any matters between the parties that could not have been raised in the administrative

proceeding. In such circumstances, although further review of the administrative decision is discretionary with this Court, a party has an appeal as of right of any matter properly before the district court as part of its original jurisdiction. To the degree that a party has an appeal as of right to this Court, our assessment of whether to reach the merits of that appeal or to dismiss it as untimely is distinct from our assessment of whether to reach the merits of the issues raised pursuant to a petition for discretionary review.

{14} Although we stated in *Maso* and *Glynn* that there is uncertainty about how a party should proceed if some portion of the appeal is as of right and some portion of the appeal is discretionary, *see Maso*, 2004-NMCA-025, ¶ 17 n.1; *Glynn*, 2011-NMCA-031, ¶ 11, our rules make clear that when an appeal from the district court is as of right, a party must file a timely notice of appeal in the district court, and when an appeal is discretionary, the party must file a petition for writ of certiorari in this Court. *See* Rule 12-202 NMRA (establishing procedures for appeals as of right from the district court); Rule 12-505 (establishing procedures for review pursuant to a writ of certiorari). Both the time and place of filing requirements are mandatory preconditions to the exercise of this Court's jurisdiction. *See Govich v. N. Am. Sys., Inc.*, 112 N.M. 226, 230, 814 P.2d 94, 98 (1991). Therefore, when a party seeks to appeal some portion of a district court's decision as of right and seeks discretionary review of some other portion, the party should file a notice of appeal as to the issues to be reviewed as of right and a petition as to those issues that are reviewed in our discretion. If there is any uncertainty about whether certain issues are appealed as of right, a party should err on the side of filing both a timely notice of appeal in the district court and a petition in this Court in order to ensure there is no waiver of any right to appeal and in order to invoke this Court's jurisdiction to exercise its discretion to review those issues that are not appealed as of right.

{15} Here, however, Bransford-Wakefield does not assert that any of her issues are appealed as of right. Therefore, we need not determine whether Bransford-Wakefield timely filed a notice of appeal (or some other non-conforming document that would serve as a notice of appeal) in the district court, and if she did not, whether unusual circumstances excuse her failure to meet the mandatory time and place of filing requirements set by Rules 12-201, -202 NMRA governing notices of appeal.

CONCLUSION

{16} Bransford-Wakefield was required to file a timely petition for writ of certiorari in order to seek discretionary appellate review in this Court. Because her petition was filed one day late and because her attorney's unanticipated illness was not an unusual circumstance that would justify the untimely filing, we deny the petition.

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

LINDA M. VANZI, Judge

WE CONCUR:

CELIA FOY CASTILLO, Chief Judge

CYNTHIA A. FRY, Judge

Certiorari Granted, March 2, 2012, No. 33,441

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-026

Filing Date: January 11, 2012

Docket No. 28,234

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

HECTOR TORRES,

Defendant-Appellant.

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for Appellee

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OPINION

WECHSLER, Judge.

{1} Defendant Hector Torres was sentenced in 1988 pursuant to a plea agreement for escape from the penitentiary and for his status as a habitual offender. The district court made several legal errors in ordering Defendant's sentence that resulted in an unlawfully light term of imprisonment. The State did not discover the errors until 2006, at a time when Defendant was nearing his release. The State filed a Rule 5-801(A) NMRA motion, requesting an increase of Defendant's sentence by an additional eight years. The district court granted the State's request, and Defendant appealed on constitutional grounds, arguing that altering his sentence nearly two decades after imposition violated double jeopardy and due process. Without addressing the constitutional issues, we reverse on jurisdictional grounds. Having reviewed the supplemental briefs requested on jurisdiction, and in light of the history and language of Rule 5-801(A), we hold that the district court did not have jurisdiction to correct Defendant's illegal sentence. We therefore remand to the district court to reinstate Defendant's sentence as originally imposed in 1988.

BACKGROUND

{2} On April 25, 1988, Defendant entered a guilty plea to the charge of escape from penitentiary, as prohibited by NMSA 1978, Section 30-22-9 (1963), for his participation in a group-inmate escape from the New

Mexico Department of Corrections in Santa Fe. At the time of Defendant's escape, he was serving multiple sentences related to a thirteen-year string of criminal activity, which included several burglaries and an aggravated assault on a police officer. Due to his criminal record, Defendant admitted to meeting the statutory requirements for a habitual offender enhancement by having three or more prior felony convictions, pursuant to NMSA 1978, § 31-18-17(C) (1983) (amended 2003). At the guilty plea proceeding, the district court noted that "[D]efendant understands the range of possible sentence for the offenses charged, from a suspended sentence to a maximum of nine (9) years imprisonment plus eight (8) years enhancement for [the h]abitual [o]ffender [enhancement plus] a parole term of two (2) years," should the court impose confinement.

{3} At the sentencing hearing on April 25, 1988, the district court ordered Defendant to serve nine years for the escape charge, two of which were to be suspended, plus an additional eight years for the habitual offender enhancement. Acknowledging defense counsel's pleas for leniency, Defendant's ancillary role in the escape (he was apparently used by the other escapees as a decoy), and the other escapees' willingness to enter pleas in hopes that Defendant would receive a lighter sentence, the judge ordered the

> [s]entences to run CONCURRENTLY with each other, but CONSECUTIVELY to the sentences [D]efendant is now serving, (CR 36947 and 83-41 CR) for a total term of incarceration of eight (8) years, to be served concurrently to the last eight (8) years of VA 85-101, with a mandatory two (2) year period of parole to be served upon completion of the basic sentence.

In effect, Defendant received only two additional years of parole and *no* additional prison time for escaping from prison and being found a habitual offender. Despite the apparent leniency of the sentence, the State did not appeal the 1988 sentence, and Defendant began serving his remaining sentences concurrently with his newly-imposed sentence.

{4} Although calculations differ between the parties, there is no debate that Defendant would have been eligible for parole with good time deductions, sometime between the fall of 2006 and the fall of 2007. Near the completion of the 1988 sentence, after Defendant had served without further incident for eighteen years, the State filed a motion to correct Defendant's illegal sentence on September 22, 2006.

{5} The State's sudden interest, after almost two decades of inactivity, was reportedly pursuant to a system-wide audit by the Department of Corrections that was prompted by media scrutiny of several high-profile sentencing errors. After discovering Defendant's sentencing error, the district court held an expedited hearing on the motion and ultimately found in favor of the State. The district court ordered Defendant's sentence modified as follows: nine years on the escape charge, with all nine years suspended, eight years on the habitual offender enhancement to be run consecutive to the aggregate of Defendant's prior sentences, and a mandatory parole term of two years. In short, the district court increased Defendant's prison sentence by eight years—the least amount required to correct the illegality.

{6} Defense counsel filed an untimely notice of appeal, requesting a presumption of

ineffective assistance of counsel for late filing and a review of the delayed sentencing increase. Because the underlying conviction was pursuant to a guilty plea, this Court could not presume ineffective assistance of counsel and instead remanded for a limited evidentiary hearing on the issue of whether Defendant's trial attorney's failure to file a timely notice of appeal was the result of ineffective assistance of counsel. Anticipating the case would return, this Court also instructed the parties to submit supplemental briefs on "whether the State was barred by the time requirements in Rule 5-801 . . . from filing the motion to correct Defendant's illegal sentence." On remand, the district court promptly found ineffective assistance of counsel for the late filing of the notice of appeal, and the parties returned to this Court with supplemental briefing on the jurisdictional issue. We now review the parties' arguments and render our decision.

ILLEGALITY OF 1988 SENTENCE

{7} As a preliminary matter, we explain how Defendant's 1988 sentence was illegal. The district court was required to sentence Defendant according to NMSA 1978, Section 31-18-21(A) (1977), for committing a felony while incarcerated and enhance that sentence according to Section 31-18-17(C) for his status as a habitual offender. The district court erred in its application of both sections.

{8} Section 31-18-21(A) dictates that "the sentence imposed shall be consecutive to the sentence being served[.]" The phrase "sentence being served" has been interpreted by *State v. Davis* to "mean[] sentences in the aggregate, and, pursuant to statute, all sentences imposed upon [a d]efendant [while incarcerated] must run consecutive to the total of his combined sentences." 2003-NMSC-022, ¶ 15, 134 N.M. 172, 74 P.3d 1064. The district court violated the *Davis* interpretation of the statute by ordering Defendant to serve his escape sentence concurrently to his last prior conviction.

{9} Defendant argues that the 2003 interpretation in *Davis* cannot apply retroactively to affect Defendant's 1988 sentence, which he claims was a rational interpretation of the statute before *Davis*. Defendant's argument is unavailing. "An appellate court's consideration of whether a rule should be retroactively or prospectively applied is invoked only when the rule at issue is in fact a new rule." *State v. Mascareñas*, 2000-NMSC-017, ¶ 24, 129 N.M. 230, 4 P.3d 1221 (internal quotation marks omitted); *see Santillanes v. State*, 115 N.M. 215, 223, 849 P.2d 358, 366 (1993) ("The issue of retroactive effect arises only when a court's decision overturns prior case law or makes new law[.]"). Section 31-18-21(A) was not a new rule and had never been construed contrary to *Davis*. It had been a law for over a decade prior to its application to Defendant, and to the extent *Davis* definitively interpreted its breadth in 2003, our Supreme Court asserted that "no doubts about construction and no insurmountable ambiguity exist with respect to Section 31-18-21(A)." *Davis*, 2003-NMSC-022, ¶ 14. Furthermore, our Supreme Court perceived no problem in applying the interpretation to the defendant in *Davis*, who as a co-escapee, was sentenced alongside Defendant in 1988.

{10} The district court also misapplied Section 31-18-17(C), which directs that a habitual offender with three or more felony convictions shall have "his basic sentence . . . increased by eight years" and the increase "shall not be suspended or deferred." The district court specifically ordered the underlying basic sentence and the enhancement "to run CONCURRENTLY with

each other," in direct conflict with the statutory mandate. *See State v. Mayberry*, 97 N.M. 760, 763, 643 P.2d 629, 632 (Ct. App. 1982) (recognizing that habitual offender enhancements cannot be served concurrently to the underlying basic sentence). Having unequivocally determined Defendant's 1988 sentence was illegal, we now determine whether the district court had jurisdiction in 2006 to correct the illegality.

JURISDICTIONAL ANALYSIS OF RULE 5-801(A)

{11} We begin with an analysis of a district court's jurisdiction under Rule 5-801(A), "Correction of sentence." We review de novo the legal "question of whether a trial court has jurisdiction in a particular case." *Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 10, 142 N.M. 786, 171 P.3d 300. We also note that defense counsel's concessions and failure to preserve the jurisdictional issue do not affect our review. *See Zarges v. Zarges*, 79 N.M. 494, 497, 445 P.2d 97, 100 (1968) ("[Parties are] entitled to raise [jurisdictional] question[s] notwithstanding . . . prior inconsistent attitude, for jurisdiction of the subject-matter must arise by law and not by mere consent." (internal quotation marks and citation omitted)). Moreover, this Court itself may raise jurisdictional issues on appeal. Rule 12-216(B) NMRA ("This rule shall not preclude the appellate court from considering jurisdictional questions[.]").

{12} "We apply the same rules of construction to procedural rules adopted by the Supreme Court as we do to statutes." *State v. Miller*, 2008-NMCA-048, ¶ 11, 143 N.M. 777, 182 P.3d 158. According to those rules of construction, our overarching goal is to determine the underlying intent of the drafters, *Roark v. Farmers Group, Inc.*, 2007-NMCA-074, ¶ 50, 142 N.M. 59, 162 P.3d 896, and we begin that task by parsing the plain language of the rule. *See State v. Steven B.*, 2004-NMCA-086, ¶ 15, 136 N.M. 111, 94 P.3d 854 ("Our starting point is the plain language of the statute.").

Plain Language of Rule 5-801(A)

{13} Although neither party raises the issue, there could be some confusion as to which version of Rule 5-801(A) applies in this case. According to the compiler's annotations, the 1989 amendment became "effective for *cases* filed in the district courts on or after August 1, 1989." Rule 5-801, compiler's annotations (1989) (emphasis added). Defendant's escape case was filed in the district court in 1988. It would appear then that Defendant's case should be governed by the version of Rule 5-801(A) that pre-dated the 1989 amendment. But the 1986 Supreme Court order adopting the previous amendment to the rule suggests otherwise. When the Supreme Court adopted the 1986 amendment, Chief Justice William Riordan annotated the order to clarify that the amendments "shall apply to all *post conviction motions* filed after" March 1, 1986. In re Amendment of Rules 57 and 57.1, Rules of Dist. Ct. Crim. P. (Feb. 10, 1986) (emphasis added). The Rules Committee did not distinguish between the manner of application of the 1986 amendment and that of the 1989 amendment. Rule 5-801 (1989) ("As amended, effective March 1, 1986, and August 1, 1989."). Accordingly, we apply the current Rule 5-801(A), as amended through 1989, to *post-conviction motions* filed in the district courts on or after August 1, 1989. Because the State filed a post-conviction motion in 2006 pursuant to Rule 5-801(A), we apply the current version of Rule 5-801(A) to Defendant, despite the fact that his underlying criminal case was originally filed prior to August 1, 1989.

{14} The current version of Rule 5-801(A) reads:

> A. **Correction of sentence.** The court may correct an illegal sentence at any time pursuant to Rule 5-802 NMRA and may correct a sentence imposed in an illegal manner within the time provided by this rule for the reduction of sentence.

{15} Rule 5-802(A) "governs the procedure for filing a writ of habeas corpus by persons in custody or under restraint." While it is clear from the face of Rule 5-801(A) that the district court has indefinite jurisdiction to correct illegal sentences pursuant to defendant-based writ of habeas corpus under Rule 5-802, it is not clear whether the court's jurisdiction is strictly limited to a writ of habeas corpus and is meant to exclude state-based motions altogether. Defendant argues that Rule 5-801(A) should be read as a strict limitation under the doctrine of *expressio unius est exclusio alterius*, and thus the State's 2006 motion under the Rule should be barred. *State ex rel. King v. Lyons*, 2011-NMSC-004, ¶ 36, 149 N.M. 330, 248 P.3d 878 ("We have repeatedly recognized that [w]here authority is given to do a particular thing and a mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded. This is a part of the so-called doctrine of expressio unius est exclusio alterius." (alteration in original) (internal quotation marks and citation omitted)). The State, on the other hand, argues that "the trial courts' [sic] jurisdiction to correct [D]efendant's sentence [does] not stem from . . . Rule 5-801, but rather from the sentencing authority vested to the trial court by . . . statute," and thus, "Rule 5-801 should not affect the disposition of this case." *See State v. Abril*, 2003-NMCA-111, ¶ 20, 134 N.M. 326, 76 P.3d 644 ("Where a sentence lacks a statutorily-mandated provision, the trial court retains jurisdiction to correct the sentence by adding the omitted term.").

{16} To the extent the language is ambiguous, we consider principles of statutory construction to determine the rule's meaning. *Dewitt v. Rent-A-Center, Inc.*, 2009-NMSC-032, ¶ 29, 146 N.M. 453, 212 P.3d 341. We consider the history and background of the subject statute, which in New Mexico "has involved analysis of previous enacted statutes relating to the same subject matter or amendments to the disputed statute[.]" *Rhinehart v. Nowlin*, 111 N.M. 319, 324, 805 P.2d 88, 93 (Ct. App. 1990); *see In re Gabriel M.*, 2002-NMCA-047, ¶ 15, 132 N.M. 124, 45 P.3d 64 ("We compare the earlier versions of . . . statute[s] with the current version to help determine legislative intent.").

History of Rule 5-801(A)

{17} Interpreting Rule 5-801(A) in the context of its history and background, it is apparent that the Rules Committee intended to strictly limit the district court's jurisdiction to correct illegal sentences to only habeas corpus-based motions under Rule 5-802. Rule 5-801(A) was adopted based on Rule 35 of the Federal Rules of Criminal Procedure, and it has closely tracked the history and background of the federal rule, which has clearly sought to curtail federal district court jurisdiction over correction of illegal sentences. Additionally, the historical amendments to Rule 5-801(A) evidence a clear effort to limit district court jurisdiction in this arena, favoring appellate and habeas corpus review of illegal sentences over unlimited district court jurisdiction.

{18} Rule 5-801(A) was originally numbered as Rule 57.1 prior to the 1986

recompilation and was adopted in 1980 to be "substantially the same as Rule 35 of the Federal Rules of Criminal Procedure." Rule 5-801 committee commentary (1980). Because our courts have routinely relied on federal case law and related legislative history when interpreting similar New Mexico rules, we provide a summary of the history of federal Rule 35. *State v. Martinez*, 2006-NMCA-148, ¶ 12, 140 N.M. 792, 149 P.3d 108 (stating that "federal law interpreting the rule is instructive," when the federal rule is similar to its New Mexico counterpart), *aff'd*, 2008-NMSC-060, 145 N.M. 220, 195 P.3d 1232. Rule 35 of the Federal Rules of Criminal Procedure was adopted in 1944 and was itself a "codification of existing law." *Duggins v. United States*, 240 F.2d 479, 483 (6th Cir. 1957). Prior to adoption, "the general principle [was] that a court [could not] set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during that term." *Gilmore v. United States*, 131 F.2d 873, 874 (8th Cir. 1942). But there were always judicially-created exceptions to this general principle, one of which was that district courts had indefinite jurisdiction to correct "clerical mistakes and a sentence which the judgment did not support." *United States v. Bradford*, 194 F.2d 197, 200 (2d Cir. 1952); *see United States v. Rico*, 902 F.2d 1065, 1067 (2d Cir. 1990) ("[U]nder common law a district court was free at any time to correct sentences when the judgment was void, because these sentences were invalid and not final dispositions." (internal quotation marks and citation omitted)), *superceded by rule as stated in United States v. Werber*, 51 F.3d 342 (2d Cir. 1995).

{19} Despite the principle's deep common law roots, it was nonetheless codified because a related principle had been called into question. *Duggins*, 240 F.2d at 483 ("It was a codification of existing law and was intended to remove any doubt, created by the ruling in *United States v. Mayer*, 235 U.S. 55, 67 [(1914)], about the jurisdiction of the [d]istrict [c]ourt to correct an illegal sentence after the expiration of the term at which it was entered."). Under common law, district courts had limited jurisdiction to modify *legal* sentences, allowing only those made during the term of court in which the sentence was entered. But "the significance of the expiration of a term of court [had] largely become an anachronism" by 1944, and it was therefore necessary to "introduce[] a flexible time limitation on the power of the court [to] reduce a sentence." Fed. R. Crim. P. 35 advisory committee's note. Rather than adopt a piecemeal rule that would only address modification of sentences, Congress enacted a comprehensive rule, encompassing the entire common law on the subject and defining federal district court jurisdiction to both modify and correct illegal sentences.

{20} Following the federal lead, New Mexico adopted Rule 57.1 in 1980 to be virtually identical to federal Rule 35, thereby codifying existing New Mexico common law. In New Mexico, as in the federal system, the judiciary had interpreted its sentencing authority, pursuant to the Legislature's many sentencing statutes, as including an inherent jurisdiction to correct illegal sentences. *See State v. Peters*, 69 N.M. 302, 304, 366 P.2d 148, 149 (1961) ("Sentences must be imposed as prescribed by statute, [and an illegal sentence] being unauthorized by law, [is] null and void[.]" (citation omitted)); *see also Jordan v. Swope*, 36 N.M. 84, 84, 8 P.2d 788, 788 (1932) ("[J]urisdiction to render legal judgment . . . is not terminated by rendition of void judgment."). The purpose of codifying a long-standing common law principle was to clarify any confusion created by the abolishment of the concept of terms of court,

just as in the federal context. Rule 5-801 committee commentary (1980) ("The Rules of Criminal Procedure for the [d]istrict [c]ourts have abolished the concept of terms of court and therefore it is desirable to have a specific rule setting forth the limits of power of the district court.").

{21} Four years after New Mexico decided to adopt federal Rule 35, the United States Congress repealed the indefinite jurisdiction principle embodied in Rule 35(a) altogether. As part of a sweeping reform of the criminal justice system, Congress enacted the Sentencing Reform Act of 1984, which sought in large part to make prisoner release dates more certain and sentences imposed in the public forum more final. S. Rep. No. 98-225, at 56 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3239; *see also United States v. Cook*, 890 F.2d 672, 674-75 (4th Cir. 1989) (stating that the underlying purpose of the Sentencing Reform Act of 1984 "was to impose on the new sentencing system a requirement that the sentence imposed in the public forum during the sentencing hearing would remain constant, immune from later modification"). Citing numerous studies and hearings—including one report that correlated prisoner uncertainty in release dates to prison riots—the congressional report concluded that making release dates more certain would increase prisoner morale, foster public respect for the law, and "enhance prison rehabilitation efforts." S. Rep. No. 98-225, at 56 n.83, 57 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3239 n.83, 3240.

{22} In order to accomplish those goals, Congress repealed long-standing Rule 35(a), thereby stripping the federal district courts of their indefinite jurisdiction to correct illegal sentences. *United States v. Jordan*, 915 F.2d 622, 627-28 (11th Cir. 1990) (stating that Congress "explicitly foreclosed [the Rule 35(a)] route for obtaining judicial review of an allegedly illegal sentence" at any time). "No changes, however, were made to [the federal habeas corpus statute] by the 1984 Act," which left open a writ of habeas corpus as an additional review mechanism for defendants. *United States v. Lussier*, 104 F.3d 32, 37 (2d Cir. 1997).

{23} Sixteen months after Congress repealed Rule 35(a) and curtailed federal district court jurisdiction over illegal sentences, New Mexico followed suit. On February 10, 1986, despite Rule 57.1(a)'s reliance on long-standing principles of common law, the New Mexico Supreme Court, by its order, adopted the recommendation of the Rules Committee to repeal 57.1(a), which had previously allowed for indefinite jurisdiction over illegal sentences. In the very same order, the New Mexico Supreme Court transformed former Rule 57 (Post-conviction motions) to become Rule 57 (Habeas corpus). As part of its comprehensive overhaul of Rule 57 (later re-compiled as Rule 5-802), the Supreme Court codified the procedure for filing writs of habeas corpus and explicitly opened that avenue for review of "illegal" sentences under the scope of the rule. Rule 5-802(A) (1986). With respect to appellate review of illegal sentences, it was unnecessary to enact another rule because New Mexico appellate courts had jurisdiction to review sentences under Article VI, Section 2 of the New Mexico Constitution and NMSA 1978, Section 34-5-8(A)(3) (1983), and had previously construed Rule 12-216 as allowing parties to challenge the legality of a sentence for the first time on appeal. *State v. Crespin*, 96 N.M. 640, 641, 633 P.2d 1238, 1239 (Ct. App. 1981); *see State v. Bachicha*, 111 N.M. 601, 608, 808 P.2d 51, 55 (Ct. App. 1991) (recognizing the right to challenge illegal sentences for the first time on appeal extends equally to the state).

{24} Since the amendments of 1984, federal case law and legislation have made clear that it was Congress's specific intent to remove any historical common law jurisdiction the federal district courts once enjoyed with respect to correction of illegal sentences. *United States v. Washington*, 549 F.3d 905, 917 (3d Cir. 2008) ("[T]o the extent there might have at one point been inherent power in the court, such power was abrogated by Congress pursuant to . . . Federal Rule of Criminal Procedure 35(a)."). In fact, in response to several circuit court opinions purporting to revive the federal district court's inherent jurisdiction to correct illegal sentences prior to appeal, Congress further tightened the rule to allow correction of "arithmetical, technical, or other clear error" only within seven days of the imposition of a sentence. *United States v. Diaz-Clark*, 292 F.3d 1310, 1316-18 (11th Cir. 2002); Fed. R. Crim. P. 35 advisory committee's note (stating that the amendment "in effect codifies the result in those two cases but provides a more stringent time requirement").

{25} Similarly, New Mexico has also sought to clarify the scope of Rule 5-801 since its 1986 repeal of Rule 57.1(a). In 1989, the New Mexico Supreme Court enacted a final amendment to Rule 5-801(A) that re-inserted original Rule 57.1(a) language— "[t]he court may correct an illegal sentence at any time"—with an important limitation—"pursuant to Rule 5-802[.]"

{26} In *Hayes v. State*, 106 N.M. 806, 808, 751 P.2d 186, 188 (1988), our Supreme Court held that the requirement of an earlier version of what is now Rule 5-801(B) that a motion to reduce a sentence be filed within thirty days of various acts is a jurisdictional requirement. Federal courts have similarly interpreted the current Rule 35 as a strict jurisdictional limitation. *See United States v. Penna*, 319 F.3d 509, 511-12 (9th Cir. 2003) (seven-day limitation in Rule 35 for correcting sentence is strict jurisdictional requirement); *United States v. Morrison*, 204 F.3d 1091, 1093 (11th Cir. 2000) (stating that "limitation contained in Rule 35(c) is a jurisdictional restriction"). Although current federal Rule 35(a) now differs from Rule 5-801(A) in language, they both serve as strict limitations on the jurisdiction of district courts to correct illegal sentences—one procedurally and the other temporally. *Compare* Rule 5-801(A) ("The court may correct an illegal sentence at any time pursuant to Rule 5-802[.]"), *with* Fed. R. Crim. P. 35(a) ("Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.").

{27} As is apparent from the historical analysis, New Mexico has closely tracked federal Rule 35(a) from adoption, through repeal, to its most current form. Additionally, New Mexico continually narrowed the scope of Rule 5-801(A) over time by first repealing and then clarifying its intended narrow reach. Given the history of the New Mexico rule, in conjunction with its federal counterpart, the current version of Rule 5-801(A) reflects a clear intent to strictly limit the district court's jurisdiction to habeas corpus proceedings to correct an illegal sentence.

INHERENT DISTRICT COURT JURISDICTION

{28} We take time to address the State's argument that the district court's authority to correct illegal sentences stems not from Rule 5-801(A), but "from the sentencing authority vested to the trial court by statute," as recognized by the common law. *See Crespin*, 96 N.M. at 643, 633 P.2d at 1241 ("The fixing of penalties is a legislative function; the trial court's authority is to impose a penalty which

has been authorized by the Legislature; a penalty which has not been authorized is void."). The State is correct that historically our courts created, through common law, an indefinite jurisdiction in the district courts to correct illegal sentences, subject only to a defendant's constitutional protections. *See, e.g.*, *Peters*, 69 N.M. at 304, 366 P.2d at 150. However, our Rules Committee codified that judicially-created principle in whole—"[t]he court may correct an illegal sentence at any time"—and then chose to repeal it shortly after Congress struck the very same language from the federal rule with the express intent of circumscribing federal district court jurisdiction in order to make sentences more final. Rule 5-801(A). Furthermore, nothing in the New Mexico Supreme Court's decision to repeal Rule 5-801(A) suggests that the Supreme Court intended an opposite result by following the congressional decision to repeal the same language in federal Rule 35(a).

{29} We remain aware of our long-standing rule that "only if a statute so provides with express language or necessary implication will New Mexico courts be deprived of their inherent equitable powers." *Sims v. Sims*, 1996-NMSC-078, ¶ 30, 122 N.M. 618, 930 P.2d 153. But as we have described above, any inherent common law jurisdiction the district courts enjoyed over correction of illegal sentences was abrogated by the express adoption of common law, subsequent repeal, and re-insertion of a limited version. "[W]hen legislation directly and clearly conflicts with the common law, the legislation will control because it is the most recent statement of the law." *Id.* ¶ 22; *cf. Washington*, 549 F.3d at 911 (holding inherent power recognized at common law "has clearly been abrogated by both statute and rule").

{30} While not expressly stated, we nevertheless hold that the Rules Committee meant to defeat the broad jurisdiction embodied in the common law by repeatedly narrowing Rule 5-801(A). Were we to conclude otherwise, as the State requests, it would necessarily require one of two constructions: (1) Rule 5-801(A) only applies to defendants, or (2) Rule 5-801(A) is intended as mere guidance. Both constructions render Rule 5-801(A) itself either absurd or superfluous, or make its amendments mere nullities.

{31} If we were to read the rule as applying only to defendants, we would give the State a procedural advantage in that defendants would be required to meet all the requirements of habeas corpus under Rule 5-802, while the State would need only file a simple motion to correct an illegal sentence. This approach would certainly contradict the thrust of the Sentencing Reform Act of 1984, which was, in part, to make sentencing more transparent and fair. Such a reading would also contradict the apparent comprehensive nature of the Rules of Criminal Procedure for the district courts, in which Rule 5-801(A) is embedded. The very first provision of the Rules states that "[t]hese rules *govern* the procedure in the district courts of New Mexico in all criminal proceedings." Rule 5-101 NMRA (emphasis added). Rule 5-801 is entitled "Modification of sentence," and Subsection (A) is entitled "Correction of sentence." There is no explicit indication in any of those sources that Rule 5-801(A) was meant to apply only to defendants or except the State from its seemingly broad reach. It would be absurd, absent some indication otherwise, to construe Rule 5-801(A) as only applying to defendants, simply because a common law principle existed prior to the rule's adoption and subsequent repeal. *State v. Nick R.*, 2009-NMSC-050, ¶ 11, 147 N.M. 182, 218 P.3d 868 ("We must take care to

avoid adoption of a construction that would render the statute's application absurd or unreasonable or lead to injustice or contradiction." (internal quotation marks and citation omitted)).

{32} Similarly, we cannot conclude that Rule 5-801(A) is meant as mere guidance. Although such a construction would resolve the unfairness to defendants of the binding construction, it would contradict the application of all the Rules of Criminal Procedure. As is mentioned above, the rules are meant to *govern*, not guide, procedure. Furthermore, such a reading would render Rule 5-801(A) and its previous iterations and amendments superfluous and nullities. *State v. Rivera*, 2004-NMSC-001, ¶ 18, 134 N.M. 768, 82 P.3d 939 ("We are generally unwilling to construe one provision of a statute in a manner that would make other provisions null or superfluous."). The repealed version would have been meaningless, in that if the common-law principle existed in Rule 57.1, and its repeal revived the same common law rule that was adopted, the change would have been completely unnecessary. Similarly, the re-insertion of the principle with limiting language would have had no meaningful effect if the unlimited common law principle remained unchanged. *Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 36, 147 N.M. 583, 227 P.3d 73 ("This Court has long held that we must avoid constructions of statutory amendments that would render the change unnecessary and meaningless." (internal quotation marks and citation omitted)).

SEPARATION OF POWERS

{33} We next explain why our interpretation of Rule 5-801(A), which serves to define, explicitly for defendants and implicitly for the State, the procedure to obtain review of illegal sentences does not violate separation of powers. We recognize that "one branch of the state government may not exercise powers and duties belonging to another," *State ex rel. State Corp. Comm'n v. McCulloh*, 63 N.M. 436, 438, 321 P.2d 207, 208 (1957), and that "it is solely within the province of the Legislature to establish penalties for criminal behavior." *State v. Mabry*, 96 N.M. 317, 321, 630 P.2d 269, 273 (1981). We also note, however, that "the power to provide rules of pleading, practice, and procedure for the conduct of litigation in the district courts, as well as rules of appellate procedure, is lodged in [the Supreme Court] by the Constitution of New Mexico." *Ammerman v. Hubbard Broad., Inc.*, 89 N.M. 307, 310-11, 551 P.2d 1354, 1357-58 (1976) (internal quotation marks and citation omitted); *see State ex rel. Anaya v. McBride*, 88 N.M. 244, 246, 539 P.2d 1006, 1008 (1975) ("Our constitutional power under [the New Mexico Constitution Article III, Section 1 and Article VI, Section 3] of superintending control over all inferior courts carries with it the inherent power to regulate all pleading, practice and procedure affecting the judicial branch of government.").

{34} The State essentially argues that our interpretation of Rule 5-801(A), by limiting the procedure by which the State can obtain review of an illegal sentence, abridges the State's substantive right to a particular sentence mandated by the Legislature. *See* NMSA 1978, § 38-1-1(A) (1966) (stating that New Mexico Supreme Court rules "shall not abridge, enlarge or modify the substantive rights of any litigant"). We disagree that Rule 5-801(A) has such an affect and note that a similar argument was rejected by this Court in *State v. Montoya*, 2011-NMCA-009, 149 N.M. 242, 247 P.3d 1127, *cert. denied*, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900,

with respect to Rule 5-805 NMRA.

{35} In *Montoya*, the state argued that the time limits requiring dismissal of probation revocation cases under Rule 5-805(H) abridged the state's substantive right to pursue probation revocations under NMSA 1978, Section 31-21-15 (1989), and thereby violated separation of powers. *Montoya*, 2011-NMCA-009, ¶ 22. The Court held that "[a]lthough [Rule 5-805(H)] can be viewed as limiting the absolute right granted by Section 31-21-15, the Supreme Court has the clear right to establish procedures to prevent delay in court proceedings." *Montoya*, 2011-NMCA-009, ¶ 23. The case at bar is not distinguishable in principle.

{36} The Supreme Court's procedural choice, with respect to how a request to correct illegal sentences should be presented to the district courts, does not abridge substantive sentencing rights. Rather Rule 5-801(A), by restricting district court jurisdiction to correct illegal sentences, "merely avoids delay in the exercise of such rights." *Montoya*, 2011-NMCA-009, ¶ 23. Promulgation of such rules falls squarely within the Supreme Court's rule-making power, as bestowed by the New Mexico Constitution, and does not violate separation of powers. *Id.* ¶ 24 ("[R]ules of the Supreme Court that affect procedure in the courts . . . are the hallmark of the Supreme Court's constitutional authority to control procedure in the courts of the state.").

EFFECT ON NEW MEXICO PRECEDENT

{37} As a final matter, we consider the effect of Rule 5-801(A), as interpreted by this Court. We recognize today that Rule 5-801(A), as amended by the Supreme Court, abrogated the common law principle that a district court has inherent and unlimited jurisdiction to correct illegal sentences. Although the abrogated principle has been cited occasionally since its demise in 1986, only one case in that time has actually relied on the principle in reaching its holding. *Compare Abril*, 2003-NMCA-111, ¶¶ 17-18, 20 (relying on the abrogated principle in affirming a district court's modification of a sentence five days after entry of the written sentencing order), *with State v. Porras*, 1999-NMCA-016, ¶¶ 7, 10, 126 N.M. 628, 973 P.2d 880 (citing the abrogated principle as background but unnecessary to its holding that a valid sentence cannot be corrected after the defendant begins serving it), *State v. Ingram*, 1998-NMCA-177, ¶¶ 18-19, 126 N.M. 426, 970 P.2d 1151 (citing the abrogated principle to support Court of Appeals' modification of the defendant's sentence on appeal), and *State v. Aragon*, 109 N.M. 632, 638-39, 788 P.2d 932, 938-39 (Ct. App. 1990) (citing the abrogated principle as background to its discussion on correction of sentences and not necessary to its holding that district courts lack jurisdiction to amend sentences during period of appeal).

{38} In *Abril*, the district court corrected its omission of a serious violent offense enhancement five days after it entered its final written sentencing order. Citing dicta from *Aragon*, the Court reasoned that "[w]here a sentence lacks a statutorily-mandated provision, the trial court retains jurisdiction to correct the sentence by adding the omitted term." *Abril*, 2003-NMCA-111, ¶ 20. We overrule *Abril* to the extent that it relied on the abrogated common law principle of inherent jurisdiction to correct illegal sentences. Because this case involves an eighteen-year, post-appeal delay in correcting an illegal sentence, we do not decide, and leave for another day, the extent the result reached in *Abril* could be supported by some other

statutory or rule-based authority.

CONCLUSION

{39} Based on our analysis of Rule 5-801(A), the district court did not have jurisdiction to correct Defendant's illegal sentence. Accordingly, we reverse the district court's decision correcting Defendant's sentence and remand for reinstatement of Defendant's 1988 sentence and denial of the State's motion.

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

JAMES J. WECHSLER, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

LINDA M. VANZI, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-027

Filing Date: January 26, 2012

Docket No. 30,660

CITY OF SANTA FE ex rel.
SANTA FE POLICE DEPARTMENT,

Petitioner-Appellant,

v.

ONE (1) BLACK 2006 JEEP 2-DOOR
V.I.N. 1J4FA6456P731037
NEW MEXICO LICENSE NO. 001 PND,

Respondent,

and

AMERICREDIT FINANCIAL SERVICES,

Claimant,

and

DIEGO OLIVAS,

Claimant-Appellee.

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Adrian Terry, Assistant City Attorney
Santa Fe, NM

for Appellant

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Aaron J. Wolf
Santa Fe, NM

for Claimant-Appellee

OPINION

VANZI, Judge.

{1} The City of Santa Fe (City) appeals from an order of the district court dismissing the City's petition for forfeiture and directing it to return the motor vehicle at issue in this case to Claimant, Diego Olivas. The district court concluded that the City's vehicle forfeiture ordinance, Santa Fe, N.M., Code § 24-9 SFCC 1987 (2007) (the Ordinance), permitting forfeiture of a vehicle operated by a person whose license is revoked as a result of a prior DWI conviction did not apply to Olivas's conduct. In a matter of first impression, the sole issue on appeal is whether a vehicle operated by a person whose license has been revoked as a result of a conviction for driving while under the influence of drugs or alcohol (DWI) but was eligible for reinstatement prior to the time of the traffic stop that led to the forfeiture action, but who failed to obtain reinstatement of the license before the stop, is subject to the Ordinance. We hold that the Ordinance does not make any exceptions for drivers who, though they may be eligible for reinstatement, continue to drive on a revoked license. We reverse the district court.

BACKGROUND

{2} The following facts are undisputed. On February 25, 2010, Diego Olivas was driving his 2006 Jeep within City limits when he was stopped and cited for a traffic violation. At the time he was stopped, Olivas's license was revoked as a result of a conviction for DWI.

{3} Olivas committed the DWI on February 17, 2008, and he was convicted for the offense on May 22, 2008. On March 8, 2008, the Motor Vehicle Division of the New Mexico Department of Taxation and Revenue (MVD) revoked Olivas's driver's license. The MVD mailed Olivas a notice of revocation on July 9, 2008, informing Olivas that his license had been revoked for a minimum of one year and that he was eligible to have his license reinstated on March 8, 2009. The revocation notice advised Olivas that reinstatement at the end of the revocation period was not automatic and that he had to meet certain requirements, including payment of a reinstatement fee.

{4} Although he was eligible to have his driving privileges restored, Olivas had not paid the $100 reinstatement fee. Consequently, when he committed the traffic violation on February 25, 2010, Olivas was cited for the violation and was arrested for driving with a revoked license. The officer then impounded Olivas's vehicle as a nuisance under the Ordinance. Santa Fe, N.M., Code §§ 24-9.3(B), 24-9.4.

{5} On April 12, 2010, the City filed a verified petition for forfeiture of motor vehicle. Olivas filed an answer and, on June 29, 2010, the district court held a hearing on the merits. At the conclusion of the hearing, the district court denied the City's application for forfeiture and dismissed the petition. The district court concluded that the failure to pay a reinstatement fee was merely a pro forma requirement that did not justify the forfeiture of Olivas's vehicle and ordered the City to immediately return the vehicle to him.

{6} The City timely appealed. We note that on appeal we are without the benefit of an answer brief as Olivas has filed a notice of non-filing of answer brief, asserting that he sold the vehicle and no longer has a continued interest in the outcome of this matter.

DISCUSSION

Standard of Review

{7} "When there are no disputed material facts, an appellate court reviews all issues on appeal under a de novo standard of review." *City of Albuquerque v. One (1) 1984 White Chevy*, 2002-NMSC-014, ¶ 5, 132 N.M. 187, 46 P.3d 94. "Interpretation of municipal ordinances and statutes is a question of law that we review de novo." *Stennis v. City of Santa Fe*, 2008-NMSC-008, ¶ 13, 143 N.M. 320, 176 P.3d 309. We follow the same rules of statutory interpretation when interpreting ordinances. *Cadena v. Bernalillo Cnty. Bd. of Cnty. Comm'rs*, 2006-NMCA-036, ¶ 7, 139 N.M. 300, 131 P.3d 687. The guiding principle in statutory construction requires that we look to the wording of the statute and attempt to apply "the plain meaning rule, recognizing that when a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 37, 147 N.M. 583, 227 P.3d 73 (alteration, internal quotation marks, and citation omitted); *State v. Johnson*, 2009-NMSC-049, ¶ 10, 147 N.M. 177, 218 P.3d 863 ("The primary indicator of legislative intent is the plain language of the statute."). Accordingly, "a statute must be read and given effect as it is written by the Legislature, not as the court may think it should be or would have been written if the Legislature had envisaged all the problems and complications which might arise in the course of its administration." *State v. Maestas*, 2007-NMSC-001, ¶ 14, 140 N.M. 836, 149 P.3d 933 (alteration, internal quotation marks, and citation omitted). With these principles in mind, we now turn to the City's argument in this case.

The Ordinance Applies to a Vehicle Operated by a Person Whose License Is Currently Revoked for DWI and Who Has Not Met All the Requirements for Reinstatement

{8} The City asserts that once Olivas's driving privileges were revoked for DWI, they remained revoked until he took affirmative steps and met all the requirements for reinstatement. The City argues that because Olivas failed to have his driver's license reinstated, his vehicle was subject to forfeiture pursuant to the Ordinance. Thus, the City contends, the district court erred in finding that the Ordinance did not apply to Olivas's conduct and in ordering the return of the vehicle to him. We agree. We begin with a review of Section 24-9 and then turn to the question of whether a driver's failure to pay a reinstatement fee is merely "a pro forma requirement" of the MVD that does not justify the forfeiture of a vehicle operated by that person under the Ordinance.

{9} In 2007, the City's governing body adopted the Ordinance with the intent of protecting the health and safety of its citizens by abating motor vehicle nuisances. Santa Fe, N.M., Code § 24-9.2(A). Specifically, the City enacted the Ordinance in response to the serious problems caused by those who drive under the influence of alcohol or drugs or "who drive in violation of driver's license restrictions" and therefore create the potential for serious injury and loss of life to innocent persons. *Id.* The City determined that the way to achieve the objective of keeping alcohol- and drug-impaired drivers off the roadways is to subject the vehicle they are driving to forfeiture if they are caught driving with a revoked license because of a previous DWI conviction. *See* Santa Fe, N.M., Code § 24-9.3 (declaring as a nuisance a motor vehicle that is "[o]perated by a person who is

arrested for DWI or operated by a person whose license is currently revoked or denied as a result of a DWI arrest"); Santa Fe, N.M., Code § 24-9.4 (stating that motor vehicles declared to be a nuisance are subject to forfeiture by the City). There is no constitutional challenge to the Ordinance here. We note that our Supreme Court has previously upheld the constitutionality of a similar forfeiture ordinance on the ground that it did not violate double jeopardy, indicating that the ordinance was "a remedial measure [designed] to protect the public from those drivers who persist in driving after license revocation and multiple DWI offenses." *One (1) 1984 White Chevy*, 2002-NMSC-014, ¶ 18.

{10} In this case, the MVD revoked Olivas's license on March 8, 2008, as a result of a DWI conviction. Although the one-year revocation period had passed, Olivas had not paid the reinstatement fee. Thus, the City argues, Olivas drove his vehicle on City streets while his license was "currently revoked or denied as a result of a DWI arrest or conviction prohibiting [him] from driving[.]" Santa Fe, N.M., Code § 24-9.3(B). As a result, his vehicle was determined to be a nuisance and subject to civil forfeiture. The district court, however, found otherwise. It concluded that the Ordinance, as written, was "draconian in certain circumstances and is not meeting the public purpose for which it was enacted." Accordingly, the district court held:

> The Ordinance does not apply to [Olivas's] conduct, in that his license was on revoked status at the time of his being stopped and cited merely for the failure to pay a reinstatement fee, a *pro forma* requirement of the [MVD], and the failure to pay such fee, standing alone does not constitute a substantial risk of harm to the public justifying the forfeiture of a motor vehicle.

For the reasons that follow, we are not persuaded by the district court's analysis.

{11} We begin with the statutory scheme governing the authority of the MVD to revoke and subsequently reinstate a driver's license, and we then consider the pertinent provisions of the Ordinance. NMSA 1978, Section 66-5-29(C) (2007) sets forth the applicable period of time a person who is convicted of DWI shall have his driver's license revoked. Here, Olivas's license was revoked for a minimum mandatory period of one year. Next, NMSA 1978, Section 66-5-33.1 (2009), provides the procedure for reinstatement of a driver's license that is revoked. Our Legislature is unequivocal that an application for reinstatement and payment of a $25 fee is *a prerequisite* to reinstatement of a revoked license. Section 66-5-33.1(A). And if the revocation is due to a DWI, an additional fee of $75 *is required* to be paid to reinstate the license. Section 66-5-33.1(B). The plain language of Section 66-5-33.1 is clear and unambiguous. The revocation period continues until the fee is paid. Nowhere does the statute state that a person's driving privileges are automatically restored upon the expiration of the penalty period or that the period of revocation is not extended by a driver's failure to pay the reinstatement fee. We conclude that a driver's license cannot be reinstated—and therefore remains revoked—until compliance with all provisions and payment of the requisite fee is accomplished.

{12} Consistent with the statutory provision governing reinstatement of a revoked license, we also observe that on July 9, 2008, the MVD mailed a notice of revocation to Olivas, informing him that his privilege to drive had been revoked for a

minimum period of one year beginning on March 8, 2008. Among other things, the notice of revocation stated:

> *IMPORTANT:* REINSTATEMENT AT THE END OF THE REVOCATION PERIOD OR DISQUALIFICATION PERIOD IS NOT AUTOMATIC. THE REVOCATION WILL REMAIN EFFECTIVE UNTIL ALL REQUIREMENTS FOR REINSTATEMENT ARE MET INCLUDING PAYMENT OF A REINSTATEMENT FEE.

The plain language of the notice makes clear that a driver's license revoked under Section 66-5-29 remains revoked until the driver has complied with all requirements for reinstatement, including payment of the reinstatement fee.

{13} For the reasons set forth above, we conclude that the New Mexico Legislature intended the revocation period set forth in Section 66-5-29(C) to continue beyond the period required and said so explicitly when it stated that payment of a fee is a prerequisite to the reinstatement of any license or registration and that an additional payment is required if the revocation was due to a DWI. Section 66-5-33.1. We cannot read into the statute any meaning other than what is stated in the plain language. Further, the notice of revocation, which unequivocally states that "the revocation will remain effective until all requirements for reinstatement are met including payment of a reinstatement fee[,]" also leads to the conclusion that failure to pay the reinstatement fee extends the period of revocation.

{14} We now turn to the Ordinance to ascertain whether any of its provisions afford relief to a driver whose license has been revoked for DWI but who is eligible for reinstatement of that license from having the vehicle he is operating forfeited. As we have noted, Santa Fe, N.M., Code Section 24-9.3(B) declares a motor vehicle to be a public nuisance if it is "[o]perated by a person whose license is currently revoked or denied as a result of a DWI arrest or conviction prohibiting them from driving[.]" Santa Fe, N.M., Code Section 24-9.4 then provides that any motor vehicle declared to be a public nuisance is subject to forfeiture proceedings. The City's governing body's stated purpose and intent of enacting the Ordinance is to protect the public from drivers who continue driving after license revocation. In that regard, the plain language of Section 24-9.3(B) does not provide any exceptions for drivers whose licenses are revoked and not reinstated. Nor does it explicitly—or implicitly—state that a driver who operates a motor vehicle following a period of revocation of his driving privileges, but prior to reinstatement, is exempt from having the vehicle he is operating declared a public nuisance and subject to forfeiture.

{15} We conclude that Olivas was operating a motor vehicle without a valid license when he was stopped on February 25, 2010, and his vehicle was subject to forfeiture under the Ordinance. Although the result here may seem harsh given that Olivas was eligible for reinstatement of his license, we are not at liberty to create an exception to or engage in further interpretation of the plain language of the statutes and Ordinance as written. Thus, a driver's license that has been revoked under Section 66-5-29(C) must remain revoked until the driver has applied for reinstatement, complied with all provisions of the Motor Vehicle Code, and paid to MVD a fee of $100. Section 66-5-33.1.

CONCLUSION

{16} We hold that a driver's license that has been revoked as a result of a DWI conviction remains revoked until all the requirements of reinstatement have been met. We also hold that a vehicle operated by a person with a revoked license whose license is eligible for reinstatement but that license had not been reinstated is subject to the forfeiture provision of the Ordinance. We reverse the decision of the district court.

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

LINDA M. VANZI, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

RODERICK T. KENNEDY, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-028

Filing Date: June 16, 2011

Docket No. 29,733

MR. and MRS. RON GLASER, THERESA CULL, CHERYL HOST, EDMUND AUERBACH, DR. and MRS. DAVIS SPENCE, DONALD R. ASHER, HEIDI LARSEN, BRAD LEONARD, TED THRASHER, ANNE DANIELS, BRYAN and LISALEE GOSS, WILLIAM W. MERSHON, KEITH and DEBORAH HILLEGOND, and MR. and MRS. BRUCE CHARNLEY,

Plaintiffs-Appellants,

v.

JAMES L. LEBUS, DANIEL E. RAKES, CHARLES VERRY, ALAN G. YOUNG, STEVEN R. OLIVER, THE NEW MEXICO FINANCE AUTHORITY, AUI, Inc., ANGEL FIRE RESORT OPERATIONS, LLC, and THE VILLAGE OF ANGEL FIRE,

Defendants-Appellees.

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Modrall, Sperling, Roehl, Harris & Sisk, P.A.
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for Appellee Village of Angel Fire

OPINION

WECHSLER, Judge.

{1} In this appeal, we consider whether (1) a formation election under the Public Improvement District Act (PID Act), NMSA 1978, §§ 5-11-1 to -27 (2001, as amended through 2009), incorporates the election contest and recount procedures found in the Election Code, NMSA 1978, §§ 1-1-1 to 1-24-4 (1969, as amended through 2010), and (2) Plaintiffs' amended complaint constituted an election contest subject to the Election Code's election contest procedures. We hold that the PID Act's formation election provisions incorporated the Election Code's election contest procedures and that the entirety of Plaintiffs' amended complaint constituted an election contest. Because an election contest requires direct appeal to our Supreme Court, this Court lacks jurisdiction, and we therefore transfer this case to our Supreme Court.

BACKGROUND

{2} This case arises out of the efforts of Defendants to create a public improvement district within the Village of Angel Fire under the PID Act. Plaintiffs appeal the district court's order of dismissal, pursuant to Rule 1-012(B)(1) NMRA, concluding that it lacked subject matter jurisdiction, because the entirety of the amended complaint was subject to and barred by the thirty-day statute of limitations found in the Election Code's election contest provisions, Section 1-14-3, or the thirty-day statute of limitations found in the Municipal Election Code, NMSA 1978, § 3-8-63(C) (1999).

{3} We summarize the facts in the amended complaint as follows. In April 2007, Defendant Angel Fire Resort Operations, LLC (the Resort) submitted a petition to Defendant Village of Angel Fire (the Village) for approval of a public improvement district to construct roads, water, a force main sewer system, and telephone and electrical utilities to serve 847 lots. The infrastructure improvements were to be funded by a special levy assessed against the property owners of the lots. The Resort resubmitted the petition on October 12, 2007, and included a general plan, a feasibility study, an estimate of construction costs, a rate and method of apportionment of a special levy, and other documents in support of the plan. The Village subsequently mailed a notice of intent to form

a public improvement district to lot owners affected by the plan. Following a public hearing, the Village council voted to approve the formation of the Angel Fire Public Improvement District (the AFPID) on February 14, 2008. The Village, the Resort, Defendant Association of Angel Fire Property Owners, and the AFPID executed a contingency agreement that allocated responsibility for construction, financing, ownership, maintenance, and operation of the AFPID plan. The agreement was contingent upon the formation of the AFPID through a formation election as required by Section 5-11-8(A) of the PID Act.

{4} On April 1, 2008, the Village mailed ballots to the property owners affected by the proposed AFPID. The ballots were to be returned by April 21, 2008, the returned ballots were counted, and the requisite majority approved the AFPID. Upon approval of the formation of the AFPID, the board of directors of the AFPID (the Board) passed a resolution authorizing a special levy upon the properties located within the AFPID. On November 1, 2008, the Village mailed property tax assessments, including the special levy, to property owners within the AFPID. The Board subsequently entered into various contracts to finance and construct the infrastructure improvements, including two loans from Defendant New Mexico Finance Authority.

{5} Plaintiffs filed a complaint for declaratory relief on June 1, 2009, more than twelve months after the formation election. Plaintiffs filed an amended complaint on June 19, 2009. Plaintiffs' amended complaint sought declarations that (1) the AFPID has no valid legal existence and all contracts and agreements made by the Board are void and unenforceable; (2) if the AFPID was formed in accordance with the law, it is illegal pursuant to Section 5-11-8(B), because the improvements for which the levy is assessed will not confer a benefit upon the property contained within the AFPID and because it will not confer a benefit upon the properties assessed the levy; (3) the properties included in the 1995 reorganization plan are entitled to form a special assessment district; and (4) the AFPID has no authority to collect any tax or assessment or to expend such sums already collected. The district court characterized the entirety of the amended complaint as an election contest and dismissed the action as untimely under the thirty-day statute of limitations for election contests in the Election Code. This appeal followed.

ARGUMENTS ON APPEAL

{6} On appeal, Plaintiffs contend that (1) the PID Act's formation election provisions did not incorporate the Election Code's election contest procedures and therefore the thirty-day statute of limitations for election contests does not apply; and (2) even assuming that the Election Code's election contest procedures apply to formation elections, the amended complaint does not present an election contest. In particular, Plaintiffs maintain that the amended complaint does not present an election contest because it does not challenge the results of the election and instead (1) challenges the underlying validity of the petition under the PID Act and the New Mexico Constitution's elections clause, (2) claims that no election occurred for the imposition of the special levy, (3) claims that the special levies are excessive under the PID Act, Section 5-11-8(B), and (4) claims that certain property owners within the AFPID have a right under the Resort's 1995 bankruptcy reorganization plan to form a special assessment district. Defendants, on the other hand, argue that the Election Code requires direct appeal of election contests to

our Supreme Court, and therefore this Court does not have jurisdiction.

STANDARD OF REVIEW

{7} On appeal from a dismissal based on a Rule 1-012 (B)(1) motion, we accept all facts alleged in the complaint as true and resolve all doubt about the sufficiency of the complaint in favor of the plaintiffs' right to proceed. *See Martinez v. Cornejo*, 2009-NMCA-011, ¶ 6, 146 N.M. 223, 208 P.3d 443. The issues of whether the election contest provisions of the Election Code or the Municipal Election Code apply to formation elections under the PID Act and whether Plaintiffs' claims constitute an election contest are legal questions that we review de novo. *See id.* (holding that determining whether the plaintiffs had an actionable claim required statutory construction, which is a question of law reviewed de novo).

ELECTION CODE'S ELECTION CONTEST PROCEDURES

{8} The district court dismissed the amended complaint as time barred by the thirty-day statute of limitations provided by Section 1-14-3 of the Election Code. This statute of limitations and other provisions found in the Election Code's election contest procedures provide for the "speedy resolution" of election contests. *See Gunaji v. Macias*, 2001-NMSC-028, ¶ 26, 130 N.M. 734, 31 P.3d 1008 (noting that the purpose of the procedures relating to election contests is the speedy resolution of election contests in which the normal rules of civil procedure take too much time).

{9} Plaintiffs argue that the district court erred when it determined that the Election Code's election contest procedures, including the thirty-day statute of limitations found in Section 1-14-3, applied to formation elections under the PID Act. The question of whether the PID Act incorporates the Election Code's election contest procedures for formation elections is primarily a question of legislative intent.

{10} The Election Code provides that in "[a]ny action to contest an election[, the] complaint shall be filed no later than thirty days from issuance of the certificate of nomination or issuance of the certificate of election to the successful candidate." Section 1-14-3. Although this provision principally addresses elections with "candidates," the Election Code's election contest procedures also apply to "special district elections," such as a PID Act formation election, "[t]o the extent procedures are incorporated or adopted by reference by separate laws governing such elections or to the extent procedures are not specified by such laws[.]" Section 1-1-19(B)(2). Thus, the Election Code's election contest procedures apply to a special district election when the laws governing the special district election incorporate the procedures. In addition, when the laws governing a special district election are silent as to the procedures, the Election Code applies as the default procedures for such an election.

{11} In determining whether the PID Act incorporated the Election Code's election contest procedures by reference, we look to the plain meaning of the election provisions of the PID Act. *See State v. Hubble*, 2009-NMSC-014, ¶ 13, 146 N.M. 70, 206 P.3d 579 ("We first look to the plain meaning of the words chosen by the Legislature[.]"). Section 5-11-7(E) of the PID Act provides that "[e]xcept as otherwise provided by this section, [PID formation elections] shall comply with the general election laws of this state." The plain meaning therefore indicates that the Legislature intended PID Act

formation elections to incorporate the same procedural protections and requirements as general elections, unless the PID Act expressly excludes or contradicts a particular procedure.

{12} Additionally, the PID Act formation election procedures do not contain independent election contest or recount procedures. *See* § 5-11-7 (general formation election provisions). Since, by virtue of Section 1-1-19(B)(2), the Election Code provides the default procedures for a formation election under the PID Act, the absence of separate election contest or recount procedures supports the conclusion that the Legislature's language and actions indicate that the Legislature intended the Election Code to apply to formation elections under the PID Act. The Election Code's provisions, including the election contest and recount procedures, therefore apply to formation elections under the plain meaning of the PID Act.

{13} Plaintiffs argue that the general language contained in Section 5-11-7(E) is insufficient to incorporate the election recount and contest procedures of the Election Code. Plaintiffs rely on *State ex rel. Denton v. Vinyard*, 55 N.M. 205, 207-09, 230 P.2d 238, 239-40 (1951), which held that a statute stating that "[s]uch election shall be conducted in a manner provided by law for general elections within said county or city, except as herein provided" was too general to incorporate the Election Code's contest and recount procedures. (internal quotation marks and citation omitted). While the language of Section 5-11-7(E) and the statute at issue in *Vinyard* are similar, *Vinyard* is distinguishable. At the time *Vinyard* was decided, the Election Code was silent as to its scope and did not contain a provision that stated that it applied to special district elections under any circumstance. *See generally* NMSA 1941, §§ 56-101 to -1017 (1951) (election code under previous compilation). It was not until 1969 that the Legislature added a provision to the Election Code that addressed the elections covered by the Election Code. *See* 1969 N.M. Laws, ch. 240, §§ 19-20. In addition, "special district elections" were originally excluded from the Election Code "[u]nless otherwise provided in the Election Code or by separate laws governing such elections[.]" *Id.* § 20. In 1975, the Legislature changed this provision to read in the affirmative and state that "special district elections" are governed by the Election Code "[t]o the extent procedures are incorporated or adopted by reference by separate laws governing such elections." 1975 N.M. Laws, ch. 255, § 6. The Legislature again changed and expanded this provision in 1977. 1977 N.M. Laws, ch. 222, § 4. The language adopted in 1977, which is the current language in the Election Code, provides that "to the extent procedures are not specified by such laws, certain provisions of the Elections Code shall also apply to . . . special district elections." *Id.* By providing that the Election Code's election contest procedures apply when procedures are not specified, the 1977 amendment enhanced the scope of the Election Code such that the Election Code now provides the default election procedures for all special district elections, which was not the situation when *Vinyard* was decided.

{14} Further, *Vinyard* addressed the issue of whether the plaintiffs had a right to file an election contest under a local option statute. *Vinyard*, 55 N.M. at 209, 230 P.2d at 240. *Vinyard* recognized that the "right of recount and contest are purely statutory" and that a general statement is insufficient to incorporate the right to recount and contest. *Id.* at 207, 209, 230 P.2d at 239, 240. In this case, Plaintiffs' amended complaint does not allege

a statutory right to contest, but instead raises a claim under Article 2, Section 8 of the New Mexico Constitution. We must determine whether the Election Code procedures for an election contest apply to a formation election, not whether there is a substantive right to contest the election as in *Vinyard*.

{15} Moreover, if Plaintiffs are correct, the statute of limitations for an election contest under the PID Act would be the general four-year statute of limitations under NMSA 1978, Section 37-1-4 (1880) (four-year catch-all statute of limitations). The practical effect would be to allow a plaintiff to challenge a formation election well after construction of a public improvement district has begun or possibly even completed. An election contest arising under the PID Act is precisely the type of case that requires the "need for speedy resolution" that the Election Code's election contest procedures provide. *Gunaji*, 2001-NMSC-028, ¶ 26.

SCOPE OF AN ELECTION CONTEST

{16} Having determined that the Election Code's election contest procedures apply to election contests of formation elections under the PID Act, we must determine whether Plaintiffs' amended complaint presents an election contest. If Plaintiffs are correct and the amended complaint does not present an election contest, the Election Code's election contest procedures, such as the thirty-day statute of limitations, do not apply. We begin by examining New Mexico case law on the question of what constitutes an election contest.

{17} In arguing that the amended complaint was not an election contest, Plaintiffs rely on several out-of-state cases and *Heth v. Armijo*, 83 N.M. 498, 500, 494 P.2d 160, 162 (1972), for the propositions that the defining features of an election contest are that an election was held in which one side won and that allegations "that conditions precedent to an election did not occur, . . . such as a valid petition for the election, complete and truthful notice to the electorate, and the preparation and dissemination of proper ballots" are not election contests. Plaintiffs note that our Supreme Court stated in *Heth* that

> [s]ince the objective of the contestant in an election contest is to be declared the winner, his notice of contest should allege that he has received more legal votes than the contestee, and a failure to so allege is not a claim showing that the contestant is entitled to relief.

Id. at 500, 494 P.2d at 162. However, we do not read *Heth* in the limited manner Plaintiffs propose. *Heth* involved a claim by unsuccessful candidates who alleged various statutory violations of the Election Code. *Id.* at 498-99, 494 P.2d at 160-61. The candidates' notice of contest failed to state that any of the alleged illegal ballots cast were cast for contestants, that the results would have been changed, or that the contestants were entitled to the offices for which they were candidates. *Id.* at 499, 494 P.2d at 161. Our Supreme Court held that the failure to assert that the results of the election would have been different in the notice of contest is "analogous to a complaint in tort alleging that the defendant negligently struck the plaintiff, but failing to allege that the plaintiff was injured thereby." *Id.* at 500, 494 P.2d at 162. *Heth* only stands for the proposition that an election contest must contain an assertion that the underlying claim in the complaint would have changed the result of the contested election.

{18} More recent cases clearly show that New Mexico courts have not recognized a distinction between allegations of failed conditions precedent to an election and allegations that the contestant should be declared the winner of a valid election in determining whether a complaint presents an election contest. In *Dinwiddie v. Board of County Commissioners of Lea County*, 103 N.M. 442, 443, 708 P.2d 1043, 1044 (1985), our Supreme Court addressed whether the statutory provisions concerning election contests and recounts applied to the plaintiffs' complaint. The plaintiffs made two allegations: (1) the bond election at issue was held in violation of statutory provisions for the consolidation of precincts, and (2) certain ballots were cast by persons invalidly registered. *Id.* The plaintiffs argued that even if the second claim, challenging the results of the election, was held to be an election contest subject to the Election Code's election contest procedures, the first claim, addressing the conditions precedent or validity of the election under the statute governing the election, was still outside the purview of an election contest. *Id.* at 444, 708 P.2d at 1045. Our Supreme Court did not agree with the distinction. *Id.* It stated that a "challenge to the validity of an election is also a challenge to its result, for if it is successful, the result is changed[, and s]imilarly, a challenge to the result contests the inherent validity of the election." *Id.* Therefore, under *Dinwiddie,* any challenge as to the underlying validity of an election that would necessarily require overturning the results or effects of an election is an election contest subject to the Election Code's election contest procedures.

{19} Plaintiffs argue that *Dinwiddie* has effectively been overruled by *Gunaji.* In *Gunaji,* our Supreme Court held that the Election Code did not provide a remedy due to a "gap in the statutory scheme" in an election contest arising from ballots containing the incorrect candidates. *Gunaji,* 2001-NMSC-028, ¶¶ 2, 13-15. The plaintiffs sued the county clerk, who was in charge of preparing the ballot, but our Supreme Court noted that the Election Code only provides for an election contest for error by the precinct board. *Id.* ¶¶ 14-15. The Court held that "[a]ssuming the Election Code does not provide a remedy when candidates' names are omitted from the ballot," there was "no barrier to our fashioning a remedy outside the Code" under Article II, Section 8 of the New Mexico Constitution. *Gunaji,* 2001-NMSC-028, ¶¶ 21, 26. The Court stated that "it is the procedure in an election contest which is exclusive, not the grounds and the remedy." *Id.* ¶ 26. Thus, even while an election contest may not arise under a specific section of the Election Code and instead alleges some other problem "compromising the validity of the election," the Election Code's election contest must be followed to "accord[] with the need for speedy resolution of election contests[.]" *Id.* *Gunaji* therefore does not support Plaintiffs' contention that there is a distinction between challenges to election results and the underlying validity of the election in defining an election contest. Instead, *Gunaji* supports applying the Election Code's election contest procedures even when the remedy and grounds forming the basis of the election contest are found outside the Election Code, such as noncompliance with the PID Act or the New Mexico Constitution.

{20} We thus view New Mexico case law as defining an election contest as a challenge to the result of an election, as well as a challenge to the inherent validity of an election when the challenge would necessarily require overturning the results or effects of the election. An election contest can derive from a violation of a provision of the Election Code, from a violation of another statute

governing the particular election at issue, or from the New Mexico Constitution. *See Heth*, 83 N.M. at 499-500, 494 P.2d at 161-62 (election contest derived from Election Code); *Dinwiddie*, 103 N.M. at 443-44, 708 P.2d at 1044-45 (election contest challenging the underlying validity of the election based on statute governing election for issuing general obligation bonds); *Gunaji*, 2001-NMSC-028, ¶¶ 2, 26 (noting that Election Code contest procedures apply to election contests alleging a violation of Article II, Section 8 of the New Mexico Constitution). Applying the Election Code's election contest procedures to all election contests, including election contests of formation elections under the PID Act, "accords with the need for speedy resolution of election contests[.]" *Gunaji*, 2001-NMSC-028, ¶ 26.

AMENDED COMPLAINT AS AN ELECTION CONTEST

{21} We next turn to Plaintiffs' amended complaint to determine whether it presents an election contest and therefore must follow the Election Code's election contest procedures. Plaintiffs' amended complaint sought declarations that (1) the AFPID has no valid legal existence and all contracts and agreements made by the Board are void and unenforceable; (2) if the AFPID was formed in accordance with the law, it is illegal pursuant to Section 5-11-8(B), because the improvements for which the levy is assessed will not confer a benefit upon the property contained within the AFPID and because the levy will not confer a benefit upon the properties assessed; (3) the properties included in the 1995 reorganization plan are entitled to form a special assessment district; and (4) the AFPID has no authority to collect any tax or assessment or to expend such sums already collected.

{22} Plaintiffs argue that they base the first prayer for relief on a claim that no legal election has occurred, and therefore it is not an election contest. In particular, the amended complaint alleges that the petition to form the AFPID was invalid because only the Resort signed the petition to form the AFPID, and Section 5-11-3(A) requires that the "*owners* of at least twenty-five percent of the real property" sign the petition. (Emphasis added.) Additionally, the amended complaint states that the formation election failed to comply with the requirements of the PID Act as stated in Section 5-11-7(E)(1)-(3) (requiring that the "ballot material" for a formation election include specified, detailed information). These claims relate to whether the petition and the ballot met statutory requirements required of a formation election by the PID Act, and the claims therefore challenge the underlying validity of the election. As we have discussed, these issues present an election contest. *See Dinwiddie*, 103 N.M. at 443-44, 708 P.2d at 1044-45 (holding that a claim that an election was held in violation of statutory requirements for consolidation of precincts was a challenge to the underlying validity of the election and therefore was an election contest subject to the Election Code's election contest procedures).

{23} With regard to the second and third prayers for relief, Plaintiffs argue that they do not challenge the underlying validity of the formation election and that the amended complaint concedes that a valid election occurred. However, these prayers for relief also rest on challenges to the underlying validity of the formation election. The gist of Plaintiffs' claim of illegality of the AFPID under Section 5-11-8(B) is that the feasibility study provided in the petition inflated the projected market value of the lots within the AFPID after construction of the infrastructure improvements. Plaintiffs allege that the inflated projections in the feasibility study

were "incorrect, misleading, or fraudulent" and were designed to keep the projected amount of bond indebtedness of the AFPID within the sixty percent limit of bond indebtedness to market value ratio mandated by Section 5-11-8(B). Similarly, Plaintiffs base their claim that certain properties are entitled to form a special assessment district on an assertion that the information in the petition is "incorrect, misleading, or fraudulent." Specifically, the amended complaint alleges that the petition misrepresented the AFPID as necessary to comply with the Resort's obligations under a final plan of reorganization from a 1995 bankruptcy. Both prayers for relief two and three address the accuracy of information provided to the Village and voters prior to the formation election to approve the AFPID. The claims challenge the underlying validity of the election by asserting that (1) the Village authorized the formation election and (2) voters approved the AFPID based on false, fraudulent, or misleading information designed to circumvent the requirements of the PID Act prior to the election. Further, the relief that Plaintiffs seek, allowing certain lots to form a special assessment district, as opposed to being included in the AFPID, and declaring the special levy illegal, would necessarily require overturning the election results. The second and third prayers for relief therefore state an election contest concerning the formation election. *See Dinwiddie*, 103 N.M. at 444, 708 P.2d at 1045 (holding that a "challenge to the validity of an election is also a challenge to [the] result, for if it is successful, the result is changed").

{24} Finally, the fourth prayer for relief, that the AFPID has no authority to tax, also derives from an assertion that the formation election was not conducted in accordance with the PID Act. Specifically, Plaintiffs claim that in order to have the authority to tax, the PID Act required that the ballot have a separate ballot question specifically addressing the authority to tax, aside from the question as to whether to form the PID. Further, the amended complaint alleges that the ballot failed to provide required details of the special levies assessed on the lot owners, as required by Section 5-11-7(E)(2) (requiring the ballot in a formation election to contain a description of district improvements and arguments for and against the imposition of the taxes and a statement that the taxes are for public infrastructure improvements and services within the district). Again, this claim challenges the underlying validity of the election based on failure to comply with statutory requirements and is therefore an election contest governed by the Election Code's election contest procedures.

TRANSFER TO SUPREME COURT

{25} Having concluded that the Election Code's election contest procedures apply to formation elections under the PID Act and that the amended complaint presented an election contest, we further conclude that this Court does not have jurisdiction over this appeal. "[L]ack of jurisdiction at any stage of the proceedings is a controlling consideration which must be resolved before going further." *In re Doe, III*, 87 N.M. 170, 171, 531 P.2d 218, 219 (Ct. App. 1975). "[W]e have a duty to determine whether [we have] jurisdiction of an appeal." *State ex rel. Dep't of Human Servs. v. Manfre*, 102 N.M. 241, 242, 693 P.2d 1273, 1274 (Ct. App. 1984). This Court is a court of limited jurisdiction and only has appellate jurisdiction as provided by law. *Id.* at 243, 693 P.2d at 1275. NMSA 1978, Section 34-5-8(A)(1) (1983) provides that this Court has appellate jurisdiction for "any civil action not specifically reserved to the jurisdiction of the supreme court by the constitution or by law."

{26} The Election Code, Section 1-14-5, states that "[a]n appeal shall lie from any judgment or decree entered in the contest proceeding to the supreme court of New Mexico within the time and in the manner provided by law for civil appeals from the district court." Thus, the Election Code provides that our Supreme Court has jurisdiction of direct appeals of election contests from a district court. We therefore transfer this appeal to our Supreme Court, pursuant to NMSA 1978, Section 34-5-10 (1966) ("No matter on appeal in the supreme court or the court of appeals shall be dismissed for the reason that it should have been docketed in the other court, but it shall be transferred by the court in which it is filed to the proper court.").

CONCLUSION

{27} We hold that the PID Act's formation election provisions incorporate the Election Code's election contest procedures, which require a direct appeal to our Supreme Court, and that Plaintiffs' amended complaint presented an election contest. We therefore hold that this Court lacks jurisdiction and transfer this case to our Supreme Court.

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

JAMES J. WECHSLER, Judge

WE CONCUR:

MICHAEL E. VIGIL, Judge

LINDA M. VANZI, Judge

Certiorari Denied, February 16, 2012, No. 33,401

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-029

Filing Date: November 23, 2011

Docket No. 28,517

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

LEROY JARAMILLO,

Defendant-Appellant.

Gary K. King, Attorney General
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Santa Fe, NM

for Appellee

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Albuquerque, NM

for Appellant

OPINION

KENNEDY, Judge.

{1} When a deputy medical examiner left the county medical examiner's office to go into private practice and subsequently required a hefty fee from the State for his trial testimony, the State put his former supervisor on the witness stand to testify to the autopsy that the first pathologist had conducted. In the course of the supervisor's testimony during direct examination, he read to the jury some contents of the autopsy report prepared by the absent doctor. The entire report was thereafter admitted as evidence and presented to the jury. To the extent the district court admitted the report as an exhibit, the admission was constitutional error as it violated Defendant's confrontation rights. Thus, we reverse Defendant's conviction.

I. BACKGROUND

{2} In October 2004, ten-month-old Cristyan Ibarra was taken to the emergency room in Clovis, New Mexico by his mother and Defendant. Owing to his symptoms, which included internal cranial bleeding, Cristyan was transported by air to Lubbock, Texas. There, he was pronounced dead several days later. Dr. Sridhar Natarajan, who at that time was employed by the Lubbock County Medical Examiner's Office, performed Cristyan's autopsy. Dr. Natarajan determined the cause of death to be closed head injuries and ruled the manner of death to be a homicide. The findings in the autopsy report were reviewed, confirmed, and signed off in a separate opinion document by four other medical examiners in the Lubbock County Medical Examiner's Office. Dr. Thomas Parsons, who later testified about the cause of Cristyan's death, was not one of these signatories.

{3} Dr. Natarajan eventually left the Lubbock County Medical Examiner's Office. When he was contacted by the State to testify at the trial in this case, he stated that he required a fee of $60,000 for his testimonial services. The State concluded that this sum of money was beyond its reach and made no further efforts to obtain his services. At trial, the State called Dr. Parsons, the Deputy Chief Medical Examiner for Lubbock County, to establish the cause and manner of Cristyan's death.

{4} Prior to Dr. Parsons being examined, the defense objected to any admission of the autopsy report into evidence based on the Confrontation Clause of the Sixth Amendment to the United States Constitution. The objection specifically asserted that the report was testimonial in nature and that Dr. Natarajan had not been shown to be unavailable as a witness. It is undisputed that the defense did not have an opportunity to cross-examine Dr. Natarajan. Defendant insisted that for the report and its contents to be admissible, its author, Dr. Natarajan, would be required to appear to testify about its contents. Defendant's specific objection was that any use of or reference to the report by Dr. Parsons would be improper because it "would [admit] otherwise . . . unpresentable [evidence by] just filtering it through an expert witness."

{5} Nonetheless, the district court admitted

the report and permitted Dr. Parsons to testify to its contents. Dr. Parsons confirmed that he was testifying for Dr. Natarajan. At the district attorney's request, Dr. Parsons read directly from the autopsy report when testifying about Cristyan's age and the circumstances leading up to his death. Dr. Parsons also testified to Dr. Natarajan's specific observations and notations made during the autopsy. In addition, a section of the admitted autopsy report, signed by five non-testifying pathologists, stated: "It is our opinion that Cristyan . . . died as a result of [c]losed [h]ead [i]njuries. . . . The manner of death is classified as a [h]omicide." The report identified one other person as having assisted in the autopsy and that person did not testify at trial. Subsequently, Defendant was convicted of child abuse resulting in death. He now appeals on the ground that his right to confrontation was violated.

II. DISCUSSION

{6} Defendant argues that the district court erroneously admitted the autopsy report and improperly allowed Dr. Parsons to testify to the substantive findings that Dr. Natarajan recorded in the report. Because admission of the autopsy report alone constituted prejudicial error mandating reversal, we need not address Defendant's argument regarding Dr. Parsons' testimony.

{7} The district court explicitly admitted the report as information of the type upon which medical examiners would typically rely in rendering their opinions. At trial, Defendant objected to the report's admission on the ground that Defendant had no opportunity to confront Dr. Natarajan. The State responded that, "if [Dr. Parsons] believes the information in the report is accurate, that should be able to be entered into evidence. And[,] of course, every expert's going to be looking at reports and things of that nature to render opinions." In making its ruling, the district court referred directly to its belief that *Crawford v. Washington*, 541 U.S. 36, 51 (2004), did not address the "expert witness section of the New Mexico [R]ules of [E]vidence [with regard to] an expert testifying from a prior report using [that] as a basis for his opinion." We therefore review the district court's admission of the report as pursuant to Rule 11-703 NMRA and consider whether the admission of the report was a violation of Defendant's rights under the Confrontation Clause.

A. Confrontation Clause Requirements

{8} "The Confrontation Clause guarantees the accused in a criminal trial the right to be confronted with the witnesses against him, regardless of how trustworthy the out-of-court statement may appear to be." *State v. Mendez*, 2010-NMSC-044, ¶ 28, 148 N.M. 761, 242 P.3d 328 (internal quotation marks and citation omitted). "As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness." *Bullcoming v. State*, 131 S. Ct. 2705, 2713 (2011). Thus, we now analyze whether (1) the statements in the autopsy report were testimonial, (2) Defendant had a prior opportunity to cross-examine the declarant, and (3) the declarant was unavailable. We first address whether the statements were testimonial because "only testimonial statements cause the declarant to be a witness within the meaning of the Confrontation Clause." *State v. Aragon*, 2010-NMSC-008, ¶ 6, 147 N.M. 474, 225 P.3d 1280 (internal quotation marks and citation omitted). "Questions of admissibility under the Confrontation Clause are questions of law, which we review de novo." *Id.*

1. The Autopsy Report in This Criminal Case was Testimonial

{9} The United States Supreme Court held in *Bullcoming* that "[a] document created solely for an evidentiary purpose, . . . made in aid of a police investigation, ranks as testimonial." 131 S. Ct. at 2713 (internal quotation marks and citation omitted); *Melendez-Diaz v. Mass.*, 129 S. Ct. 2527, 2531 (2009) (holding that a statement is testimonial if the declarant would reasonably expect the statements to be used prosecutorially). In *Aragon*, the New Mexico Supreme Court, adopting *Melendez-Diaz*, analyzed, in the context of reports of chemical analysis, what sort of forensic report might constitute a testimonial statement. *Aragon*, 2010-NMSC-008, ¶ 2. One factor the *Aragon* Court examined was the extent to which the person preparing the report exercised independent judgment and analysis. *Id.* ¶ 30. In this case, Dr. Natarajan's report containing his findings and conclusions resulting from Cristyan's autopsy included an exercise of judgment and analysis on his part, as he formed opinions based on his medical training and as he interpreted factual findings.

{10} Furthermore, the *Aragon* Court stated that a testimonial statement "is a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* ¶ 6 (internal quotation marks and citation omitted). In particular, *Aragon* considered whether the witness's "statements go to an issue of guilt or innocence." *Id.* ¶ 8. In this case, the autopsy report was made with the intention of the medical examiner to establish the cause and manner of Cristyan's death. The medical examiner's finding of homicide was critical to substantiate allegations that Defendant abused Cristyan and caused his death. Therefore, the autopsy report was prepared with the purpose of preserving evidence for criminal litigation. In this case, the face of the autopsy report itself states that an autopsy was requested because of "the circumstances" of Cristyan's death, being a severe brain injury of a sort commonly associated with trauma. By the time the medical examiner had determined the cause of death to be closed head injuries and the manner of death to be homicide, there was no doubt this would be used against someone in a criminal prosecution. NMSA 1978, Section 24-11-7 (1973) requires an autopsy with complete findings when a "medical investigator suspects a death was caused by a criminal act or omission or the cause of death is obscure[.]"

{11} Furthermore, Dr. Parsons testified that the report was prepared for use in litigation. There is no reason to suspect that a pathologist with considerable experience and knowledge of statutory duties to report suspicious deaths to law enforcement officers would not anticipate criminal litigation to result from his determination that the trauma-related death of a child was the result of homicide. The statements in the report were made to establish the facts related to Cristyan's cause of death; ruling the death a homicide reflects directly on the issue of a defendant's guilt or innocence. No question existed that the report would support and be used in a criminal prosecution.

{12} The State advanced a number of contentions in its briefing to support the autopsy report being considered to be outside of what is considered a testimonial statement, all of which are unavailing or predominantly based on law preceding *Melendez-Diaz*. In its supplemental brief, the State argues that *Melendez-Diaz* and *Aragon* do not address the issues in this case. First, the State argues that "[u]nlike [the] blood alcohol reports or chemical forensic reports, Texas medical examiners do not solely prepare autopsy

reports for use in future prosecutions [because the] reports are prepared pursuant to [a] duty imposed by law to investigate many deaths which are not the subject of criminal prosecution." *See* Tex. Code Crim. Proc. Ann. art. 49.25, § 6 (West 2003) (listing the instances where the medical examiner has a duty to investigate a death). The State insists that the autopsy was not performed at the request of law enforcement and was non-adversarial, relying on *Garcia v. State*, and was thus non-testimonial. 868 S.W.2d 337, 341-42 (Tex. Crim. App. 1993) (en banc). The State's use of Texas law is unavailing both in Texas and here in New Mexico.

{13} Texas courts have specifically rejected the State's argument that a medical examiner's statutory duty to conduct an inquest whenever there is an unexplained death renders the report non-testimonial. *See Wood v. State*, 299 S.W.3d 200, 210 (Tex. Crim. App. 2009) (holding that an autopsy report was testimonial when it was reasonable to assume that the pathologist "understood that the report containing her findings and opinions would be used prosecutorially"). More importantly, in New Mexico, any sudden, violent, or untimely death, the cause of which is unknown, must be reported to law enforcement. NMSA 1978, § 24-11-5 (1975). Medical examiners are obligated by statute to report their findings directly to the district attorney in all cases they have investigated. NMSA 1978, § 24-11-8 (1973). This forensic role is entirely in keeping with the medical examiner's purpose to "serve the criminal justice system as medical detectives by identifying and documenting pathologic findings in suspicious or violent deaths and testifying in courts as expert medical witnesses." *Strengthening Forensic Science in the United States: A Path Forward* 244 (Nat'l Research Council of the Nat'l Acads. 2009).

{14} Because Dr. Natarajan's report was prepared to document a homicide and intended for use in prosecution of a criminal case, we conclude that the purpose of the autopsy report was to provide prosecutorial evidence. Thus, we hold that the statements contained in the report were testimonial.

2. Defendant had No Opportunity to Cross-Examine Prior to Trial

{15} "A criminal defendant is guaranteed the right to an effective cross-examination." *Aragon*, 2010-NMSC-008, ¶ 25 (internal quotation marks and citation omitted). It is undisputed in this case that Defendant had no previous opportunity to cross-examine either the four other pathologists signing the summary statement in the report or Dr. Natarajan, who, himself, only testified at the grand jury hearing that resulted in Defendant's indictment. Dr. Natarajan's exercise of judgment in creating the report should be subject to cross-examination as to its basis in his training in, and the application of, forensic pathology. *See Bullcoming*, 131 S. Ct. at 2714 (stating that "representations, relating to past events and human actions[,] . . . are meet for cross-examination"). Cross-examination is the "crucible" in which the opinions of an expert, the basis for those opinions, and the methods producing them are tested. *Aragon*, 2010-NMSC-008, ¶ 32. Foreclosing on the opportunity to cross-examine could create an injury of constitutional magnitude. Even in scientific matters that are performed and documented frequently and routinely, cross-examination is necessary to explore the boundaries of the expert's qualifications and correct application of scientific techniques and methods. In matters where experts base their opinions on circumstance-dependent factors, this need is acute. *See* Randy Hanzlick, John C. Hunsaker III, & Gregory J. Davis, *A Guide for Manner of Death Classification* 4 (Nat'l

Assoc. of Med. Exam'rs, 1st ed. 2002) ("All [medical examiners] agree, however, on the fundamental premise that manner of death is circumstance-dependent, not autopsy-dependent.").

{16} Defendant's inability to cross-examine the declarant's testimonial statements is dispositive in this case. Where the government seeks to admit a testimonial out-of-court statement, it must establish that the defendant had a prior opportunity to cross-examine the declarant. *State v. Rivera*, 2008-NMSC-056, ¶ 18, 144 N.M. 836, 192 P.3d 1213. As Defendant had no prior opportunity to cross-examine the declarant, we need not concern ourselves with his availability as a trial witness. In the absence of the cross-examination requirement in satisfaction of the Confrontation Clause, we hold that admission of the autopsy report resulted in the violation of Defendant's right to confrontation.

B. The District Court Improperly Admitted the Autopsy Report Under Rule 11-703

{17} "We review the admission of evidence under an abuse of discretion standard and will not reverse in the absence of a clear abuse." *See State v. Sarracino*, 1998-NMSC-022, ¶ 20, 125 N.M. 511, 964 P.2d 72. When the district court exercises its discretion based on a misapprehension of the law, it abuses its discretion. *State v. Elinski*, 1997-NMCA-117, ¶ 8, 124 N.M. 261, 948 P.2d 1209. Here, the district court's misapprehension of the law regarding the admissibility of facts and data underlying Dr. Parsons' testimony is inextricable from the confrontation violation.

{18} Although we have held that the admission of the autopsy report violated Defendant's confrontation rights, we briefly address the State's argument that the district court properly admitted the report under Rule 11-703, which provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

{19} Our Supreme Court's opinion in *Aragon* disposes of this argument. First, the Court in *Aragon* stated that "[o]nce it has been established that the Confrontation Clause does not bar admission of the statement, the rules of evidence govern whether the statement is admissible." 2010-NMSC-008, ¶ 6. Thus, if the Confrontation Clause bars use of the statement, the rules of evidence cannot make it admissible and that ends the inquiry.

{20} Second, *Aragon* stated that an expert could testify about his or her own opinion based on the facts and data contained in a non-testifying expert's report, but only if the testifying expert "unequivocally testified that it was his opinion," not the opinion of the non-testifying witness, and if the testifying expert testified that the facts and data are the types relied upon by experts in the field. 2010-NMSC-008, ¶ 33. Consistent with this

analysis, had Dr. Parsons made it clear that he was stating his own independent opinions and that he relied on the facts contained in Dr. Natarajan's report because it contained the types of facts and data upon which medical examiners rely, then Dr. Parsons' testimony may have been admissible. However, Dr. Parsons did not testify to this effect and, thus, the narrow exception noted in *Aragon* is not applicable. Furthermore, even under such a narrow exception, the report itself and the facts contained in it would not be admissible absent further action by the court. *See* Rule 11-703 ("Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."); *see also Aragon*, 2010-NMSC-008, ¶ 23 (noting that reliance upon hearsay facts or data not in evidence "does not necessarily make the hearsay itself admissible"). Admission of the other five doctors' opinions contained in the report and Dr. Parsons' testimony concerning Dr. Natarajan's opinions are even more prejudicial, and the admission of other experts' opinions has in the past constituted reversible error. *O'Kelly*, 94 N.M. at 76, 607 P.2d at 614; *Aragon*, 2010-NMSC-008, ¶ 24.

{21} The district court in this case was operating under the misperception that the information contained in Dr. Natarajan's autopsy report, upon which Dr. Parsons relied, was admissible because Dr. Parsons relied on it. Whether the reliance was justifiable is of no importance. *Komis*, 114 N.M. at 666 n.4, 845 P.2d at 760 n.4. The district court's position was not supported by law and caused the erroneous admission of otherwise inadmissible hearsay evidence in the report, in particular, Dr. Natarajan's opinions and the opinions of other medical examiners based on their review of the autopsy. Admission of this information through Dr. Parsons' testimony was an abuse of discretion under Rule 11-703 and inadmissible because it violated Defendant's right to confrontation.

C. Erroneous Admission of the Report was not Harmless Error

{22} Admission of the report violated Defendant's constitutional right to confrontation. "When a constitutional trial error has been committed, the burden is on the [s]tate to demonstrate the error is harmless beyond a reasonable doubt. The central focus of this inquiry is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *State v. Romero*, 2006-NMCA-045, ¶ 70, 139 N.M. 386, 133 P.3d 842 (internal quotation marks and citations omitted). We may consider three factors to determine whether the error was harmless; no one factor is dispositive as we consider them together. *Aragon*, 2010-NMSC-008, ¶ 35. We evaluate whether there was "(1) substantial evidence to support the conviction without reference to the improperly admitted evidence; (2) such a disproportionate volume of permissible evidence that, in comparison, the amount of improper evidence will appear minuscule; and (3) no substantial conflicting evidence to discredit the [s]tate's testimony." *State v. Barr*, 2009-NMSC-024, ¶ 56, 146 N.M. 301, 210 P.3d 198 (footnote omitted).

{23} We do not reweigh the evidence in making this determination. *Id.* ¶ 57. "[H]armless error analysis does not center on whether, in spite of the error, the right result was reached. Rather, the focus is on whether the verdict was impacted by the error." *Aragon*, 2010-NMSC-008, ¶ 35 (internal quotation marks and citation omitted). "Weighing these factors, a court must decide

if it can conclude with the requisite level of certainty that an error did not contribute to the jury's verdict." *State v. Macias*, 2009-NMSC-028, ¶ 39, 146 N.M. 378, 210 P.3d 804. New Mexico appellate courts in the past have held that the admission of another expert's inadmissible evidence is reversible error. *Aragon*, 2010-NMSC-008, ¶ 24; *O'Kelly*, 94 N.M. at 77, 607 P.2d at 615; *Sewell v. Wilson*, 101 N.M. 486, 488-89, 684 P.2d 1151, 1153-54 (Ct. App. 1984).

{24} Here, the cause and manner of death as human caused, rather than accidental, was critical.. The testimony from the medical examiner regarding Cristyan's injuries and the cause of his death were the crux of the case. The wrongfully admitted report bolstered the credibility of this testimony with the unchallenged corroborative opinions of five non-testifying pathologists. The impact of Dr. Parsons' testimony is inseparable from the bolstering it received from the inadmissible original source of his information and the four other pathologists' signatures attesting to its conclusions. Thus, to remove all constitutionally offensive evidence as to the cause and manner of death, there would not be substantial evidence to convict Defendant. The testimony of Dr. Parsons was heavily intertwined with the report and was supported by it. Its impact cannot be regarded as minuscule. No other evidence could have proven that Cristyan's death was a homicide caused by Defendant's abuse. Furthermore, Dr. Parsons' statement to the jury that he was testifying for Dr. Natarajan, and the admission of the report and its included opinions provided the jury with an overwhelming quantity of unconfronted testimonial evidence that was improperly admitted. The report was the crux of the State's case, proving that Cristyan's death was a homicide.

{25} This constitutional violation rises to the level of harmful error because we cannot be certain that the wrongfully admitted evidence did not impact the verdict. Accordingly, we reverse Defendant's conviction and remand this matter for a new trial.

III. CONCLUSION

{26} In light of the court's improper admission of the autopsy report in violation of Defendant's confrontation right, we reverse the district court and remand for a new trial consistent with our holdings here.

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

RODERICK T. KENNEDY, Judge

WE CONCUR:

CELIA FOY CASTILLO, Chief Judge

CYNTHIA A. FRY, Judge

Certiorari Denied, February 13, 2012, No. 33,400

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-030

Filing Date: December 27, 2011

Docket No. 30,331

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

CANDACE S.,

Child-Appellant.

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for Appellee

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OPINION

FRY, Judge.

{1} Candace S., a minor at the relevant time, appeals the district court's denial of her motion to suppress the results of her field sobriety tests (FSTs) and breath alcohol tests. She argues that FSTs are searches that must be supported by a warrant, an exception to the warrant requirement, or voluntary consent. She further argues that the Children's Code required the officer investigating her traffic violation to advise her of her right to remain silent and her right to withhold consent to the FSTs and the breath tests. Because the officer did not so advise her, Candace maintains that her consent to the FSTs and breath tests was involuntary.

{2} We conclude that FSTs must be supported by reasonable suspicion, that there is no requirement for an officer to advise a minor of a right to withhold consent, and that failure to advise a minor of a right to remain silent does not render FSTs inadmissible. We therefore affirm the district court's denial of Candace's suppression motion.

BACKGROUND

{3} While on patrol in September 2009, Officer Brian Kinley observed a vehicle swerving across the white line on the roadway and traveling at least ten miles under the posted speed limit. He stopped the vehicle and made contact with Candace, who was driving the car. He asked Candace for her driver's license, and Candace said that she had left it at home. He told the occupants that he

smelled alcohol in the car, and a passenger said that she had been drinking. Officer Kinley asked Candace to step out of the car and noticed that Candace smelled of alcohol and that she was weaving as she walked away from the car. Officer Kinley asked Candace if she had been drinking, and she said that she had not. He asked her again after he administered an FST, and she said that she had had "one can."

{4} Officer Kinley administered additional FSTs, during which Candace swayed, stumbled, and failed to follow directions. Officer Kinley asked Candace if she wanted to take a portable breath test and, without waiting for an answer, instructed her how to provide a breath sample. The portable breath test yielded a result of .153. Officer Kinley estimated that the time from contacting Candace in her car to her arrest was about five minutes. He then transported Candace to the New Mexico State Police office, where he obtained two breath samples from the Intoxilyzer testing machine, which registered .14 and .16. Officer Kinley did not advise Candace of her right to remain silent prior to this time.

{5} The State filed a delinquency petition against Candace alleging that she drove while under the influence of intoxicating liquor (DWI), failed to maintain her traffic lane, and drove without a valid license. Candace's attorney filed a motion to suppress all statements made by Candace and the results of the FSTs and the breath tests. As grounds for the motion, Candace asserted that the New Mexico Constitution and NMSA 1978, Section 32A-2-14 (2009), of the Children's Code provide broad protections to children during police questioning and that, as a result, Candace's unwarned statements to Officer Kinley should be suppressed. In addition, Candace argued that the greater protections provided by Article II, Section 10 of the New Mexico Constitution and by *State v. Javier M.*, 2001-NMSC-030, 131 N.M. 1, 33 P.3d 1, compelled the suppression of the FSTs and breath tests because Candace's consent to the tests was not voluntary.

{6} In its response to the suppression motion, the State agreed that "any statements of [Candace] made in response to Officer Kinley's questioning should be suppressed." However, the State opposed suppression of the FST and breath test results. Following an evidentiary hearing, the district court suppressed all statements made by Candace, whether in response to Officer Kinley's questions or volunteered, but it further determined that the FST and Intoxilyzer breath test results were admissible. Candace entered a conditional plea admitting to the allegations in the delinquency petition while reserving her right to appeal the denial of her suppression motion. This appeal followed.

DISCUSSION

{7} Candace makes one overarching argument with several sub-parts. Her general argument is that the district court should have suppressed the FST and breath test results because Officer Kinley's failure to advise her of her right to remain silent and of her right to refuse the testing rendered her consent to the tests involuntary and invalid. In support of this argument, Candace further argues that: (1) FSTs violate the right against self-incrimination under Article II, Section 15 of the New Mexico Constitution; (2) FSTs constitute a search and, under Section 32A-2-14 and the holding of *Javier M.*, Candace should have been advised of her right to refuse consent before being asked to perform FSTs; and (3) Candace's consent to the breath tests was involuntary.

Standard of Review

{8} The same standard of review applies to all of Candace's arguments. "In reviewing an order of suppression, we defer to the district court's findings of fact that are supported by substantial evidence, and we review the district court's application of the law to the facts de novo." *State v. Randy J.*, 2011-NMCA-105, ¶ 10, 150 N.M. 683, 265 P.3d 734, *cert. denied*, 2011-NMCERT-009, 269 P.3d 903. In the present case, the facts are undisputed, so we review the district court's order to determine whether it was correct as a matter of law. *See id.* In addition, we review the district court's interpretation of Section 32A-2-14 de novo. *Id.*

Article II, Section 15 of the New Mexico Constitution and the Right Against Self-Incrimination

{9} Candace argues that the FSTs violated her right against self-incrimination, which is guaranteed by Article II, Section 15 of the New Mexico Constitution, and that Article II, Section 15 provides broader protections than the Fifth Amendment to the United States Constitution. We agree with the State that Candace failed to preserve this argument.

{10} Our Supreme Court recently clarified what is required in order to preserve an argument that the state constitution provides greater protection than the federal constitution in *State v. Leyva*, 2011-NMSC-009, ¶ 49, 149 N.M. 435, 250 P.3d 861. The Court stated:

> Where a state constitutional *provision* has previously been interpreted more expansively than its federal counterpart, trial counsel must develop the necessary factual base and raise the applicable constitutional *provision* in trial court. Where the provision has never before been addressed under our interstitial analysis, trial counsel additionally must argue that the state constitutional provision should provide greater protection, and suggest reasons as to why, for example, a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics.

Id. (internal quotation marks and citation omitted). In the present case, Candace acknowledges that Article II, Section 15 has never been addressed under our interstitial analysis because, as she notes, it "has been interpreted in lock step with the Fifth Amendment." Yet she failed in the district court to suggest reasons why the provision should be interpreted as providing greater protection than the federal constitution. Indeed, in the district court, the only mention of Article II, Section 15 was Candace's statement in her written suppression motion that she "relie[d] upon the New Mexico Constitution, Article 2 [sic], Sections 14, 15, and 18 . . . to support the proposition that children in New Mexico are provided broader and greater protections during police questioning than are provided to children . . . under the United States Constitution." She did not elaborate on this conclusory statement in either her written motion or her argument at the hearing on her motion.

{11} Even if Candace had properly preserved her argument, our decision in *Randy J.* disposes of her contentions. In that case, we concluded that a child's performance during FSTs is not a testimonial communication subject to suppression under the Fifth Amendment's privilege against self-incrimination or in accordance with the

protections provided by Section 32A-2-14(D) of the Children's Code. *Randy J.*, 2011-NMCA-105, ¶¶ 14, 17-18. Because our courts have never interpreted Article II, Section 15 differently from Fifth Amendment case law, the same holding would apply in the present case.

Prerequisite to Performance of FSTs

{12} Candace argues that FSTs are searches implicating constitutional protections and that they cannot be undertaken without establishing an exception to the warrant requirement or voluntary consent. Apparently assuming that there were no warrant exceptions established, Candace then contends that, consistent with Section 32A-2-14 and *Javier M.*, a child must be told that consent to FSTs may be withheld. She further maintains that because Officer Kinley did not tell her this, any consent she may have given was involuntary.

{13} We begin by considering Candace's argument that FSTs constitute a search with constitutional ramifications. Candace summarizes cases from other jurisdictions holding that FSTs constitute searches and notes that some of these jurisdictions require a showing of probable cause while some require only reasonable suspicion to justify FSTs. *See, e.g.*, *People v. Carlson*, 677 P.2d 310, 316-18 (Colo. 1984) (en banc) (holding that FSTs constitute searches that must be supported by probable cause); *Blasi v. State*, 893 A.2d 1152, 1164, 1168 (Md. Ct. Spec. App. 2006) (holding that FSTs constitute a search subject to a showing of reasonable suspicion). Other cases hold that FSTs constitute an expansion of an investigatory detention, rather than a search, and that they require the articulation of reasonable suspicion to justify the expansion. *See, e.g.*, *State v. Little*, 468 A.2d 615, 617-18 (Me. 1983) (determining that FSTs are part of an investigatory stop that must be based on reasonable suspicion); *State v. Gray*, 552 A.2d 1190, 1194-95 (Vt. 1988) (same).

{14} We need not decide whether FSTs constitute a search or an expansion of an investigatory detention. Regardless of how they are labeled, FSTs implicate constitutional protections under the Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution. Candace focuses on Article II, Section 10 and, as a result, we limit our analysis to that constitutional provision.

{15} Our Supreme Court's decision in *Leyva* provides the framework for our discussion. Although that case involved an officer's expansion of an investigatory detention with questioning unrelated to the initial traffic stop, the analysis is applicable to any search or seizure conducted in connection with any investigatory detention. 2011-NMSC-009, ¶¶ 4-5, 10. In *Leyva*, the Court reassessed its decision in *State v. Duran*, 2005-NMSC-034, 138 N.M. 414, 120 P.3d 836, and concluded that *Duran* no longer represented proper Fourth Amendment analysis in light of recent United States Supreme Court precedent. However, the Court further determined that the *Duran* analysis continues to be proper when a court assesses searches and seizures under Article II, Section 10. *Leyva*, 2011-NMSC-009, ¶¶ 2-3.

{16} *Duran* considered when an officer's questions about travel plans during a traffic stop are reasonable under the Fourth Amendment. *Leyva*, 2011-NMSC-009, ¶ 11. The *Duran* Court applied the two-part test first set out in *Terry v. Ohio*, 392 U.S. 1 (1968), for determining the propriety of a detention expansion. *Leyva*, 2011-NMSC-

009, ¶ 11. The *Terry* test considers "[(1)] whether the officer's action was justified at its inception, and [(2)] whether it was reasonably related in scope to the circumstances which justified the interference in the first place." 392 U.S. at 20.

{17} The Court in *Leyva* determined that the *Terry*-type test had been replaced in Fourth Amendment jurisprudence with a bright-line test holding that if the initial stop was lawful, officers may ask questions unrelated to the initial reason for the stop "so long as they do not measurably extend the length of the stop." *Leyva*, 2011-NMSC-009, ¶ 15 (internal quotation marks and citation omitted). However, in considering the propriety of a similar expansion of a traffic stop under the New Mexico Constitution, *Leyva* held that the two-part *Terry* test should still be utilized. *Leyva*, 2011-NMSC-009, ¶ 55 (stating that "*Duran*'s two-part analysis, adhering to the scope and duration requirements set forth in *Terry*, best protects the right against unreasonable searches and seizures under Article II, Section 10 of the New Mexico Constitution"). The Court concluded that "[t]he overall reasonableness of the stop continues to be determined [under the New Mexico Constitution] by balancing the public interest in the enforcement of traffic laws against an individual's right to liberty, privacy, and freedom from arbitrary police interference." *Leyva*, 2011-NMSC-009, ¶ 55 (internal quotation marks and citation omitted).

{18} Applying this analysis to FSTs, we hold that an officer may administer FSTs if the officer has developed independent reasonable suspicion that would support the extension of the traffic stop to conduct the FSTs. There is a "compelling public interest in eradicating DWI occurrences and the potentially deadly consequences" of that crime. *City of Santa Fe v. Martinez*, 2010-NMSC-033, ¶ 13, 148 N.M. 708, 242 P.3d 275. In accordance with *Leyva*, we must weigh this compelling interest against the intrusion of FSTs that assess the physical performance of a suspected drunk driver. In our estimation, such an intrusion is warranted if the investigating officer has reasonable, articulable facts upon which to base a suspicion that the driver in question may be impaired. *See State v. Williamson*, 2000-NMCA-068, ¶¶ 8, 9, 129 N.M. 387, 9 P.3d 70 (explaining that an officer may expand an investigatory detention related to a traffic stop if the officer "has a reasonable and articulable suspicion that the driver is impaired" and that the administration of FSTs may reasonably be a part of this investigation); *see also Randy J.*, 2011-NMCA-105, ¶¶ 33-34 (holding that, under Article II, Section 10, the officer had reasonable suspicion to expand a traffic stop into an investigation of the possibility that the minor driver had been driving while impaired).

{19} We find support for our determination in cases from other jurisdictions that have reached a similar conclusion. For example, in *State v. Superior Court*, 718 P.2d 171, 176 (Ariz. 1986) (in banc), the Arizona Supreme Court weighed the intrusion of FSTs against the public's interest in removing drunk drivers from the state's highways. Consistent with *Terry*, which involved an officer conducting a pat-down search based on reasonable suspicion that the suspect might be armed, *see* 392 U.S. at 6-7, the Arizona court concluded that "the threat to public safety posed by a person driving under the influence of alcohol is as great as the threat posed by a person illegally concealing a gun." *Superior Court*, 718 P.2d at 176. Similarly, the Vermont Supreme Court balanced the intrusion of FSTs against law enforcement interests and determined that the "minimal level of intrusion" of FSTs is "clearly

outweighed by the strong law enforcement interest in attempting to keep a suspected drunk driver off the roads." *Gray*, 552 A.2d at 1195; *see Little*, 468 A.2d at 617-18 (holding that FSTs may be conducted if they are supported by reasonable suspicion); *State v. Royer*, 753 N.W.2d 333, 340 (Neb. 2008) (same); *People v. Walter*, 872 N.E.2d 104, 114 (Ill. App. Ct. 2007) (same).

{20} Given our disposition of this issue, we reject one premise underlying Candace's argument—that administration of FSTs must be supported by a warrant, an exception to the warrant requirement, or valid consent. Instead, an officer may administer FSTs if the officer has reasonable suspicion that a driver was driving impaired. We turn now to Candace's argument that she was entitled to additional protections due to her status as a minor.

Application of Section 32A-2-14 to FSTs

{21} Candace relies on Section 32A-2-14 to argue that Officer Kinley was required to advise her of her right to remain silent and of her right to refuse consent to the FSTs. Because Officer Kinley did not give Candace these warnings, she maintains that the district court should have excluded the FST results from evidence.

{22} We begin our analysis with a review of the applicable provisions of Section 32A-2-14. In relevant part, that statute provides:

> A. A child subject to the provisions of the Delinquency Act is entitled to the same basic rights as an adult, except as otherwise provided in the Children's Code, including rights provided by the Delinquency Act, except as otherwise provided in the Children's Code [NMSA 1978, §§ 32A-1-1 to -21 (1993, as amended through 2009)].
>
> . . . .
>
> C. No person subject to the provisions of the Delinquency Act who is alleged or suspected of being a delinquent child shall be interrogated or questioned without first advising the child of the child's constitutional rights and securing a knowing, intelligent and voluntary waiver.
>
> D. Before any statement or confession may be introduced at a trial or hearing when a child is alleged to be a delinquent child, the state shall prove that the statement of confession offered in evidence was elicited only after a knowing, intelligent and voluntary waiver of the child's constitutional rights was obtained.

These provisions require that any child subject to an investigatory detention be advised of his or her "right to remain silent and that anything they say can be used against [the child]." *Javier M.*, 2001-NMSC-030, ¶ 41. In addition, under Section 32A-2-14(D), if a child is not so advised, "any statement or confession obtained as a result of the detention or seizure is inadmissible in any delinquency proceeding." *Javier M.*, 2001-NMSC-030, ¶ 1. The State does not dispute that Candace was subject to an investigatory detention when Officer Kinley stopped her car and that he failed to advise her of the rights specified in *Javier M.*

{23} Candace contends that, consistent with Section 32A-2-14 and *Javier M.*, any child subject to an investigatory detention

must also be advised that he or she has the right to deny consent to the performance of FSTs. She argues that a request to perform FSTs is a question like any other and, as a result, if a child is not advised of his or her right to decline the request and/or if the state fails to prove that the child's consent was voluntary, the results of the FSTs are inadmissible.

{24} Candace's argument boils down to the contention that the holding in *Javier M.* should be expanded. She maintains that, in addition to advising a child of the right to remain silent and of the fact that anything said can be used against the child, an officer detaining a child must also advise the child of the right to withhold consent to FSTs.

{25} Our Supreme Court's decision in *Javier M.* does not support Candace's contention. In that case, the Court interpreted Section 32A-2-14(C) as requiring that "children who are subject to investigatory detentions are statutorily entitled *only* to be warned of their right to remain silent and that anything they say can be used against them." *Javier M.*, 2001-NMSC-030, ¶ 41 (emphasis added). Thus, we do not read *Javier M.* as requiring any additional warnings to a child, such as a warning that the child need not consent to FSTs.

{26} In addition, the Court in *Javier M.* made it clear that Section 32A-2-14 "only protects against a child's *statements* which are made during an investigatory detention in response to a police officer's questioning." *Javier M.*, 2001-NMSC-030, ¶ 40 (emphasis added). It is also clear that a child's "lack of muscular coordination during the [FSTs] is not a statement subject to suppression under Section 32A-2-14(D)." *Randy J.*, 2011-NMCA-105, ¶ 18. Because Section 32A-2-14 was narrowly drawn to protect a child's statements and because a child's physical conduct in an FST is not a statement, it follows that Section 32A-2-14 does not require a police officer to advise a child that he or she may decline to perform FSTs. Indeed, it may well be a disservice to a child to advise him or her in this way because a refusal to perform FSTs may be admissible in evidence. *See State v. Wright*, 116 N.M. 832, 835-36, 867 P.2d 1214, 1217-18 (Ct. App. 1993) (holding that admission of evidence that the defendant refused to take an FST did not violate the right to be free of self-incrimination).

{27} Furthermore, the Court in *Javier M.* interpreted Section 32A-2-14 as a very narrowly drawn statutory protection. The Court noted that Subsection (C) of the statute "is an exception to Subsection (A)'s general recognition that children are entitled to the same basic rights as adults." *Javier M.*, 2001-NMSC-030, ¶ 32 (internal quotation marks and citation omitted). Thus, with the exception of this very limited statutory requirement to advise a child of the right to remain silent and of the consequences of waiving that right, a child's constitutional rights are the same as an adult's rights. *See id.* ¶ 42 (noting that "in enacting Section 32A-2-14(C), the Legislature is providing juveniles with a separate statutory right, not codifying a constitutional mandate"). Candace has not directed us to any authority holding that an adult must be advised that he or she need not consent to FSTs, and we conclude that there is no constitutional mandate requiring an officer to so inform either an adult or a child. *Cf. McKay v. Davis*, 99 N.M. 29, 31, 653 P.2d 860, 862 (1982) (explaining that "there is no constitutional right to refuse to take a chemical test" for the presence of alcohol). We therefore reject Candace's argument that the holding in *Javier M.* should be expanded to require a child to be advised that consent to

FSTs may be withheld.

Application of Holding to the Facts

{28} Having disposed of Candace's arguments with respect to the FSTs, we apply our determinations to the facts of this case. Officer Kinley had reasonable suspicion to administer FSTs to Candace because he observed her erratic driving, smelled the odor of alcohol on her person, and saw her sway as she walked to the back of her car. *See State v. Walters*, 1997-NMCA-013, ¶ 26, 123 N.M. 88, 934 P.2d 282 (stating that an officer had reasonable suspicion to investigate further when he detected the odor of alcohol). Officer Kinley had no obligation to advise Candace of a right to refuse FSTs in order to administer the FSTs. And, while Section 32A-2-14 required Officer Kinley to advise Candace of her right to remain silent and of the consequences of her waiver of that right, his failure to explain this to her did not render the FSTs inadmissible because her performance of the FSTs did not constitute statements subject to suppression. Therefore, we affirm the district court's denial of Candace's motion to suppress the results of the FSTs.

Admissibility of Breath Test Results

{29} Candace's final argument is that Officer Kinley had to advise her of her right to refuse the portable breath test. In support of this contention, she relies on the same authorities and logic she relied on in arguing that Officer Kinley was required to advise her of her right to withhold consent to the FSTs. For the same reasons that we rejected her argument with respect to the FSTs, we also reject her argument regarding the portable breath test.

{30} The district court stated that the results of the portable breath test would not be admissible. However, Candace argues that the Intoxilyzer breath tests taken at the police station after her arrest were "tainted by the earlier breath test which was a product of involuntary consent." We are not persuaded by this argument. Before Officer Kinley transported Candace to the police station for the Intoxilyzer breath tests, he had probable cause, even without the portable breath test, to arrest her for DWI in light of her performance on the FSTs, her erratic driving, and the odor of alcohol. *State v. Granillo-Macias*, 2008-NMCA-021, ¶ 12, 143 N.M. 455, 176 P.3d 1187 (holding that "the smell of alcohol emanating from [the d]efendant, [his] lack of balance at the vehicle, and the manner of [his] performance of the FSTs" constituted probable cause to arrest him for DWI). As a result, the Intoxilyzer breath test results obtained at the station were not rendered inadmissible by anything that preceded them.

CONCLUSION

{31} For the foregoing reasons, we affirm the district court's order denying Candace's motion to suppress the results of the FSTs and the Intoxilyzer breath tests.

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

CYNTHIA A. FRY, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

LINDA M. VANZI, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-031

Filing Date: February 7, 2012

Docket No. 30,123

CAROLYN MASCAREÑAS,

Plaintiff-Appellant,

v.

CITY OF ALBUQUERQUE and MIKE TORRES, Parking Division Director,

Defendants-Appellees.

Paul S. Livingston
Placitas, NM

for Appellant

French & Associates, P.C.
Paula I. Forney
Stephen G. French
Albuquerque, NM

for Appellees

OPINION

WECHSLER, Judge.

{1} After the City of Albuquerque's personnel board (the personnel board) determined that Defendant City of Albuquerque (the City) had just cause to terminate Plaintiff Carolyn Mascareñas, Plaintiff filed a single complaint in district court appealing the personnel board's decision and alleging constitutional, contract, and statutory claims against the City. Plaintiff appeals two district court orders in this case: (1) an order affirming the decision of the personnel board, determining that the City had just cause in terminating Plaintiff's employment with the City; and (2) an order dismissing Plaintiff's due process, breach of contract, and Family Medical Leave Act (FMLA) claims on the ground that the claims

or the factual predicates of the claims were litigated in the prior personnel board proceedings. In this appeal, Plaintiff argues that (1) the personnel board's decision was arbitrary, not in accordance with the law, and not supported by the facts, and (2) the district court erred by dismissing Plaintiff's due process, breach of contract, and FMLA claims on preclusion grounds. We hold that (1) because Plaintiff did not file a timely petition for writ of certiorari pursuant to Rule 12-505 NMRA, we lack jurisdiction to consider Plaintiff's appeal of the personnel board's decision; and (2) the district court did not err in concluding that res judicata barred Plaintiff's breach of contract claim, and collateral estoppel precluded litigating the factual predicates of Plaintiff's due process and FMLA claims. Accordingly, we affirm.

BACKGROUND

{2} The City employed Plaintiff for more than seventeen years. She worked as a clerk for the City's Parking Division of the Municipal Development Department (the Department), which was managed by Mike Torres beginning in late 2004. Shortly after he took over the Department and continuing through 2005, Torres inflicted "progressive discipline" upon Plaintiff.

{3} On January 3, 2005, Torres gave Plaintiff an "[o]fficial [v]erbal [w]arning" for late arrivals to work. Despite the verbal warning, Torres remained unsatisfied with Plaintiff, and Torres issued Plaintiff a pre-determination hearing notice on March 16, 2005, due to continued tardiness, abuse of her lunch hour, failing to call when arriving late or taking sick leave, and being late returning from appointments. After the hearing, the City issued Plaintiff a letter of reprimand on March 28, 2005, which was held in abeyance for three months. Plaintiff received another "verbal letter of reprimand" on June 10, 2005 for lunch break and work break abuse, patterns of absence on Mondays or Fridays, failure to begin work in a timely manner, and excessive personal use of the telephone. On August 2, 2005, Plaintiff's immediate supervisor, Shalene Andujo, gave Plaintiff another notice of pre-determination hearing for similar problems with tardiness; failure to call when arriving late or sick, to obtain permission to work through her lunch hour, to submit proper forms when taking leave, and to process four checks that were found in envelopes on her desk; and other work performance issues related to processing traffic citations and warrants. After a hearing, the City issued Plaintiff a three-day suspension and sent Plaintiff and Andujo to mediation, which resulted in Plaintiff agreeing to arrive at her job on time and complete her assigned tasks.

{4} On August 14, 2005, Plaintiff submitted an application for leave under the FMLA to care for her husband and children due to her husband's disability. The leave was intermittent leave that was to be taken whenever her husband's condition worsened and needed to be approved on an as-needed basis. On September 2, 2005, the City's human resources department notified Plaintiff that it approved the FMLA leave retroactive to August 14, 2005.

{5} Plaintiff did not take any of the intermittent FMLA leave until the afternoon of September 26, 2005. Earlier that day, Plaintiff was issued a notice of investigation, claiming that Plaintiff "was being investigated for matters associated with her work." Upon receiving the notice, Plaintiff became visibly upset and raised her voice in protest of the investigation. At roughly 2:00 p.m., Plaintiff left work after having placed a leave form on Andujo's desk without consulting her.

Plaintiff did not return to work on September 27, 2005. On September 28, 2005, she told Andujo during a telephone conversation that she was on FMLA leave for September 26-28, and Andujo informed Plaintiff that she needed a doctor's note regarding her husband's condition for the days she was absent from work.

{6} On September 28, 2005, Plaintiff was hand delivered, at her home, a notice of pre-determination hearing related to her work absence since September 26, 2005, her continued late arrivals to work, and her failure to call prior to her shift when she was late. Plaintiff did not appear for the hearing related to these charges scheduled for October 6, 2005, and the hearing was rescheduled for October 13, 2005. Plaintiff did not attend the rescheduled hearing, and it was held without her presence. At the conclusion of the hearing, the hearing officer recommended a fifteen-day suspension, which Plaintiff did not appeal to the personnel board.

{7} The human resources department sent Plaintiff a letter on October 10, 2005, requiring that Plaintiff submit, by October 11, 2005, medical information regarding her husband's condition in order to recertify her FMLA leave. Plaintiff did not provide any medical information to the human resources department.

{8} On October 21, 2005, Plaintiff was again given a notice of a pre-determination hearing set for October 29, 2005, concerning allegations that she was on unauthorized leave since September 26, 2005. Plaintiff presented a doctor's note at the hearing, stating that she should be excused from work on days her husband's condition flared up, but did not mention when or if his condition had recently flared up. The hearing resulted in Plaintiff receiving a fifteen-day suspension.

{9} The next day, on October 27, 2005, human resources director Pat Miller informed Plaintiff that her FMLA leave was cancelled due to a lack of medical documentation, retroactive to September 26, 2005. Plaintiff also received a hand-delivered letter on October 28, 2005, notifying her that her FMLA leave was cancelled and that she would be terminated if she did not report to work on October 31, 2005. After Plaintiff did not return to work on October 31, 2005, the Department Director, John Castillo, notified her that the City was terminating her employment.

{10} A post-termination hearing took place over a three-day period, in which Plaintiff argued that she was terminated without just cause. During the hearing, Plaintiff argued that she was a good and productive employee for seventeen years and that her problems with Torres and Andujo resulted from a longstanding grudge Torres had with Plaintiff's husband. Plaintiff also argued that the City failed to provide her with a performance evaluation and that her supervisors failed to refer the disciplinary actions taken against Plaintiff to the City's mediation coordinator, contrary to the City's merit system ordinance. *See* Albuquerque, N.M., Code of Ordinances, ch. 3, art. 1, §§ 3-1-1 to -28 (1978, as amended through 2010).

{11} The hearing officer concluded that the City did not give Plaintiff a performance evaluation, contrary to Section 3-1-9(C) of the merit system ordinance, and that the City failed to refer the disciplinary actions to the City's mediation coordinator, contrary to Section 3-1-23(C) of the merit system ordinance. However, the hearing officer concluded that both of these violations of the merit system ordinance by the City were harmless error. The hearing officer also found that Plaintiff failed to abide by the City's

personnel rules and regulations, that the City provided appropriate progressive discipline, and that Plaintiff did not provide valid documentation to support her FMLA leave. Further, the hearing officer determined that the City properly notified Plaintiff to return to work on October 31, 2005 or be considered to have quit her job, that Plaintiff failed to return to work, and she had testified that she "did not return to work because she chose not to." The hearing officer therefore concluded that just cause supported Plaintiff's termination. The personnel board upheld the recommendation of the hearing officer by a 3-1 vote.

{12} Plaintiff filed a complaint in district court on December 15, 2006, containing four claims. The first claim was a notice of appeal of the personnel board's decision (the administrative appeal), pursuant to Rule 1-074 NMRA and Section 3-1-25(F) of the merit system ordinance. Plaintiff subsequently filed a statement of appellate issues related to the administrative appeal, pursuant to Rule 1-074(K). The second, third, and fourth claims (the civil complaint) alleged that the City violated Plaintiff's due process rights; breached the implied employment contract consisting of the merit system ordinance, the City's personnel rules and regulations, and the collective bargaining agreement between the City and City employees; and abridged Plaintiff's rights under the FMLA.

{13} The City answered Plaintiff's complaint, filed a demand for a twelve-person jury for the civil complaint, and filed a response to Plaintiff's statement of appellate issues. Plaintiff subsequently filed a reply to the City's response. While the parties awaited the district court's decision on the administrative appeal, the district court erroneously dismissed the case for lack of prosecution on November 26, 2007. Plaintiff filed a motion to reinstate, informing the district court that the parties had fully briefed the administrative appeal and were awaiting the district court's decision. Additionally, Plaintiff argued that the civil complaint, outside of the administrative appeal, would be litigated once the district court decided the administrative appeal. The district court reinstated the case and on April 15, 2008, filed a memorandum opinion and order affirming the decision of the personnel board. The district court also "discarded" Plaintiff's civil complaint, stating that Plaintiff had not exhausted administrative remedies and that the same issues were covered by the administrative appeal.

{14} Plaintiff filed a motion for reconsideration on April 29, 2008, essentially arguing that the civil complaint and the administrative appeal raised separate issues. The City responded, arguing that the district court did not err under the law of the case doctrine. The district court reinstated the civil complaint on July 28, 2008, but it did not reinstate the administrative appeal. At a scheduling conference held on January 21, 2009, the district court set the case on its November 2-20, 2009 docket and set August 7, 2009 as the deadline for all dispositive motions.

{15} Represented by new counsel, on September 8, 2009, the City filed a motion for judgment of dismissal or, in the alternative, to vacate trial. The City's brief erroneously stated that the district court had not reinstated the civil complaint. In addition, the City argued that res judicata barred the breach of contract claim and that collateral estoppel or the law of the case doctrine precluded the due process and FMLA claims because the personnel board decided the factual predicates of each claim. After a hearing, the district court granted the City's motion and issued an order dismissing the civil complaint.

JURISDICTION OVER ADMINISTRATIVE APPEAL

{16} Plaintiff argues that the district court erred by affirming the decision of the personnel board in its memorandum opinion and order on April 15, 2008. In particular, Plaintiff claims that the personnel board's decision was arbitrary, not in accordance with the law, and not supported by facts because (1) the City failed to hold a pre-termination hearing on the termination charges, (2) the personnel board failed to consider favorable testimony, and (3) the City's actions regarding Plaintiff violated the FMLA and various City ordinances. The City, on the other hand, argues that this Court lacks jurisdiction to address the district court's order affirming the personnel board because Plaintiff did not file a petition for writ of certiorari pursuant to Rule 12-505. The City also asserts that because Plaintiff did not timely file a petition for writ of certiorari and therefore exhausted her ability to have the personnel board's decision reviewed, issue preclusion bars Plaintiff from challenging the factual findings of the district court's April 15, 2008 order affirming the personnel board.

{17} We first address the City's argument that this Court lacks jurisdiction over the administrative appeal. *See State ex rel. Dep't of Human Servs. v. Manfre*, 102 N.M. 241, 242, 693 P.2d 1273, 1274 (Ct. App. 1984) ("[W]e have a duty to determine whether [we have] jurisdiction of an appeal[.]"); *In re Doe, III*, 87 N.M. 170, 171, 531 P.2d 218, 219 (Ct. App. 1975) ("[L]ack of jurisdiction at any stage of the proceedings is a controlling consideration which must be resolved before going further[.]"). The City bases its argument on Plaintiff's failure to file a petition for writ of certiorari pursuant to Rule 12-505. Specifically, the City contends that Plaintiff impermissibly combined her appeal of the district court's order affirming the personnel board with the appeal of the order dismissing the civil complaint and that a writ of certiorari is "the only method for obtaining review by this Court" of the administrative appeal.

{18} As noted, Plaintiff brought the administrative appeal pursuant to Rule 1-074, which governs a district court's appellate jurisdiction over appeals from administrative decisions or orders when there is a statutory right of review. Once a district court sitting in its appellate capacity has rendered a final order or decision on a Rule 1-074 appeal, further review by this Court is governed by Rule 12-505. *See* Rule 12-505(A)(1) ("This rule governs review by the Court of Appeals of decisions of the district court . . . from administrative appeals pursuant to Rule 1-074[.]"). Rule 12-505(B) provides that a "party aggrieved by the final order of the district court . . . may seek review of the order by filing a petition for writ of certiorari with the Court of Appeals, which may exercise its discretion whether to grant the review." Rule 12-505(C) requires that the petition for writ of certiorari be filed within thirty days of the final action by the district court.

{19} Plaintiff did not file a petition for writ of certiorari for the administrative appeal after the dismissal of the entirety of the complaint. When the district court granted the City's motion for judgment of dismissal or to vacate trial and issued an order of dismissal on November 4, 2009, Plaintiff filed a notice of appeal pursuant to Rule 12-201(A)(2) NMRA on December 4, 2009, challenging the order of dismissal of the civil complaint. It was not apparent that Plaintiff intended to challenge the district court's order affirming the personnel board until Plaintiff filed her docketing statement on January 4, 2010, which included the appeal of the personnel

board's decision as one of her appellate issues. We therefore address (1) whether the inclusion of the administrative appeal in the docketing statement was sufficient in form to comply with Rule 12-505 as a non-conforming petition for writ of certiorari, and (2) if so, whether Plaintiff's non-conforming petition for writ of certiorari was timely under Rule 12-505(C) even though the docketing statement was not filed within the thirty-day period.

{20} This Court has recently addressed whether a timely notice of appeal and docketing statement are an adequate substitute for a petition for writ of certiorari. In *Wakeland v. New Mexico Department of Workforce Solutions*, 2012-NMCA-021, ¶13, 274 P.3d 766 (No. 31,031, filed Sept. 27, 2011), this Court determined that a notice of appeal alone is not an adequate substitution for a petition for writ of certiorari. *See also Roberson v. Bd. of Educ. of the City of Santa Fe*, 78 N.M. 297, 299-300, 430 P.2d 868, 870-71 (1967) (holding that a notice of appeal was an insufficient substitute for a petition for writ of certiorari). However, because "New Mexico courts have not been stringent about the form and content requirements of documents filed in an effort to seek appellate review," a docketing statement complying with the substantive requirements of Rule 12-208(D) NMRA is an adequate substitute for a petition for writ of certiorari. *Wakeland*, 2012-NMCA-021 ¶¶7, 16; *see also Audette v. City of Truth or Consequences*, 2012-NMCA-011, ¶ 5, 270 P.3d 1273 (No. 30,988, filed Sept. 27, 2011) ("[A] docketing statement that substantially complies with the content requirements for a petition for writ of certiorari will be accepted as a petition despite the fact that its form and content do not precisely comply with the requirements of Rule 12-505.").

{21} However, in *Wakeland*, we held that a non-conforming petition for a writ of certiorari, such as a docketing statement, must be filed within thirty days after the order to be reviewed, as required by Rule 12-505(C). *Wakeland*, 2012-NMCA-021, ¶18. We noted that parties seeking to substitute a docketing statement for a petition for writ of certiorari will often not meet the thirty-day time requirement due to the procedural differences governing appeal as of right and the rules governing discretionary review. *Id.*; *see* Rule 12-201(A)(2) (requiring the notice of appeal be filed within thirty days of the judgment or order appealed from); Rule12-208(B) (requiring that the docketing statement be filed within thirty days of the notice of appeal). We stated that, because "the time requirement for filing a petition for writ of certiorari is a mandatory precondition to the exercise of an appellate court's jurisdiction to review a petition on its merits[,]" a petitioner must file the docketing statement within thirty days in order to be considered as a timely non-conforming petition for writ of certiorari. *Wakeland*, 2012-NMCA-021, ¶ 18.

{22} Applying *Wakeland* and *Audette*, we construe Plaintiff's docketing statement as a non-conforming petition for writ of certiorari. However, Plaintiff filed her docketing statement on January 4, 2010, which was sixty days after the district court entered its order dismissing the complaint. Therefore, although we accept her docketing statement as a non-conforming petition for writ of certiorari, it was untimely under Rule 12-505(C).

{23} When a petition for writ of certiorari is untimely, this Court will not excuse untimely filing "absent a showing of the kind of unusual circumstances that would justify an untimely petition." *Wakeland*, 2012-NMCA-021, ¶20. Our Supreme Court has stated that unusual circumstances justifying the untimely

filing of a petition for writ of certiorari exist when (1) there is error on the part of the court, or (2) "when the filing is not very late, and there are other unusual circumstances that were not caused by the court system but that were not within the control of the party seeking appellate review." *Id.*

{24} Plaintiff does not argue, nor do we conclude, that unusual circumstances justify the untimely filing of the docketing statement. Plaintiff filed the docketing statement thirty days after the thirty-day period prescribed by Rule 12-505(C), and there is no claim of error on the part of the district court. The only apparent reason that Plaintiff did not file a petition for writ of certiorari for the administrative appeal after the dismissal of the complaint was because she believed that it was procedurally valid to include the administrative appeal in the notice of appeal and docketing statement for the civil complaint. However, the procedures governing this Court's review of appeals from the personnel board pursuant to Rule 1-074 are well established. *See* Rule 12-505(A)(1) (stating that Rule 12-505 governs district court decisions addressing administrative appeals pursuant to Rule 1-074); *City of Albuquerque v. AFSCME Council 18 ex rel. Puccini*, 2011-NMCA-021, ¶ 7, 149 N.M 379, 249 P.3d 510 (addressing the merits of an appeal from the personnel board after noting that this Court granted a petition for writ of certiorari pursuant to Rule 12-505). Further, this Court has stated that "[s]imply being confused or uncertain about the appropriate procedure for seeking review is not the sort of unusual circumstance beyond the control of a party that will justify an untimely filing." *Wakeland*, 2012-NMCA-021, ¶ 25. This Court lacks jurisdiction to address the merits of Plaintiff's administrative appeal because the appeal was untimely and unusual circumstances do not justify the untimeliness.

PRECLUSION OF CIVIL COMPLAINT

{25} Plaintiff next argues that the district court erred in dismissing the civil complaint because she was required to file the civil complaint in the same action as her administrative appeal and res judicata does not bar litigation of the FMLA, breach of contract, and due process claims. The City responds by arguing that the factual predicates of each claim were litigated before the personnel board and therefore collateral estoppel, or issue preclusion, not res judicata, bars re-litigation of those facts, and that, as a result, there are no issues of material fact to support the claims.

{26} Plaintiff supports her argument that she was required to file the civil complaint in the same action as the administrative appeal and that res judicata does not apply by citing *Chavez v. City of Albuquerque*, 1998-NMCA-004, 124 N.M. 479, 952 P.2d 474, *Strickland v. City of Albuquerque*, 130 F.3d 1408 (10th Cir. 1997), and *Mares v. City of Albuquerque*, 173 F.3d 864 (table), No. 98-2118, 1999 WL 224866 (10th Cir. April 19, 1999). We begin by discussing these cases.

{27} In *Chavez*, 1998-NMCA-004, ¶2, the plaintiff filed a complaint in district court alleging breach of contract, denial of his right to privacy, violations of his right to be free from unreasonable searches and seizures, violations of his rights under the Open Meetings Act, NMSA 1978, §§ 10-15-1 to -4 (1974, as amended through 2009), and violations of both his procedural and substantive due process rights following termination for failing a drug test. The district court granted summary judgment in favor of the city based on res judicata, reasoning that the plaintiff did not and should have raised the claims in his previous grievance before the personnel board. *Chavez*, 1998-NMCA-004,

¶ 3. This Court reversed on all claims, except for the breach of contract claim, holding that, because the city's grievance process was limited to matters within the purview of the merit system ordinance and the city's personnel rules and regulations, the personnel board did not have jurisdiction over the plaintiff's constitutional or statutory claims. *Id.* ¶¶ 8, 12. As a result, the district court erred by applying res judicata to the constitutional and statutory claims. *Id.* ¶ 29. However, this Court affirmed the district court's determination that the plaintiff could have and should have raised his contract claims during the administrative proceeding before the personnel board. *Id.* ¶ 28.

{28} In *Strickland*, 130 F.3d at 1410, the plaintiff filed a grievance after the city terminated his employment for failing a drug test. The city's personnel board held that just cause supported the termination, and both the district court and this Court affirmed the personnel board's decision. *Id.* While the personnel board appeal was pending in district court, the plaintiff filed a complaint in federal court asserting fourth amendment and procedural due process violations and various state claims. *Id.* After the state district court affirmed the personnel board, the federal court granted summary judgment based on res judicata. *Id.* Applying New Mexico preclusion law, the Tenth Circuit affirmed, holding that regardless of whether the personnel board had jurisdiction over the claims, the plaintiff was required to bring them in state district court during his appeal of the personnel board's decision. *Id.* at 1411-13. Similarly, *Mares*, 1999 WL 224866 at *4, relied on *Chavez* and *Strickland* in holding that res judicata precluded the plaintiff from asserting constitutional claims in federal court because he should have asserted the claims in a state district court action appealing a decision of the personnel board.

{29} We first determine that the district court did not err in holding that *Chavez*, 1998-NMCA-004, ¶ 28, precluded the breach of implied contract claim. Plaintiff based her breach of contract claim solely on the merit system ordinance, the City's personnel rules and regulations, and the collective bargaining agreement governing employment with the City. The personnel board had jurisdiction over this claim, and res judicata prevented Plaintiff from raising the claim in the civil complaint. *See id.* ¶¶ 5, 28.

{30} However, regarding the FMLA and due process claims in the civil complaint, we agree with Plaintiff that *Chavez*, *Strickland*, and *Mares* stand for the proposition that res judicata does not bar litigation of Plaintiff's civil complaint based on the district court's order affirming the personnel board. Further, *Strickland* and *Mares* seem to support Plaintiff's argument that res judicata required that Plaintiff file the administrative appeal and civil complaint in the same action, although we note that our state appellate courts have not decided that issue. However, the district court held that collateral estoppel, not res judicata, precluded Plaintiff's FMLA and due process claims. The two doctrines are distinct. As this Court has stated,

> [t]he doctrines of res judicata and collateral estoppel by judgment involve different and distinct principles. Res judicata in its proper application operates where there are identical parties, causes of action, subject matter, and capacities in the two cases; collateral estoppel by judgment arises where the causes of action are different but some ultimate facts or issues may necessarily have been decided in the previous case. Stated another way, where the causes of action in the cases are identical in

> all respects, the first judgment is a conclusive bar upon the parties and their privies as to every issue which either was or properly could have been litigated in the previous case. But absent the identity of causes of action, the parties are precluded from relitigating only those ultimate issues and facts shown to have been actually and necessarily determined in the previous litigation.

C & H Constr. & Paving Co. v. Citizens Bank, 93 N.M. 150, 160, 597 P.2d 1190, 1200 (Ct. App. 1979) (internal quotation marks and citation omitted). We therefore must determine whether the district court erred in applying collateral estoppel to the personnel board's decision.

{31} "The doctrine of collateral estoppel fosters judicial economy by preventing the relitigation of ultimate facts or issues actually and necessarily decided in a prior suit." *Shovelin v. Cent. N.M. Elec. Coop., Inc.*, 115 N.M. 293, 297, 850 P.2d 996, 1000 (1993) (internal quotation marks and citation omitted). Our Supreme Court has acknowledged that collateral estoppel applies to issues resolved in an administrative agency adjudicative decision to a later civil trial when rendered under conditions in which the parties have the opportunity to fully and fairly litigate the issue at the administrative hearing. *Id.* at 298, 850 P.2d at 1001. For collateral estoppel to preclusively effect litigation, the moving party must show that "(1) the party to be estopped was a party to the prior proceeding, (2) the cause of action in the case presently before the court is different from the cause of action in the prior adjudication, (3) the issue was actually litigated in the prior adjudication, and (4) the issue was necessarily determined in the prior litigation." *Id.* at 297, 850 P.2d at 1000. Once the moving party has produced sufficient evidence to meet all four elements, the district court must determine whether the party to be estopped had a full and fair opportunity to litigate the issue in the prior litigation. *Id.*

{32} In her due process claim, Plaintiff alleged that the City failed to hold a pre-termination hearing, pursuant to her rights under the merit system ordinance, that the ultimatum to return to work was a pretext that she voluntarily left her job, and that the post-termination hearing was unlawful because the hearing officer refused to consider evidence favorable to Plaintiff. The personnel board found, and the district court affirmed, factual findings that negate these allegations. Both the personnel board and the district court found that an adequate pre-termination hearing took place on October 26, 2005, which resulted in Plaintiff being informed to report to work on October 31, 2005, or face termination. Further, the district court found that there was no indication that the hearing officer did not consider all the evidence presented.

{33} With regard to Plaintiff's FMLA claim, Plaintiff alleged that she was entitled to FMLA leave to care for her husband and children due to her husband's physical disability. *See* 29 U.S.C.A. § 2612(a)(1)(C) (2009) (providing that eligible employees are entitled to twelve workweeks of leave per twelve-month period to care for a spouse or child that has a serious medical condition). Plaintiff further claimed that she properly certified the FMLA leave to which she was entitled, pursuant to 29 U.S.C.A. Section 2613(a) (2009), that the City's demand for recertification was unreasonable, and that the City violated 29 C.F.R. Section 825.110(d) (2011) by retroactively denying Plaintiff's

FMLA leave. Again, the personnel board found, and the district court affirmed, factual findings that negate these allegations. The personnel board found that Plaintiff provided no valid documentation to support taking intermittent FMLA leave to support her absence from work from September 26, 2005 through October 31, 2005. The district court elaborated that the City was well within its rights to require Plaintiff to recertify her FMLA after taking her first day of leave on September 26, 2005, because of the unusual circumstances regarding her departure on that day and that, because she failed to properly recertify the leave after September 26, 2005, there was no retroactive denial of Plaintiff's FMLA leave.

{34} The City has made a prima facie showing that collateral estoppel applies to these findings. First, Plaintiff and the City were identical parties to the hearing before the personnel board. Second, the cause of action in the personnel board hearing was different from the due process and FMLA causes of action in this case. *See Chavez*, 1998-NMCA-004, ¶ 12 (stating that the personnel board has limited authority to administer the merit system ordinance and that it has no authority to decide constitutional or statutory claims). Third, as the findings of the personnel board indicate, the issues of whether there was an adequate pre-termination hearing, whether Plaintiff voluntarily left her job, whether Plaintiff properly applied for and certified FMLA leave, and whether the FMLA leave was retroactively rescinded were actually litigated in the personnel board hearing. Fourth, the issues were necessarily decided in the personnel board hearing. The personnel board decided the issue of whether the City had just cause under the merit system ordinance to terminate Plaintiff's employment. The personnel board considered whether the City granted Plaintiff's FMLA leave and subsequently retroactively rescinded it, because it was necessary to consider the issue of whether Plaintiff voluntarily abandoned her employment. Further, because the merit system ordinance requires a pre-termination hearing, the personnel board must have determined that the City held a proper pre-termination hearing in finding that the City provided appropriate discipline to Plaintiff.

{35} Turning now to the question of whether the parties had a full and fair opportunity to litigate, we employ the two-part inquiry described in *Rex, Inc. v. Manufactured Housing Committee*, 119 N.M. 500, 505, 892 P.2d 947, 952 (1995). First, we examine "whether the non-movant had . . . incentive to vigorously litigate the prior action." *Id.* In this case, because the issue addressed in the personnel board hearing was whether the City had just cause to terminate Plaintiff's employment, we cannot say that she did not have the incentive to vigorously litigate. *See Larsen v. Farmington Mun. Sch.*, 2010-NMCA-094, ¶ 12, 148 N.M. 926, 242 P.3d 493 (holding that the plaintiff had a full and fair opportunity to litigate in an arbitration proceeding challenging his termination from employment); *cf. Reeves v. Wimberly*, 107 N.M. 231, 235, 755 P.2d 75, 79 (Ct. App. 1988) (holding that the plaintiff had "ample opportunity and incentive" to fully litigate when the issue at stake was the only issue in the prior case).

{36} The second part of our inquiry is "whether procedural differences between the two actions, such as representation by counsel, presentation of evidence, questioning of witnesses, and appellate review, would make preclusion unfair, and whether policy considerations exist to deny any preclusive effect. *Rex, Inc.*, 119 N.M. at 505, 892 P.2d at 952. During the personnel board hearing, both parties were entitled to be and were

represented by counsel. The hearing took place over a three-day period, and the parties submitted written briefs at the close of the hearing. Both parties submitted exhibits and presented witness testimony, and the hearing officer was entitled to subpoena witnesses and compel production of relevant documents. *See* Albuquerque, N.M., Code of Ordinances § 3-1-25(H). Further, the merit system ordinance requires that the hearing officer be an attorney licensed to practice in New Mexico or experienced in employee relations or personnel administration. *See id.* § 3-1-26(C). The hearing officer must issue factual findings and conclusions of law, and the decision is approved or rejected by a vote of the entire personnel board. *See id.* § 3-1-25(C), (E). The plaintiff is then entitled to an appeal as a matter of right in district court. *See id.* § 3-1-25(F). Considering the procedures, it would not be unfair to apply collateral estoppel to a personnel board's decision. *See Larsen*, 2010-NMCA-094, ¶¶ 10-12 (upholding district court's application of collateral estoppel when the plaintiff presented evidence, cross-examined witnesses, testified on his own behalf, and was represented by counsel); *cf. Shovelin*, 115 N.M. at 301, 850 P.2d at 1004 (holding that this factor weighs against application of collateral estoppel in an unemployment case because the hearing was two-and-one-half hours, provided minimal time for discovery, and was conducted by telephone). The district court did not err in applying collateral estoppel in dismissing Plaintiff's civil complaint based on the factual determinations made by the personnel board.

CONCLUSION

{37} We hold that (1) because Plaintiff did not file a timely writ of certiorari pursuant to Rule 12-505, this Court lacks jurisdiction to consider Plaintiff's appeal of the personnel board's decision; and (2) the district court did not err in concluding that res judicata barred Plaintiff's breach of contract claim, and collateral estoppel precluded litigating the factual predicates of Plaintiff's due process and FMLA claims. Accordingly, we affirm.

{38} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

RODERICK T. KENNEDY, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMSC-005

Filing Date: February 16, 2012

Docket No. 33,074

NEW ENERGY ECONOMY, INC.,

Petitioner,

v.

HON. LINDA M. VANZI,
New Mexico Court of Appeals Judge,

Respondent,

and

PUBLIC SERVICE COMPANY OF NEW MEXICO and NEW MEXICO ENVIRONMENTAL IMPROVEMENT

BOARD,

Real Parties in Interest.

Consolidated with:

Docket No. 33,091

AMIGOS BRAVOS, LEAGUE OF WOMEN VOTERS OF NEW MEXICO, and CENTER OF SOUTHWEST CULTURE,

Petitioners,

v.

HON. LINDA M. VANZI,
New Mexico Court of Appeals Judge,

Respondent,

and

PUBLIC SERVICE COMPANY OF NEW MEXICO and NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD,

Real Parties in Interest.

Consolidated with:

Docket No. 33,102

AMIGOS BRAVOS, NEW MEXICO BACKCOUNTRY HUNTERS AND ANGLERS, NEW MEXICO TROUT, NEW MEXICO WILDLIFE FEDERATION, and WILDEARTH GUARDIANS,

Petitioners,

v.

HON. LINDA M. VANZI,
New Mexico Court of Appeals Judge,

Respondent,

and

NEW MEXICO CATTLE GROWERS ASSOCIATION, NEW MEXICO WATER QUALITY CONTROL COMMISSION, NEW MEXICO ENVIRONMENT DEPARTMENT, NEW MEXICO ENERGY, MINERALS, AND NATURAL RESOURCES DEPARTMENT, and NEW MEXICO GAME AND FISH DEPARTMENT,

Real Parties in Interest.

Consolidated with:

Docket No. 33,116

MESQUITE COMMUNITY ACTION COMMITTEE,

Petitioner,

v.

HON. MICHAEL E. VIGIL,
New Mexico Court of Appeals Judge,

Respondent,

and

HELENA CHEMICAL COMPANY, INC., NEW MEXICO ENVIRONMENT DEPARTMENT, and ENVIRONMENTAL IMPROVEMENT BOARD,

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OPINION

BOSSON, Justice.

{1} What level of participation in an administrative rule-making proceeding gives a participant the right to defend that new rule in an appellate court during a subsequent appeal? This Opinion answers that question based on the significance of participation in administrative proceedings by the four Petitioners in this case. The Court of Appeals denied appellee status to all four Petitioners, and the Petitioners requested that this Court issue writs of superintending control to overturn those rulings. We consolidated the four petitions and, after hearing oral arguments, issued the writs requested by three of the Petitioners while rejecting the fourth. We issue this Opinion to explain our reasoning in more detail.

BACKGROUND

{2} Each of the four petitions for writs of superintending control stems from an appeal of a decision made by one of two administrative agencies, the New Mexico Environmental Improvement Board (EIB) or the New Mexico Water Quality Control Commission (WQCC). We first address the three petitions we granted that were filed by (1) New Energy Economy (NEE); (2) Amigos Bravos, League of Women Voters of New Mexico, and Center of Southwest Culture (collectively "the Amigos Bravos Groups"); and (3) Amigos Bravos, New Mexico Backcountry Hunters and Anglers, New Mexico Trout, New Mexico Wildlife Federation, and WildEarth Guardians (collectively "the River Parties"). Those petitions arise from two appeals of administrative rule makings: one appeal challenging rules adopted by EIB and the other challenging rules adopted by WQCC.[1]

[1] We use the term "rule" to mean any administrative rule, regulation, or standard. The statutes and administrative guidelines pertinent to this Opinion use the terms interchangeably. *Compare* NMSA 1978, § 74-1-5 (1997) ("The board shall promulgate all *regulations* applying to persons and entities outside of the [New Mexico Environment Department]." (Emphasis added.)), *with* NMSA 1978, § 74-1-8(A) (2000) ("[T]he board shall promulgate *rules and standards*" governing food safety, water supply, etc. (Emphasis added.)); *see also* 20.1.1.7(O) NMAC (8/27/2006) ("'regulation' means any

We then address, at the end of the Opinion, the fourth petition filed by Mesquite Community Action Committee (MCAC), which we denied.

Petitions Relating to the Appeal of a Rule Adopted by EIB

{3} Several years ago, NEE petitioned EIB to adopt a new rule, now known as "Rule 100" or the "Greenhouse Gas Reduction Program." EIB decided to hold a hearing on the proposal. In support of its petition, NEE asserts that it submitted over one hundred hours of sworn expert testimony and volumes of exhibits during the hearings. The Amigos Bravos Groups also assert that they supported Rule 100 by submitting technical testimony.

{4} Many others also participated in the Rule 100 hearings. NEE reports that nearly one hundred participants that were considered "parties" by EIB, including NEE and the Amigos Bravos Groups, took part in the Rule 100 hearings. In addition, according to NEE, "hundreds" of nonparty members of the public participated. EIB adopted Rule 100 in December 2010.

{5} Soon after EIB adopted Rule 100, Public Service Company of New Mexico (PNM), one of the many "parties" to the Rule 100 proceedings, appealed Rule 100 to the Court of Appeals. Six additional parties filed separate appeals challenging EIB's adoption of Rule 100. While PNM sent notice of its appeal to NEE and the Amigos Bravos Groups, neither PNM nor any other appellant named NEE or the Amigos Bravos Groups as parties to the appeal. The appellants named EIB as the sole respondent.

{6} Asserting that the appeal "may be affected by actions of the new administration or the 2011 legislative session," PNM filed a motion with the Court of Appeals to extend the time to file its docketing statement. PNM further asserted that "Governor Martinez has indicated that she does not support [Rule] 100 and is actively considering avenues to secure the repeal or otherwise prevent the implementation of that rule and other related rules . . . ." The Court of Appeals granted an extension until May 25, 2011.

{7} In April 2011, NEE and the Amigos Bravos Groups sought to intervene as a party to PNM's appeal. While the motions to intervene were pending, PNM requested that the Court of Appeals refer its appeal to mediation, a request apparently unopposed by EIB. The Court of Appeals ordered mediation between EIB and PNM and denied NEE and the Amigos Bravos Groups motions to intervene in the appeal.

{8} PNM and the other six appellants took part in the mediation with EIB but without NEE or the Amigos Bravos Groups. Thus, appellate mediation over the future of Rule 100 took place without the parties who had prevailed below. The mediation included only the seven parties who opposed Rule 100 and the newly appointed EIB, now composed of members appointed by the new governor who publically declared her opposition to Rule 100. *See* NMSA 1978, § 74-1-4(A) (2001) (The governor appoints EIB members.).

{9} After the mediation began, PNM and EIB jointly requested that the Court of Appeals "temporarily remand" the pending appeal to EIB, apparently because EIB and the seven appellants had agreed that the appeal could be resolved through further EIB proceedings. The Court of Appeals agreed, remanding all seven appeals to EIB for 180 days.

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rule, regulation or standard promulgated by the board").

{10} On remand, EIB did not reopen the original administrative hearing on Rule 100. Rather, PNM and the six other appellants filed a new petition with EIB, essentially taking the role of petitioners in a new rule-making proceeding that would rescind or amend Rule 100. In the absence of an appellate rule addressing a rule-making "remand," we consider the Court of Appeals' action to be more an abatement of PNM's appeal while Rule 100 is under consideration, a sound exercise of appellate discretion in the interest of efficiency. Nonetheless, NEE and the Amigos Bravos Groups ask this Court to order the Court of Appeals to grant them intervention as parties to the appeal.

Petition Relating to Appeal of Several Rules Adopted by WQCC

{11} In an unrelated matter, the River Parties participated in an administrative proceeding before WQCC that resulted in WQCC adopting certain federal water quality designations, revised water quality management standards, and policy documents (collectively "the Water Rules"). The New Mexico Environment Department (NMED), the Department of Game and Fish, and the Energy, Minerals and Natural Resources Department requested the Water Rules. Although the River Parties did not initiate the administrative process, they assert that they supported the Water Rules by giving written and oral testimony, including technical testimony, and making legal and closing arguments.

{12} WQCC adopted the Water Rules on December 14, 2010. On January 14, 2011, the New Mexico Cattle Growers Association appealed the Water Rules to the Court of Appeals, listing WQCC and the petitioners below (NMED, the New Mexico Department of Game and Fish, and the New Mexico Energy, Minerals and Natural Resources Department) as parties to the appeal. The River Parties, despite their apparent extensive participation below, were not named parties to the appeal. Thereafter, the River Parties filed an *unopposed* motion to intervene in the Cattle Growers Association's appeal. As with the motions to intervene filed by NEE and the Amigos Bravos Groups, the Court of Appeals denied the River Parties' motion. The River Parties now ask this Court to order the Court of Appeals to grant them intervention as parties to the Cattle Growers Association's appeal.

Legal Background: EIB and WQCC Rule-Making Proceedings

{13} Our ultimate conclusion in this Opinion hinges upon the roles assumed by Petitioners in their respective administrative proceedings below. Thus, before we begin our legal analysis, we make clear what we mean in stating that NEE was the "petitioner" for Rule 100, that the Amigos Bravos Groups and the River Parties submitted "technical testimony," and that all three Petitioners were "parties" during the rule-making proceedings. In addition, it is helpful to have a general understanding of the laws governing the administrative rule-making process.

{14} Statutes and rules governing EIB's and WQCC's rule-making processes are strikingly similar. In order to adopt a new rule, or amend or repeal an old rule, EIB and WQCC must hold a public hearing. *See* NMSA1978, § 74-1-9(B) (1985); NMSA 1978, § 74-6-6(A) (1993). In order to initiate the public hearing, someone must file a petition proposing a new rule, an amendment to a rule, or a repeal of a rule. *See* § 74-1-9(A), (B); § 74-6-6(B). Thus, for example, EIB may not have held a hearing on Rule 100 if NEE had not proposed that rule. As the

petitioner, NEE caused the rule-making process to begin and fulfilled a role that is central to rule formulation.

{15} When a rule is proposed, EIB and WQCC have discretion on whether to hold a hearing on the proposal. *See* § 74-1-9(A); § 74-6-6(B). This discretion is significant because EIB could have decided not to hear NEE's proposed Rule 100 for any reason. *See* § 74-1-9(A); § 74-6-6(B).

{16} Rule-making hearings are intended to be inclusive, encouraging broad public participation. EIB and WQCC must give "all interested persons reasonable opportunity to submit data, proposed changes to the proposed regulation, views or arguments orally or in writing and to examine witnesses testifying at the hearing." Section 74-1-9(E); § 74-6-6(D). EIB has promulgated rules on rule making to provide the statutorily required "reasonable opportunity" for participation. *See* 20.1.1.400 NMAC (8/27/2006). *See generally* 20.1.1.7 NMAC. While WQCC has not adopted administrative rules on rule making, it does have "guidelines," which in many ways closely resemble EIB rules. *See generally* WQCC *Guidelines for Water Quality Control Commission Regulation Hearings* (1992) (amended 1993) (WQCC 1993 Guidelines), *available at* http://www.nmenv.state.nm.us/wqcc/WQCC1993Guidlines.pdf.

{17} We note that EIB and WQCC have the power, to a certain extent, to amend these rule-making rules and guidelines. *See* 20.1.1.300(A) NMAC (8/27/2006); 20.1.1.7(P) NMAC; WQCC 1993 Guidelines, Part III, 301(A). In addition, hearing officers may issue specific orders with respect to a particular hearing so as to provide additional structure, setting more explicit guidelines beyond what is dictated by statute, rule, or guideline. *See* 20.1.1.107 NMAC (8/27/2006); 20.1.1.400 NMAC; WQCC 1993 Guidelines, Part IV, 401(B). Thus, EIB and WQCC may change the details of their rule-making processes, as long as the administrative agencies afford a "reasonable opportunity" for participation.

{18} Both EIB and WQCC recognize certain participants as parties to administrative rule-making hearings. If a rule-making participant files early notice and meets certain criteria, EIB rules define that participant as a "party." For example, EIB considers those who file petitions to be parties. 20.1.1.7(K), (M) NMAC. While WQCC does not classify a petitioner as a "party," the requirements for a petitioner are the same for both administrative agencies. A petitioner must file a copy of the proposed rule, indicating any language to be added or deleted and a statement of the reasons for the regulatory change in order to initiate a rule-making hearing. *See* 20.1.1.300(B) NMAC; WQCC 1993 Guidelines, Part III, 301(B). In addition, once a hearing is held on a proposed rule, petitioners must pay to transcribe the hearings. *See* 20.1.1.403 NMAC (8/27/2006); WQCC 1993 Guidelines, Part IV, 404(A). Thus, a petitioner not only causes a hearing to occur, but also, by EIB and WQCC requirement, a petitioner sets the stage for a rule-making proceeding by proposing the specific language of a rule and taking responsibility for creating the transcript of the hearing, which will be relied upon in any later appeals.

{19} Both administrative agencies recognize persons giving technical testimony as a distinct category of rule-making participants. EIB considers a person presenting technical testimony to be another type of "party." 20.1.1.7(K) NMAC. Although, again, WQCC Guidelines do not designate "party" status, they mirror EIB rules governing technical testimony. *Compare*

20.1.1.7(K) NMAC *with* WQCC 1993 Guidelines, Part I, 103(F). Persons presenting technical testimony to EIB must file notice no later than fifteen days prior to a scheduled hearing. *See* 20.1.1.302(A) NMAC (8/27/2006). For WQCC, notice must be filed no later than ten days prior to a scheduled hearing. WQCC 1993 Guidelines, Part III, 303(A). EIB and WQCC each require that persons presenting technical testimony identify their witnesses along with the witnesses' professional qualifications. *See* 20.1.1.302(A)(1)-(2) NMAC; WQCC 1993 Guidelines, Part III, 303(A)(1)-(2). EIB and WQCC both define technical testimony as "scientific, engineering, economic or other specialized testimony but does not include legal argument, general comments, or statements of policy or position concerning matters at issue in the hearing." 20.1.1.7(R) NMAC; WQCC 1993 Guidelines, Part I, 103(O). Thus, NEE, the Amigos Bravos Groups, and the River Parties, as presenters of technical testimony, were held to a higher standard than other participants, and their testimony was limited to a narrower set of interests than mere preferences for one policy over another.[2] These distinctions are important.

{20} Unlike the status of a petitioner or a person presenting technical testimony, which EIB and WQCC condition upon fulfillment of certain procedural and substantive requirements, EIB and WQCC provide generally for "participant[s]." Participants include "any person who participates in a [rule-making] proceeding before [EIB or WQCC]." 20.1.1.7(J) NMAC; WQCC 1993 Guidelines, Part I, 103(I). Participants who are not also parties may still testify, file written statements before or during the hearing, and offer exhibits. *See* 20.1.1.304 NMAC (8/27/2006); WQCC 1993 Guidelines, Part III, 304(A), (B). Any person attending the hearing who wishes to cross examine any of the witnesses, may do so as long as it furthers the purposes of that hearing. *See* 20.1.1.401(C) NMAC (8/27/2006); WQCC 1993 Guidelines, Part IV, 402(C). In addition, the hearing officer may allow any person, not just a party, to make a brief closing statement. *See* 20.1.1.400(B)(6) NMAC; WQCC 1993 Guidelines, Part IV, 401(B)(6).

{21} NEE, the Amigos Bravos Groups, and the River Parties each distinguished themselves from mere participants by fulfilling additional responsibilities during the Rule 100 and the Water Rules proceedings. All three were considered parties. Under EIB rules, NEE was a "party," distinguishable from a nonparty participant, because NEE filed the petition for Rule 100 and fulfilled all the requirements associated with that role, including financing the transcription of the proceedings. The Amigos Bravos Groups

[2] After we released this Opinion, the Amigos Bravos Groups notified this Court that they did not comply with Rule 20.1.1.1.302 of the Administrative Code when submitting technical testimony to EIB. Thus, statements in this Opinion suggesting the Amigos Bravos Groups' compliance are erroneous. The error, however, does not change our holding that the Amigos Bravos Groups had the right to appear as appellees upon appeal of Rule 100. The Amigos Bravos Groups took other specific procedural actions, by filing early entries of appearances, to gain recognition as parties during the rule-making proceedings. Further, the technical testimony they submitted still directly informed the factors that statute requires EIB to consider. Thus, the Amigos Bravos Groups participated in a legally significant manner and should be permitted party status on appeal.

were parties as well because they provided technical testimony. Although WQCC Guidelines do not explicitly designate "part[ies]," the River Parties assert that they were considered "formal parties" during the Water Rules rule-making proceedings.

{22} After the rule-making hearings were complete, EIB and WQCC had significant statutory discretion to weigh the evidence presented at the rule-making hearings. By statute, EIB may

> *give the weight it deems appropriate to all relevant facts and circumstances* presented at the public hearing, *including but not limited to*:
>
> (1) character and degree of injury to or interference with health, welfare, animal and plant life, property and the environment;
>
> (2) the public interest, including the social, economic and cultural value of the regulated activity and the social, economic and cultural effects of environmental degradation; and
>
> (3) technical practicability, necessity for and economic reasonableness of reducing, eliminating or otherwise taking action with respect to environmental degradation.

Section 74-1-9(B) (emphasis added). WQCC must adopt water quality standards for surface and ground waters of the state that are "based on credible scientific data and other evidence appropriate under the Water Quality Act." NMSA 1978, § 74-6-4(D) (2009). In adopting regulations to prevent or abate water pollution

> [WQCC] shall give weight it deems appropriate to all relevant facts and circumstances, including:
>
> (1) character and degree of injury to or interference with health, welfare, environment and property;
>
> (2) the public interest, including the social and economic value of the sources of water contaminants;
>
> (3) technical practicability and economic reasonableness of reducing or eliminating water contaminants from the sources involved and previous experience with equipment and methods available to control the water contaminants involved;
>
> (4) successive uses, including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses;
>
> (5) feasibility of a user or a subsequent user treating the water before a subsequent use;
>
> (6) property rights and accustomed uses; and
>
> (7) federal water quality requirements.

Section 74-6-4(E). We note that persons presenting technical testimony directly inform EIB and WQCC on many of the relevant statutory factors. Thus, NEE, the Amigos Bravos Groups, and the River Parties not only assumed roles that required additional responsibilities and preparation, but they also presented the very kind of evidence that directly informed the administrative agencies' decisions on whether to adopt Rule 100 and the Water Rules. We now turn to whether NEE, the Amigos Bravos Groups, and the River Parties are entitled to be parties to appeals of the rules.

DISCUSSION

{23} The New Mexico Constitution provides that "[t]he supreme court . . . shall have a superintending control over all inferior courts . . . ." N.M. Const. art. VI, § 3. We have previously provided guidance for when we will consider a writ of superintending control:

> when a ruling, order, or decision of an inferior court, within its jurisdiction, (1) is erroneous; (2) is arbitrary or tyrannical; (3) does gross injustice to the petitioner; (4) may result in irreparable injury to the petitioner; (5) and there is no plain, speedy, and adequate remedy other than by issuance of the writ.

In re Extradition of Martinez, 2001-NMSC-009, ¶ 12, 130 N.M. 144, 20 P.3d 126 (internal quotation marks and citations omitted). We evaluate the five factors independently. *Id.*

{24} Before this Opinion, no case had provided clear guidance—and certainly no case with these or similar circumstances had provided *any* guidance—with respect to who has the right to become appellees in administrative rule-making appeals. Although not necessarily "erroneous" as a matter of law, the Court of Appeals decision to deny intervention for NEE, the Amigos Bravos Groups, and the River Parties did lead to an "arbitrary" result that created a "gross injustice," threatened "irreparable injury," and left these parties without any plain, speedy, and adequate remedy. Accordingly, for the reasons that follow, this Court was compelled to issue a writ of superintending control for these three Petitioners.

{25} EIB argues that we should not grant these writs because the writ of superintending control "will not be exercised to control the discretion of another court." *Albuquerque Gas & Elec. Co. v. Curtis*, 43 N.M. 234, 237, 89 P.2d 615, 616 (1939) (internal quotation marks and citation omitted). While we agree with this general statement of law, the argument misses the point. For the reasons that follow, we hold that the Court of Appeals did *not* have discretion to deny intervention for NEE, the Amigos Bravos Groups, and the River Parties. In the interest of justice, the law compels their participation as parties to these appeals.

Irreparable Injury to the Petitioners, Leading to an Arbitrary Result and a Gross Injustice

{26} To successfully appeal a rule adopted by EIB or WQCC, an appellant—such as PNM (challenging Rule 100) or the Cattle Growers Association (challenging the Water Rules)—must allege and prove that the rule is "(1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the transcript; or (3) otherwise not in accordance with law." Section 74-1-9(J) (EIB); NMSA 1978, § 74-6-7(B) (1993) (WQCC). If the Court of Appeals finds that a newly fashioned administrative rule falls short in any of these three ways, then the rule must be "set aside." Section 74-1-9(J); § 74-6-7(A), (B). Thus, if PNM or the Cattle Growers Association successfully appeals Rule 100 or the Water Rules, the appellate court will set those rules aside, giving them no legal effect.

{27} With that understanding of the appeal process, the resulting injury threatened to NEE, the Amigos Bravos Groups, and the River Parties is self-evident: they stand to lose everything. Having made significant and *successful* investments of time and financial

resources to secure adoption of Rule 100 and the Water Rules, these groups stand to see their gains erased while they can only watch. As a matter of common sense and fundamental fairness, one would expect our appellate procedures to provide for their participation as parties to these appeals on equal footing with their opponents.

Guidance from Our Court Rules, Statutes, and Case Law

{28} Although not as clearly as we would like, our rules of appellate procedure do imply a right for parties to administrative rule making to become parties on appeal. Rule 12-601(B) NMRA provides that "[d]irect appeals from orders, decisions or actions of boards, commissions, administrative agencies or officials shall be taken by filing a notice of appeal with the appellate court clerk, together with the docket fee and *proof of service* thereof on the agency involved and all *parties* . . . ." (Emphasis added.) NEE, the Amigos Bravos Groups, and the River Parties were all recognized as parties to their respective proceedings below. As such, they were entitled to, and did receive, service of notice of the appeals filed with the Court of Appeals.

{29} If Rule 12-601(B) requires service of notice of appeal on "all parties," in addition to the "agency involved," then it must be for some reason. Previously, our Court of Appeals has recognized that, in a typical appeal from a district court judgment involving multiple parties, notice of appeal is served on all parties, not to *require* their participation on appeal but to afford them an *opportunity* to join the appeal. *See Lozano v. GTE Lenkurt, Inc.*, 1996-NMCA-074, ¶¶ 11-12, 122 N.M. 103, 920 P.2d 1057 (reasoning that "[a]fter a party or other interested person has been notified of an appeal, the decision whether to join in the appeal is left to them"); *see also* Rule 12-202(E)(3) NMRA ("The appellant shall give notice of the filing of a notice of appeal . . . by serving a copy on . . . trial counsel of record for each party other than the appellant.").

{30} That same logic applies to parties to administrative rule making. The reason to require service of the notice of appeal "on the agency involved and all parties" is to enable them to act, to exercise their right to participate as parties to the appeal if their interests are at risk. On appeal, NEE, the Amigos Bravos Groups, and the River Parties were entitled to make this same choice to participate.

{31} On a previous occasion, when faced with the absence of an explicit rule governing proper parties to an administrative appeal, this Court concluded that, "[i]n the absence of a statutory provision as to parties, the question with respect to who may or must be joined as parties to a proceeding to review the decisions and orders of an administrative agency is governed by the rules as to parties in civil actions generally." *Plummer v. Johnson*, 61 N.M. 423, 427-28, 301 P.2d 529, 532 (1956) (internal quotation marks and citation omitted). In *Plummer*, we held that the state engineer was a proper party, if not an indispensable party, to an appeal of his water permitting decision. *Id.* at 427, 301 P.2d at 532. The current guidance on this topic in Corpus Juris Secundum provides that "[i]n the absence of statutory provisions to the contrary, general rules with respect to parties in other civil proceedings apply on judicial review of administrative decisions." 73A C.J.S., *Public Administrative Law and Procedure* § 342 (2004). For the foregoing reasons, we conclude that our rules do authorize those who are parties to administrative rule-making proceedings to participate as parties to an

appeal under the circumstances set forth in this case.

{32} Respondents argue, without authority, that the term "parties" in Rule 12-601(B) applies only to an agency's *adjudicatory* proceedings, not to rule making. We disagree. Rule 12-601(B) is not specific to adjudications; it includes "decisions" and "actions" of administrative agencies, each of which adequately describe administrative rule making. *See Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo Cnty. Air Quality Control Bd.*, 80 N.M. 633, 639, 459 P.2d 159, 165 (Ct. App. 1969) (holding that the "*decisions* of administrative agencies of the state" described by Article VI, Section 29 of the Constitution of New Mexico, include "*regulations* adopted by a board" (emphasis added) (internal quotation marks and citations omitted)). This Court has never crafted a separate rule for appeals from administrative rule making. *See* Rule 12-102(C)(1) NMRA.

{33} We also observe that Rule 12-502(C) NMRA provides for certiorari petitions to this Court which "shall show the names of the *parties*, with the plaintiff, petitioner or party initiating the proceeding in the trial court or *administrative body* listed first." (Emphasis added.) This rule, like Rule 12-601(B), does not distinguish between parties to administrative rule-making appeals and parties to any other type of proceeding.

{34} The order denying intervention to NEE and the Amigos Bravos Groups reasoned that "[t]he Air Quality Control Act allows only an adversely affected person to appeal from decisions of the EIB" (citing Section 74-2-9(A)), and the "[m]ovants were not adversely affected." The same reasoning can be applied to the statute governing WQCC. *See* § 74-6-7(A). We agree with the Court of Appeals, but only in the sense that these statutes specify that an adverse party may *initiate* an appeal. The statutes are silent, however, as to who may *respond* to an appeal taken by an "adversely affected person" that may threaten the interests of the prevailing party below. The appeal statutes are simply not clear on this point.

The Meaning of "Party" as Intended in Our Court Rules

{35} As we have mentioned, the definition of "party" in the context of an EIB or WQCC administrative rule making is not set by statute and, in fact, may be changed by EIB or WQCC without any input from this Court or from the Legislature. Thus, EIB or WQCC could broaden or constrain the term "party," such that the resulting designation might not align with the intended meaning of the term "party" in our rules. In regard to NEE, the Amigos Bravos Groups, and the River Parties, all considered parties by EIB and WQCC, that does not seem to be the case.

{36} We know that NEE is a "party" under our rules because it initiated the Rule 100 proceedings. *See* Rule 12-502(C) (directing that the appellee petition "shall show the names of the parties, with the party initiating the proceeding in the trial court or administrative body"). Rule 12-502(C) assumes that whoever initiates an administrative proceeding is the first-named *party* in any appeal, regardless how that person is characterized ("plaintiff," "petitioner," or "party initiating the proceeding . . . in the administrative body").

{37} Beyond the party initiating the proceeding, we need only decide in this case whether participants who have presented technical testimony are "parties" to an appeal as contemplated under our rules. We conclude that they are.

{38} The Amigos Bravos Groups and the River Parties were not just participants below who happened to be recognized as parties by EIB and WQCC. Rather, each participated in the rule-making proceedings in a legally significant manner. Each was required to file advance notice of participation, naming their witnesses and the witnesses' qualifications, and each was required to satisfy other prerequisites to their testimony. *Cf.* Rule 1-026 NMRA (allowing parties to obtain information about other parties' witnesses at trial through discovery).

{39} In addition, as we highlighted earlier, each contributed the kind of evidence that directly informed the inquiries made by EIB and WQCC in making their final decisions. In fact, because the "sufficiency of the evidence" is one of the grounds upon which an appellant may challenge the legality of a rule on appeal, the Amigos Bravos Groups' and the River Parties' evidentiary contributions to the rule-making hearing may well come under direct attack on appeal. Thus, we conclude that the requirements imposed upon the Amigos Bravos Groups and the River Parties, the contributions they made, highlighted by their technical testimony, and the possible challenge to those contributions on appeal, afford them a right to defend their positions as parties on appeal.

No Rule or Case Law Supports Exclusion of Parties on Appeal

{40} The Court of Appeals denied these intervention motions, in part because "[t]here is no rule of appellate procedure allowing for intervention on appeal." While we agree that there is no rule with explicit allowances for intervention, we have now clarified that Rule 12-601, requiring notice of an appeal to all parties below, implicitly provides for the interests of persons in addition to the aggrieved party and the relevant administrative agency. The Court of Appeals order cites *Old Abe Co. v. N.M. Mining Comm'n*, 121 N.M. 83, 86, 908 P.2d 776, 779 (Ct. App. 1995), in support of its decision, but we do not find that case helpful.

{41} In *Old Abe Co.*, the Court of Appeals denied two requests to intervene in an administrative appeal. *Id.* The Court of Appeals did not, however, explain its reasons for denying intervention or discuss the facts that dictated its decision. For example, *Old Abe Co.* does not describe what role, if any, the attempted interveners played in the proceeding below before they filed a motion to intervene on appeal. In addition, we do not know if the attempted interveners were petitioners or parties to the administrative process, as were NEE, the Amigos Bravos Groups, and the River Groups; nor do we even know what the administrative process was. Therefore, *Old Abe Co.* fails to illuminate either its own reasoning or how its holding would apply to the vastly different circumstances of this case.

{42} The Court of Appeals order states that intervention on appeal would "only be permitted in very exceptional circumstances," citing *Thriftway Mktg.Corp. v. State*, 111 N.M. 763, 810 P.2d 349 (Ct. App. 1990). In *Thriftway*, however, the persons attempting intervention had *not* been involved in the district court proceeding below; they sought to intervene for the first time on appeal, a request which the Court of Appeals granted. *Id.* at 764-65, 767, 810 P.2d at 350-51, 353. Conversely, NEE, the Amigos Bravos Groups, and the River Parties were all parties during the rule making below, each presented technical testimony, and NEE introduced Rule 100 as the petitioner. *Thriftway* offers no guidance in answering the question before us.

Alternative Plain, Speedy, and Adequate Remedies

{43} Respondents argue that NEE, the Amigos Bravos Groups, and the River Parties have other plain, speedy, and adequate remedies. Specifically, PNM and EIB argue, and the Court of Appeals agrees, that NEE and the Amigos Bravos Groups could participate in EIB's appeal as amici curiae and that such participation would adequately protect their interests. The Cattle Growers Association argues similarly regarding the River Parties' participation in the WQCC appeal.[3] PNM also suggests that NEE and the Amigos Bravos Groups could participate in any future EIB hearings to revise Rule 100 as an adequate alternative to party status on appeal.

{44} We are not persuaded. We seriously doubt, for example, that PNM would have been content to sit on the sidelines as amicus curiae, if it had been successful before EIB and NEE was appealing.

{45} Amicus curiae status does not afford the same rights as those available to a party on appeal. "'Amicus must accept the case on the issues as raised by the parties, and cannot assume the functions of a party.'" *Whittington v. State Dep't of Pub. Safety*, 2002-NMSC-010, ¶ 3, 132 N.M. 169, 45 P.3d 889 (quoting *State ex rel. Castillo Corp. v. N.M. State Tax Comm'n*, 79 N.M. 357, 362, 443 P.2d 850, 855 (1968)). Amici curiae do not have the right to file a brief, may only file "upon order of the appellate court," and may only share in the time allocated to a party for oral argument. *See* Rule 12-215 NMRA. Unlike parties, amici curiae may not make or respond to procedural motions, *see* Rule 12-309 NMRA, and cannot submit a reply brief, *see* Rule 12-213 NMRA. Similar to the Court of Appeals' exclusion of NEE from mediation in this case, amici curiae cannot participate in mediation. *See* Rule 12-313 NMRA (establishing authority for appellate courts to hold settlement conferences); *see also* The New Mexico Court of Appeals Mediation Conference Procedures and Suggestions for Effective Mediation Representation 1 (2003), available at http://coa.nmcourts.gov/mediation/mediation.pdf ("The conferences offer *parties* and their counsel confidential, risk-free opportunities to communicate about underlying interests, self-evaluate their cases, and explore possibilities for voluntary settlements with an informed, neutral mediator." (Emphasis added.)). Further, amici do not have standing to petition this Court for a writ of certiorari. *See N.M. Chiropractors Ass'n v. Katz*, 94 N.M. 554, 555, 613 P.2d 424, 425 (1980). Accordingly, participation as amici curiae does not provide an adequate remedy for NEE, the Amigos Bravos Groups, or the River Parties.

{46} The other alternative remedy, addressing the already adopted rules during any future rule making, hardly provides a plain, speedy, or adequate alternative to party status. Having prevailed below, NEE, the Amigos Bravos Groups, and the River Parties have *earned* the right to defend their gains on appeal. In regard to Rule 100, NEE and the Amigos Bravos Groups may have to start all over again in new rule-making proceedings below. But for the time being, the appeal is simply abated. If EIB decides not to alter the rule on remand, the present appeal will go forward. And, as parties to the appeal, NEE and the Amigos Bravos Groups had the right to be heard by the Court of Appeals even as to the decision whether to abate the appeal or proceed.

[3] WQCC takes no position on the issue and states that it welcomes this Court's guidance.

Rule for Administrative Appeals

{47} For the reasons stated, we hold that those who have participated in a legally significant manner in administrative rule making, as set forth in this Opinion, have the right to participate as parties to an appeal if they express such an intention. NEE, the Amigos Bravos Groups, and the River Parties all qualify as parties.

{48} We recognize, however, that if we were to allow *all* parties or other participants in an underlying rule-making proceeding *automatically* to be made parties to an appeal, then serious unintended consequences could arise. Conceivably, there could be hundreds of parties to an administrative rule-making proceeding. Apparently, there were almost one hundred parties to the Rule 100 hearings. The Court of Appeals correctly points out that

> no fewer than fourteen entities have sought to intervene in [the River Parties] case and the two companion writs pending before this Court. Allowing them all to intervene because they can show the kind of interest in the regulation on appeal shown by the other petitioners pending before the Court would invite havoc. This is particularly true in light of the fact that, inevitably, not all of the parties seeking to intervene bring a unique perspective to the issue.

{49} We agree that such a large number of appellants and appellees might unnecessarily burden the court. In addition, we recognize that the administrative definition of a "party" to a rule-making proceeding is something of a moving target. As discussed earlier, administrative rules may be changed to define a party more broadly or narrowly, such that "party" may not always mean the same thing. Potentially, this could invite the "havoc" described by the Court of Appeals.

{50} Unquestionably, the Court of Appeals has inherent authority over its own docket and plenary discretion in how it manages that docket. *See Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶ 14, 150 N.M. 398, 259 P.3d 803. The Court may take reasonable steps to encourage efficiency and avoid unnecessary duplication. For example, the Court may order consolidated briefing by similarly situated parties and avoid the kind of chaos anticipated in its order. Similarly situated parties may well elect to pool their resources and speak with one voice. There are many possibilities for an appellate court to maintain order while protecting the legitimate interests of participants whose level of participation below requires those participants' party status on appeal. For this reason, our rules require notice and a meaningful opportunity to participate as parties to an appeal under the circumstances set forth in this Opinion. We refer our holding to the appropriate rules committee for further study.

The Air Permit Appeal

{51} We now turn to the fourth petition for writ of superintending control, the one we did not grant. In 2010, Helena Chemical Company (Helena) initiated a notice of intent to remove or rescind its air permit, apparently in an effort to eliminate the conditions imposed by that permit. After NMED's Air Quality Bureau declined to agree with the requested permit changes, Helena appealed that decision to EIB.

{52} EIB held a hearing and then denied Helena's request to rescind the air permit on December 29, 2010. When EIB holds a

permit appeal hearing, which is an adjudication, it must allow the public "a reasonable opportunity to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing." NMSA 1978, § 74-2-7(I) (2003). To facilitate participation in the adjudication, NMED must give EIB "a list of all persons who have expressed in writing an interest" and those persons "who participated in a public hearing on the permitting action." 20.1.2.202(C)(2) NMAC (8/27/2006).

{53} Several years earlier, in 2005, MCAC had entered into a "Permit Settlement Agreement And Stipulated Final Order" with Helena and NMED to resolve an air quality permit dispute. MCAC asserts that it did not receive notice of the subsequent Helena air permit hearing when it should have. MCAC does concede, however, that it had *actual* notice of EIB's hearing on the air permit appeal, though it is not clear when. Despite its actual knowledge that the hearing was taking place, however, MCAC does not indicate that it ever filed a request to be heard or to intervene as a party during Helena's permit appeal to EIB. This decision not to take formal steps to participate before EIB bears significant consequences.

{54} Like the varying strata of participants established by EIB for rule making, EIB has created designations for adjudications such as air permit appeals. A "party," as applicable in this case, includes "any person who is permitted to intervene in the particular hearing pursuant to [Rule 1-024 NMRA]." 20.1.2.7(H) NMAC (8/27/2006). In addition to the "party" designation, EIB adjudications anticipate a category called "interested participants," which includes persons—other than parties—who file an entry of appearance at least fifteen days before a hearing. 20.1.2.207(A) NMAC (8/27/2006). An entry of appearance must include notice of any witnesses appearing on that person's behalf, and the "interested participant" may cross-examine witnesses. *Id.* There is no indication that MCAC filed an entry of appearance in the Helena air permit adjudication in order to become an "interested participant,"although MCAC did make public statements during the proceedings.

{55} Helena appealed the decision by EIB to the Court of Appeals in January 2011, naming NMED as the sole respondent. According to MCAC, it did not expect NMED to mediate with Helena, and so, initially, MCAC was satisfied to file an amicus curiae brief favoring the decision by EIB not to rescind or modify Helena's air quality permit. However, Helena filed a motion to mediate that the Court of Appeals granted. Only then did MCAC move to intervene as a party to the appeal in order to participate in the mediation, but its motion was denied. In its subsequent petition for a writ of superintending control, MCAC requested that this Court order the Court of Appeals to allow it to intervene as a party to Helena's appeal.

{56} As explained earlier, our appellate rules do not anticipate affording nonparties below, like MCAC, the right to receive notice of an appeal, nor do they otherwise suggest that nonparties below can become parties on appeal. In *Wylie Brothers Contracting Co.*, the Court of Appeals remarked that "[i]n the usual case or lawsuit which reaches this court for appellate review, the parties before this court must have appeared as litigants in the court below, and the record must so show. The same is true of the usual appeal from a decision or order of an administrative agency." 80 N.M. at 640, 459 P.2d at 166. We have previously cited the reasoning from the *Wylie Brothers Contracting Co.* opinion, recognizing that "[t]here is New Mexico law

to support the . . . position that parties who have not been parties to an administrative proceeding should not be added on appellate review of that proceeding." *Luboyeski v. Hill*, 117 N.M. 380, 382, 872 P.2d 353, 355 (1994).

{57} Unlike NEE, the Amigos Bravos Groups, and the River Parties, MCAC was not a party to EIB administrative proceeding, the result of which is now on appeal. Moreover, MCAC did not attempt to intervene in the EIB proceeding, although that was an option. As mentioned, it did not attempt to qualify for the available status of "party" or "interested participant," and it did not contend that any evidence it introduced during the appeal to EIB is directly at issue on appeal to the Court of Appeals. Accordingly, we hold that MCAC does not have the right to become a party on appeal to the Court of Appeals. Its sole recourse in Helena's appeal of the permit was to petition the Court of Appeals for *discretionary* intervention which, in this case, the Court was within its authority to deny.

CONCLUSION

{58} For the foregoing reasons, we grant the petitions for superintending control filed by NEE, the Amigos Bravos Groups, and the River Parties. We deny the petition for a writ of superintending control filed by MCAC.

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

RICHARD C. BOSSON, Justice

WE CONCUR:

CHARLES W. DANIELS, Chief Justice

PATRICIO M. SERNA, Justice

PETRA JIMENEZ MAES, Justice

EDWARD L. CHÁVEZ, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMSC-006

Filing Date: February 21, 2012

Docket No. 33,386

ANTONIO MAESTAS and BRIAN FRANKLIN EGOLF, JR., members of the New Mexico House of Representatives, and JUNE LORENZO, ALVIN WARREN, ELOISE GIFT and HENRY OCHOA,

Petitioners,

v.

HON. JAMES A. HALL, District Judge Pro Tempore of the First Judicial District Court,

Respondent,

and

SUSANA MARTINEZ, in her capacity as Governor of New Mexico, et al.,

Real Parties in Interest,

and

MAURILIO CASTRO, BRIAN FRANKLIN EGOLF, JR., MEL HOLGUIN, HAKIM BELLAMY and ROXANE SPRUCE BLY, PUEBLO OF LAGUNA, PUEBLO OF ACOMA,

JICARILLA APACHE NATION, PUEBLO OF ZUNI, PUEBLO OF SANTA ANA, PUEBLO OF ISLETA, RICHARD LUARKIE, HARRY A. ANTONIO, JR., DAVID F. GARCIA, LEVI PESATA and LEON REVAL, NAVAJO NATION, LORENZO BATES, DUANE H. YAZZIE, RODGER MARTINEZ, KIMMETH YAZZIE and ANGELA BARNEY NEZ,

Intervenors.

CONSOLIDATED WITH

Docket No. 33,387

TIMOTHY Z. JENNINGS, in his official capacity as President Pro Tempore of the New Mexico Senate, and BEN LUJAN, SR., in his official capacity as Speaker of the New Mexico House of Representatives,

Petitioners,

v.

THE NEW MEXICO COURT OF APPEALS,

Respondent,

and

DIANNA J. DURAN, in her official capacity as New Mexico Secretary of State, SUSANA MARTINEZ, in her capacity as New Mexico Governor, and JOHN A. SANCHEZ in his official capacity as New Mexico Lieutenant Governor and presiding officer of the New Mexico Senate,

Real Parties in Interest,

and

JONATHAN SENA, DON BRATTON, CARROLL LEAVELL, GAY KERNAN, CONRAD JAMES, DEVON DAY, MARGE TEAGUE, MONICA YOUNGBLOOD, JUDY MCKINNEY, JOHN RYAN, MAURILIO CASTRO, BRIAN F. EGOLF, JR., MEL HOLGUIN, HAKIM BELLAMY and ROXANE SPRUCE BLY, PUEBLO OF LAGUNA, PUEBLO OF ACOMA, JICARILLA APACHE NATION, PUEBLO OF ZUNI, PUEBLO OF SANTA ANA, PUEBLO OF ISLETA, RICHARD LUARKIE, HARRY A. ANTONIO, JR., DAVID F. GARCIA, LEVI PESATA and LEON REVAL, NAVAJO NATION, LORENZO BATES, DUANE H. YAZZIE, RODGER MARTINEZ, KIMMETH YAZZIE and ANGELA BARNEY NEZ,

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OPINION

CHÁVEZ, Justice.

{1} One of the most precious personal rights in a free society is the right to vote for the candidate of one's choice. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The right to vote is the essence of our country's democracy, and therefore the dilution of that right strikes at the heart of representative government. The idea that every voter must be equal to every other voter when casting a ballot has its genesis in the Equal Protection Clause, U.S. Const. amend. XIV, § 1 (Equal Protection Clause), and is commonly referred to as the "one person, one vote" doctrine. As stated by the United States Supreme Court in the seminal case of *Reynolds v. Sims*, 377 U.S. 533, 577 (1964), "[b]y holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." Therefore, when it comes to preserving an adult citizen's right to vote, there is no more important task for the Legislature and the Governor to perform than the decennial reapportionment of districts for state and national elective offices.

{2} At issue in this case is the apportionment of the New Mexico House of Representatives following the 2010 federal census. It is undisputed that the House of Representatives at this time is unconstitutionally apportioned. The Legislature passed House Bill 39, which reapportioned the House, during the 2011 Special Session. Governor Susana Martinez vetoed House Bill 39.[1] Because the lawmaking process failed to create constitutionally-acceptable districts, the burden fell on the judiciary to draw a

[1] The Legislature was unable to pass reapportionment legislation relating to the Congress. Governor Martinez vetoed legislation reapportioning the Public Regulation Commission and the state Senate. The district court's decision regarding these elective offices is not challenged.

reapportionment map for the House. To accomplish this we designated retired District Judge James Hall, a hard-working jurist with an impeccable reputation for both fairness and impartiality, to assume this arduous undertaking.

{3} After eight days of testimony and the submission of numerous reapportionment maps by the parties, the district court adopted, in part, the third alternative plan submitted by the attorneys representing Governor Martinez and Lieutenant Governor John Sanchez (Executive Alternative Plan 3). Petitioners filed petitions for a writ of superintending control asking this Court to assume jurisdiction over the case. Petitioners asked this Court to either reverse the district court and adopt an alternative plan or remand the case with instructions regarding the legal standards that the district court should apply. Petitioners argued that the district court incorrectly applied the law for reapportionment (1) by not protecting against the dilution of minority voting rights under the Voting Rights Act; (2) by prioritizing the smallest deviations from ideal population equality over the traditional redistricting principles; and (3) by selecting a partisan plan. In addition, Petitioners raised issues such as due process and separation of powers that were addressed in an order we entered on February 10, 2012, or that are otherwise deemed to be without merit.

{4} We granted Petitioners' requests for writs of superintending control by assuming jurisdiction in this matter and established an extremely expedited briefing schedule designed to permit this Court to conduct oral argument and issue a decision forthwith in an effort not to delay the House elections. Before this year this Court had never been asked to decide the legal principles that would govern our courts when they draw reapportionment maps. After reading the parties' briefs and listening to oral argument, we entered an order articulating the legal principles that should govern redistricting litigation in New Mexico and remanded the case to the district court for further proceedings consistent with the order.

BACKGROUND AND PROCEDURAL HISTORY

{5} The House of Representatives must be composed of seventy members elected from single-member districts that are contiguous and as compact as is practicable and possible. N.M. Const. art. IV, § 3(C); NMSA 1978, § 2-7C-3 (1991). The 2010 federal census indicates that the population in New Mexico is 2,059,179 people, an increase of 13.2 percent over the population documented by the 2000 census. *Profile of General Characteristics for the United States*, United States Census Bureau (2010). The ideal House district population, under the one person, one vote principle, would be 29,417 people. The current House districts deviate from the ideal population with percent deviations ranging from negative 24.3 to a positive 100.9, for a total deviation range of 125.2 percent. The population in West Albuquerque and Rio Rancho indicate that these areas combined can support three additional house districts. Slower growth in North Central New Mexico, Southeastern New Mexico, and Central Albuquerque indicate that these areas each currently have one district too many.

{6} The need to reapportion elected offices in the New Mexico House of Representatives is readily apparent from the above summary of population growth and shifts. The Legislature has the responsibility to reapportion its membership. *See* N.M. Const. art. IV, § 3(D). The bipartisan New Mexico Legislative Council unanimously adopted "Guidelines for the Development of State and Congressional

Redistricting Plans" and formed a bipartisan Interim Redistricting Committee to prepare to fulfill the Legislature's constitutional responsibility. The Interim Redistricting Committee developed redistricting plans and invited public input regarding the plans so as to make recommendations to the Legislature in advance of the September 6, 2011 Special Session called by Governor Martinez.

{7} During the summer of 2011, the Interim Redistricting Committee held public hearings throughout New Mexico and gathered input from citizens and special interest groups. Possible redistricting plans were presented to the public for their input. Demographer Brian Sanderoff and his company, Research & Polling, Inc., worked with Republican and Democrat legislators to create plans requested by individual legislators or their caucuses. A common theme expressed by citizens during these hearings was their desire to keep their municipalities and communities unified so that their representatives would better represent their interests and values. The Native American leadership fully participated in the public meetings and worked closely with the Legislature throughout the process to convey their concerns and preferences for Native American voting districts. The Native American leaders also attempted to communicate with the Governor's Office both prior to and during the Special Session to convey their preferences, but they did not receive a response.

{8} During the entire legislative process, including the Special Session, over 200 redistricting plans were drafted by Research & Polling. Many of those plans were introduced during the Special Session and debated in committee and on the floor of both legislative chambers. No redistricting plan introduced during the Special Session was identified as proposed or approved by Governor Martinez. House Bill 39, which reapportioned the House, passed both the House and the Senate without a single Republican vote in favor of the bill. Governor Martinez later vetoed the bill.

{9} Numerous complaints by various parties were filed in different state district courts challenging the constitutionality of the current distribution of voters under the State and Congressional maps. We found it appropriate to exercise our superintending control because this is not the first time New Mexico courts have been imposed upon to reapportion political maps. *See Jepsen v. Vigil-Giron*, No. D-0101-CV-02177 (N.M. D. Ct. January 24, 2002). We consolidated all of the cases and appointed retired District Judge James Hall to preside over the redistricting litigation.

{10} During the trial, the district court was initially presented with six complete House redistricting plans: (1) the Legislative Plan passed by the Legislature as House Bill 39; (2) the Executive Plan; (3) the James Plan; (4) the Sena Plan; (5) the Egolf Plan; and (6) the Maestas Plan. The Multi-Tribal/Navajo Nation plaintiffs also submitted partial plans to address the concerns of the Native American population in New Mexico. As the trial progressed, nine additional plans were tendered by certain parties, some to address criticisms raised during the testimony of various witnesses and others to respond to the district court's request. In addition to numerous lay witnesses, seven expert witnesses, some demographers and other political scientists, testified in favor of and in opposition to certain maps.

{11} The executive plaintiffs tendered Executive Alternative Plan 3, which was adopted in part by the district court, into evidence on the last day of testimony. The Governor's demographer who drew the plan

was not available to testify. In addition, other expert witnesses who had previously introduced methodologies for assessing the partisan performance of plans and compliance with historic state policies were also not available to testify. Brian Sanderoff, the earlier-mentioned demographer, who had assisted legislators from all parties to prepare redistricting maps, testified about Executive Alternative Plan 3. He noted that the plan had significant partisan performance changes and that the plan could have been drawn without such significant changes.

{12} The district court entered detailed findings of fact and conclusions of law rejecting the Legislative Plan and other plans submitted by the parties. The Legislative Plan was rejected because it systematically left North Central and Southeastern New Mexico underpopulated, which diluted the votes of the persons in the more populated areas of the state: specifically West Albuquerque, Rio Rancho, and Doña Ana County. An overriding, related concern was the Legislative Plan's failure to consolidate a district in North Central New Mexico. The district court rejected another proposed plan because of "significant partisan bias." It rejected one plan because of "highly partisan incumbent pairings" and another plan because of the pairing of "the only Republican incumbent in north central New Mexico with a Democratic incumbent and splits Los Alamos [from] White Rock." Other plans were rejected because of the failure "to establish Native American districts as contained in the Multi-Tribal/Navajo Nation Plan under the Voting Rights Act."

{13} The district court adopted Executive Alternative Plan 3, with a minor modification, because it found that the plan prioritized low population deviations between districts, adhered to the requirements of the Voting Rights Act, and reasonably satisfied secondary reapportionment policies. The district court acknowledged that Executive Alternative Plan 3 impacted partisan performance measures, but determined that because all of the plans had some partisan effect, it was compelled not to allow partisan considerations to control the outcome of its decision.

GOVERNING PRINCIPLES

{14} Our review of whether the district court applied the correct legal standards in selecting a redistricting plan is de novo. *Strausberg v. Laurel Healthcare Providers, LLC*, 2012-NMCA-006, ¶ 6, 269 P.3d 914. As mentioned earlier, the "one person, one vote" doctrine applied by the United States Supreme Court in *Reynolds*, 377 U.S. at 558 (internal quotation marks and citation omitted), is grounded in the Equal Protection Clause. This doctrine prohibits the dilution of individual voting power by means of state districting plans that allocate legislative seats to districts of unequal populations, thereby diminishing the relative voting strength of each voter in overpopulated districts. While the United States Supreme Court has held that population equality is the paramount objective of apportionment for congressional districts, *Karcher v. Daggett*, 462 U.S. 725, 732-33 (1983), state legislative district plans require only "*substantial*" population equality, *see Gaffney v. Cummings*, 412 U.S. 735, 748 (1973). According to the results of the 2010 census, ideal population equality among each of the seventy House Districts in New Mexico would be 29,417 persons. However, such mathematical precision is not mandated by the Equal Protection Clause. *See Reynolds*, 377 U.S. at 577. Adherence to the requirements of the Voting Rights Act is essential, and justifiable considerations, such as incorporating legitimate and rational state

policies relevant to our representative form of government, may result in deviations from ideal population equality. *See id.* at 577-81.

VOTING RIGHTS ACT

{15} Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, prohibits any State or political subdivision from imposing any electoral practice "which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). If districts are drawn in such a way that a bloc voting majority is usually able to defeat candidates supported by a politically cohesive, geographically insular minority group of sufficient size, those districts will not be in compliance with Section 2. *Thornburg v. Gingles*, 478 U.S. 30, 49 (1986). The *Gingles* Court defined three threshold conditions for establishing a Section 2 violation. "[T]he minority group must be able to demonstrate [(1)] that it is sufficiently large and geographically compact to constitute a majority in a single-member district[; (2)] that it is politically cohesive[; and (3)] that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." *Id.* at 50-51 (footnotes omitted). If these three preconditions are established, then a violation of Section 1973(a) of the Voting Rights Act occurs if

> based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [racial group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

{16} The essential inquiry is whether, as a result of the way the districts are structured, the protected minority group does "not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Gingles*, 478 U.S. at 44 (internal quotation marks and citation omitted). Relevant to this essential inquiry are the non-exclusive factors set forth in the Senate Report on the 1982 amendments to the Voting Rights Act, which include

> the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group . . .; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous may have probative value.

Gingles, 478 U.S. at 44-45 (citing S. Rep. No. 97-417 (1982), at 28-29, U.S. Code Cong. & Admin. News 1982, at 205-07).

{17} For the purposes of Section 2 of the Voting Rights Act, only eligible voters affect a group's opportunity to elect candidates. Therefore, the question is whether the minority group has a citizen voting-age majority in the district. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 427-29 (2006). Also under Section 2, because the injury is vote dilution, the *Gingles* compactness inquiry considers "the compactness of the minority population, not . . . the compactness of the contested district." *Bush v. Vera*, 517 U.S. 952, 997 (Kennedy, J., concurring) (referring to *Gingles*, 478 U.S. 30). A district that "reaches out to grab small and apparently isolated minority communities" is not reasonably compact. *Id.* at 979. Section 2 compactness should take into consideration "traditional districting principles such as maintaining communities of interest and traditional boundaries." *Id.* at 977; *see also Shaw v. Reno*, 509 U.S. 630, 647 (1993) (reasoning that traditional districting principles "are important not because they are constitutionally required—they are not—but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines").

{18} In this case, the district court's Findings of Fact 42 through 60 support adopting the Multi-Tribal/Navajo Nation partial plan. These findings by the district court have not been challenged on appeal, and therefore any redistricting plan must contain the Multi-Tribal/Navajo Nation partial plan.

{19} The Egolf petitioners, however, have raised the issue of whether the district court applied the correct legal standard to its analysis of the Hispanic community in and around Clovis, New Mexico. The district court found that "[t]he Hispanic community in and around Clovis is sufficiently large and geographically compact to constitute a majority in a single-member district," that the community "is politically cohesive," and that "Anglos in the area vote sufficiently as a bloc to enable them to usually defeat the minority's preferred candidate."

{20} A federal three-judge panel had previously found a detailed history of racial and ethnic discrimination affecting the Clovis minority population. *Sanchez v. King*, No. 82-0067-M (D.N.M. 1984). That panel found a violation of federal law and redrew House District 63 to include compact and politically cohesive Clovis minorities and make the district a performing, effective, majority-minority district. *Id.* "Of course, the federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law. But that does not mean that the State's powers are similarly limited." *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993). Although House District 63 was reshaped in the *Jepsen* court-ordered redistricting plan, it remains an effective majority-minority district. In the present trial, there was no evidence to establish that the relevant population had materially changed so as to no longer require an effective majority-minority district. Therefore, the same considerations that led to a redrawing of House District 63 in 1984 continue to be relevant to the history of voting-related discrimination in this area. As a result, on remand the district court should determine whether the relevant population is an effective Hispanic citizen voting-age population. Any redistricting plan ultimately adopted by the district court should maintain an effective majority-minority district in and around the Clovis area unless specific findings are made

based on the record before the district court that Section 2 Voting Rights Act considerations are no longer warranted.

MINOR DEVIATIONS BASED ON LEGITIMATE AND RATIONAL STATE POLICY ARE PERMISSIBLE

{21} Although ideal population equality and whether a plan dilutes the vote of any racial minority are primary considerations in drawing a districting map, minor deviations from absolute population equality are tolerated to permit states to pursue legitimate and rational state policies relevant to our representative government. *See Mahan v. Howell*, 410 U.S. 315, 321-22 (1973) (recognizing that more flexibility is constitutionally permissible with respect to state legislative reapportionment than in congressional reapportionment). We interpret the United States Supreme Court to require courts to consider "the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution." *White v. Weiser*, 412 U.S. 783, 795 (1973). Adhering to state policies is a way in which courts can give effect to the will of the majority of the people. *Preisler v. Secretary of State*, 341 F. Supp. 1158, 1161-62 (D.C. Mo. 1972).

{22} Because the promotion of legitimate and rational state policies will often necessitate "minor deviations" from absolute population equality, the United States Supreme Court has held that such minor deviations alone are insufficient to establish a prima facie case of invidious discrimination. *Voinovich*, 507 U.S. at 161. So what constitutes a minor deviation? In *Brown v. Thomson*, 462 U.S. 835, 842 (1983), the United States Supreme Court held that redistricting plans with a maximum population deviation below ten percent fall within the category of minor deviations that are insufficient to establish a prima facie violation of the Equal Protection Clause.

{23} The following methodology is used to calculate deviation percentages. First, the population deviation of a district is the percentage by which a district's population is above or below the ideal population. The ideal population is determined by dividing the total population by the total number of districts in the state. "Total deviation" is determined by adding the absolute deviation of the district with the largest population to the absolute deviation of the district with the smallest population. The total deviation can also be thought of as the range of population deviations.

{24} If ten percent is the maximum allowable deviation, then a legislative plan with five percent deviations or less in each district will be prima facie constitutional because the total absolute deviation will not exceed ten percent. Conversely, legislative plans with a total population deviation greater than ten percent are prima facie unconstitutional. *See Brown*, 462 U.S. at 842-43. The New Mexico State Legislature has declared it to be state policy not to consider a redistricting plan that includes any district with a total population that deviates more than plus or minus five percent from ideal. Thus, no district may contain a population that deviates more than plus or minus 1,470 persons from the ideal population of 29,417.

{25} However, simply because a plan has minor deviations that are prima facie constitutional does not mean that such plans are immune from judicial challenge. *See Larios v. Cox*, 300 F. Supp. 2d 1320, 1340-41

(N.D. Ga. 2004) (rejecting Georgia's redistricting plans for its state legislature, although the plans contained maximum deviations under ten percent). An equal protection challenge will lie "if the plaintiff can present compelling evidence that the drafters of the plan used illegitimate reasons for population disparities and created the deviations *solely* to benefit certain regions at the expense of others." *See Legislative Redistricting Cases*, 629 A.2d 646, 657 (Md. 1993).

{26} Yet plans with prima facie constitutional ten-percent deviations are plans drawn by a legislature that have become law. In contrast to legislatively-drawn plans, court-drawn plans are held to a higher standard, and "must ordinarily achieve the goal of population equality with little more than de minimus variation." *Chapman v. Meier*, 420 U.S. 1, 27 (1975). The United States Supreme Court has not defined what constitutes de minimus variations for a court-drawn plan.[2] However, unlike a legislative body that does not have to articulate the policy reasons for minor deviations from ideal population equality, unless the range of deviations exceeds ten percent, a court must enunciate the historically significant state policy or unique features that it relies upon to justify deviations from ideal population equality. *Connor v. Finch*, 431 U.S. 407, 419-20 (1977).

[2] Deviations in court-drawn maps have varied with some in the range of five to ten percent. *See Burling v. Chandler*, 804 A.2d 471 (N.H. 2002) (per curiam) (court-drawn map with 9.26 percent deviations in House plan); *Below v. Gardner*, 963 A.2d 785 (N.H. 2002) (court-drawn map with 4.96 percent deviations in Senate plan); *Chapman v. Meier*, 407 F. Supp. 649 (D.N.D 1975), *on remand from* 420 U.S. 1 (1975) (court-drawn map with 6.6 percent deviations).

PERMISSIBLE STATE POLICIES WHICH JUSTIFY POPULATION DEVIATIONS

{27} When called upon to draw a redistricting map, a court acts in equity and may adopt a plan submitted by a party, modify such a plan, or draw its own map. *See O'Sullivan v. Bryer*, 540 F. Supp. 1200, 1202-03 (D.C. Kan. 1982). The most fundamental tenet of judicial administration and independence is that "the process must be fair, and it must [also] appear to be fair." *See Peterson v. Borst*, 786 N.E.2d 668, 673 (Ind. 2003) (internal quotation marks and citation omitted). This concept of judicial independence, that judges decide the merits of a case based on the facts and the law before them, without fear or favor, is particularly important in this area, which is fundamentally a political dispute. As Justice Felix Frankfurter observed in *Colegrove v. Green*, 328 U.S. 549, 554 (1946), "[t]he one stark fact that emerges from a study of the history of [legislative] apportionment is its embroilment in politics, in the sense of party contests and party interests." Thus, his strong recommendation was that "[c]ourts ought not to enter this political thicket." *Id.* at 556. Unfortunately, because of the inability of our sister branches of government to find a way to work together and address the most significant decennial legislation to affect the voting rights of the adult citizens of our State, the judiciary in New Mexico finds itself embroiled in this political thicket.

{28} Because the redistricting process is embroiled in partisan politics, when called upon to draw a redistricting map, a court must "do so with both the appearance and fact of scrupulous neutrality." *Peterson*, 786 N.E.2d at 673. To avoid the appearance of partisan

politics, a judge should not select a plan that seeks partisan advantage. Thus, a proposed plan that seeks to change the ground rules so that one party can do better than it would do under a plan drawn up by someone without a political agenda is unacceptable for a court-drawn plan. *See Wilson v. Eu*, 823 P.2d 545, 576-77 (Cal. 1992) (in bank) (rejecting plans submitted by the parties because each had calculated partisan political consequences, the details of which were unknown, leaving no principled way for the court to choose between the plans, while knowing that the court would be endorsing an unknown but intended political consequence if it chose one of the plans).

{29} A court's adoption of a plan that represents one political party's idea of how district boundaries should be drawn does not conform to the principle of judicial independence and neutrality. *Peterson*, 786 N.E.2d at 673. Although some courts are indifferent to political considerations such as incumbency or party affiliation, *Burling v. Chandler*, 804 A.2d 471, 474 (N.H. 2002) (per curiam), other courts question the wisdom of such indifference, *Gaffney*, 412 U.S. at 753 ("It may be suggested that those who redistrict and reapportion should work with census, not political, data and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results.").

{30} The district court heard several of the parties' expert witnesses testify about court-drawn plans and partisan neutrality. One of the executive's expert witnesses who testified in this case agreed that a court should not select a plan that gives one political party a partisan advantage. Dr. Keith Gaddie testified that how political balance is shifted by the court plan when compared to the baseline map is an important consideration. Dr. Theodore Arrington also testified that when courts draw redistricting plans, there is more partisan balance and more competitive districts. Dr. Thomas Lloyd Brunell, the executive's other expert witness, put it more bluntly: "[c]ourts . . . try not to advance the purposes or the ability of one party to really elect a lot more people than the status quo. . . ." Whether these experts would have expressed concern about Executive Alternative Plan 3 is not known because they had testified before this plan was introduced into evidence.

{31} Despite our discomfort with political considerations, we conclude that when New Mexico courts are required to draw a redistricting map, they must do so with the appearance of and actual neutrality. The courts should not select a plan that seeks partisan advantage. As was evident from the numerous plans drawn in this case, parties are capable of drawing maps that seek to give themselves a partisan advantage. This was true even when the party was able to maintain de minimus population deviations. When a court is required to draw a redistricting map, it is a desirable goal for the court to draw a partisan-neutral map that complies with both the one person, one vote doctrine and the requirements of the Voting Rights Act. To accomplish this goal, partisan symmetry may be one consideration. Although partisan asymmetry is not a reliable measure of *unconstitutional* partisanship, *League of United Latin Am. Citizens*, 548 U.S. at 420, it should be considered as "a measure of partisan fairness in electoral systems," *id.* at 466 (Stevens, J., concurring in part and dissenting in part). In addition, maintaining the political ratios as close to the status quo as is practicable, accounting for any changes in statewide trends, will honor the neutrality required in such a politically-charged case. Districts should be drawn to promote fair and

effective representation for all, not to undercut electoral competition and protect incumbents. It is preferable to allow the voters to choose their representatives through the election process, as opposed to having their representative chosen for them through the art of drawing redistricting maps. We believe that consistent and non-discriminatory application of historic legislative redistricting policies, in conjunction with limited flexibility in the court's search for ideal population equality, will be effective tools in drawing redistricting maps that avoid partisan advantage. In applying these rules, a court may be well advised to employ the services of an expert under Rule 11-706 NMRA.

{32} However, because redistricting is primarily the responsibility of the State Legislature, courts must look at previous plans and policies when drawing redistricting maps. Even plans that pass the Legislature but fail to be enacted into law, such as House Bill 39, are due "thoughtful consideration." *See Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 197 (1972). Thoughtful consideration is important because redistricting ordinarily involves criteria, policies, and standards that have been publicly deliberated by both the legislative and the executive branches of government in the exercise of their political judgment. More importantly, it is during the legislative process that the public regularly participates by commenting on policies and plans and observing the legislators deliberate the virtues of different policies and plans during open meetings. The Legislature is the voice of the people, and it would be unacceptable for courts to muzzle the voice of the people simply because the Legislature was unable, for whatever reason, to have its redistricting plan become law.

{33} Adhering to policies adopted by the Legislature gives effect to the will of the majority of the people and is permissible in redistricting litigation. *See White*, 412 U.S. at 795-96. Other courts have looked to state policies when drawing a redistricting plan. *Bone Shirt v. Hazeltine*, 387 F. Supp. 2d 1035, 1042 (D.S.D. 2005) (directing that a court should apply traditional state districting principles); *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 688 (D. Ariz. 1992), *aff'd*, 507 U.S. 981 (1993) (a court may look to several neutral criteria in drawing a redistricting plan that is politically fair); *Alexander v. Taylor*, 51 P.3d 1204, 1211 (Okla. 2002) ("Widely recognized 'neutral redistricting criteria' may be considered" when drawing a redistricting map.").

{34} The bipartisan New Mexico Legislative Council adopted guidelines which set forth policies that are similar to policies that have been recognized as legitimate by numerous courts. Testimony during the trial revealed that these guidelines, or other guidelines very similar in substance, have been followed in New Mexico since 1991. These guidelines were followed by the court in *Jepsen*, and should be considered by a state court when called upon to draw a redistricting map. The policies set forth in the guidelines that are relevant to state districts include:

> b. State districts shall be substantially equal in population; no plans for state office will be considered that include any district with a total population that deviates more than plus or minus five percent from the ideal.
>
> . . .
>
> d. Since the precinct is the basic building block of a voting district in New Mexico, proposed redistricting

plans to be considered by the legislature shall not be comprised of districts that split precincts.

e. Plans must comport with the provisions of the Voting Rights Act of 1965, as amended, and federal constitutional standards. Plans that dilute a protected minority's voting strength are unacceptable. Race may be considered in developing redistricting plans but shall not be the predominant consideration. Traditional race-neutral districting principles (as reflected below) must not be subordinated to racial considerations.

f. All redistricting plans shall use only single-member districts.

g. Districts shall be drawn consistent with traditional districting principles. Districts shall be composed of contiguous precincts, and shall be reasonably compact. To the extent feasible, districts shall be drawn in an attempt to preserve communities of interest and shall take into consideration political and geographic boundaries. In addition, and to the extent feasible, the legislature may seek to preserve the core of existing districts, and may consider the residence of incumbents.

{35} Some comment is necessary regarding these guidelines. Single-member districts are required by Section 3(C), Article IV of the New Mexico Constitution. Districts designed with contiguous precincts that are as compact as practicable are intended to comply with the requirements of NMSA 1978, Section 2-7C-3. Compactness and contiguity are important considerations because these requirements help to reduce travel time and costs. These considerations make it easier for legislative candidates to campaign for office, and once they are elected, to maintain close and continuing contact with the people they represent. It has also been suggested that compactness and contiguity greatly reduce, although they do not eliminate, the possibilities of gerrymandering. Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301, 326-34 (1991).

{36} Similarly, considering political and geographic boundaries furthers our representative government. Minimizing fragmentation of political subdivisions, counties, towns, villages, wards, precincts, and neighborhoods allows constituencies to organize effectively and decreases the likelihood of voter confusion regarding other elections based on political subdivision geographics. *See Prosser v. Elections Bd.*, 793 F. Supp. 859, 863 (1992).

{37} With respect to the legislative policy of preserving communities of interest, we recognize that this criterion may be subject to varying interpretations. We interpret communities of interest to include a contiguous population that shares common economic, social, and cultural interests which should be included within a single district for purposes of its effective and fair representation. *See O'Sullivan*, 540 F. Supp. at 1204. The rationale for giving due weight to clear communities of interest is that "[t]o be an effective representative, a legislator must represent a district that has a reasonable homogeneity of needs and interests; otherwise the policies he supports will not represent the preferences of most of his constituents." *Prosser*, 793 F. Supp. at 863.

{38} Incumbency considerations present their own difficulties. The United States Supreme Court in *Karcher*, 462 U.S. at 740, held that the legislative policy of avoiding contests between incumbents was included among legitimate objectives, which "on a proper showing could justify minor population deviations." *See also White*, 412 U.S. at 791 ("[I]n the context of state reapportionment . . . the fact that 'district boundaries may have been drawn [to] minimize[] the number of contests between present incumbents does not in and of itself establish invidiousness.'" (quoting *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966)); *Gaffney*, 412 U.S. at 752. However, incumbency protection cannot be justified if it is simply for the benefit of the officeholder and not in the interests of the constituents. *League of United Latin Am. Citizens*, 548 U.S. at 403.

{39} In summary, we interpret United States Supreme Court precedent to permit courts encumbered with the responsibility to draw redistricting maps to be guided by legislative policies underlying state plans to the extent the policies do not violate either the constitution or the Voters Rights Act. *Perry v. Perez*, ___ U.S. ___, ___, 132 S. Ct. 934, 941-42 (2012) (per curiam). A court is not required to rigidly adhere to maximum population equality as long as the court can enunciate the state policy on which it relies in deviating from the ideal population. By only deviating for enunciated state policy reasons, the court complies with the constitution and furthers the state's interests. In this case, we interpret the district court to have concluded that it was bound to a plus-or-minus one-percent population deviation with the sole exception of addressing the requirements of the Voting Rights Act. This conclusion does not conform to our view of the proper legal standard to be applied in redistricting cases as articulated above. Thus, we remanded this matter to the district court to draw its own redistricting map to avoid, to the extent possible, partisan bias, and to determine whether it could implement legitimate state policies by employing a more flexible approach to ideal population equality without departing from constitutional considerations.

THE DISTRICT COURT SHOULD HAVE SCRUTINIZED ALL OF THE PLANS FOR POLITICAL CONSIDERATIONS

{40} The district court considered evidence regarding the partisan bias of various plans, and acknowledged the same in its findings of fact and conclusions of law. However, the plan ultimately adopted by the district court, Executive Alternative Plan 3, did not undergo the same scrutiny for partisan bias that the majority of the plans that were previously considered had undergone. The executive parties introduced Executive Alternative Plan 3 into evidence on the last day of trial, after the political science experts who had scrutinized the plans before the district court were no longer available to testify. This plan was introduced during the testimony of Brian Sanderoff. Mr. Sanderoff pointed out the existence of significant partisan performance changes as compared with previously introduced executive plans; plans which the district court had previously heard from experts were partisan-neutral. Consistent with that testimony about partisan performance changes, the district court found that Executive Alternative Plan 3 increased Republican swing seats from five to eight over prior partisan-neutral executive plans. In addition, the number of majority Republican districts increased from 31 in the original executive plan to 34 in Executive Alternative

Plan 3.[3] Mr. Sanderoff testified that Executive Alternative Plan 3 could have been drafted with less partisan change, perhaps with the use of slightly greater population deviations. Because of both this testimony and the district court's rejection of other plans for perceived partisan bias considerations, and because of its own recognition that the plan contained significant partisan performance changes, the district court should have rejected Executive Alternative Plan 3 as well. At a minimum, the district court should have slowed the process down enough to determine whether the significant partisan performance changes could have been ameliorated by consideration of legitimate state policies and a more flexible approach to population deviations that would not offend the constitution.

{41} The incumbent pairings in Executive Alternative Plan 3 appear to have contributed to the plan's partisan performance. Six districts were consolidated in areas that were underpopulated, two strong Democrat districts in North Central New Mexico, two strong Republican districts in Southeastern New Mexico, and a strong Republican district and a strong Democrat district that were consolidated in Central Albuquerque. The consolidated North Central district remained a strong Democrat district and the consolidated Southeastern district remained a strong Republican district. However, the consolidated Central Albuquerque district became a strong Republican district. When the vacant districts were moved to the more populous areas West of Albuquerque, two strong Republican and one strong Democrat districts were created. The result was a partisan swing of two strong seats in favor of one party. The three new seats, two Republican and one Democrat, correctly reflected the political affiliation of the population in the overpopulated areas on the West side of Albuquerque and in Rio Rancho, a result we do not question. However, the source of those three seats has a questionable partisan bias. Two of the consolidated seats, one a Democrat-Democrat consolidation in North Central New Mexico, and the other a Republican-Republican consolidation in Southeastern New Mexico, are partisan-neutral in effect. The third consolidated district in Central Albuquerque is the one that raises questions. Despite combining a Republican and a Democrat seat, it resulted in a strongly partisan district favoring one party, in effect tilting the balance for that party without any valid justification. The resulting district is oddly shaped in an area where compactness is apparently relatively easy to achieve, suggesting, at least in part, that the district was created to give political advantage to one party. This result was not politically neutral and raises serious questions regarding its propriety in a court-ordered plan that should be partisan-neutral and fair to both sides. Stated differently, a more competitive district should have been created if at all practicable to avoid this political advantage to one political party and disadvantage to the other. Competitive districts are healthy in our representative government because competitive districts allow for the ability of voters to express changed political opinions and preferences. *See Alexander*, 51 P.3d at 1212.

{42} Although consolidation of districts coupled with moving one of the consolidated districts is not the only way to address population disparities when drawing new district boundaries to comply with the Equal Protection Clause, in this case the district

[3] How these findings of fact are relevant and material to the status quo was not completely developed at the district court level.

court appropriately exercised its equitable powers to insist on the consolidation of districts in the underpopulated regional areas of North Central and Southeastern New Mexico, as well as Central Albuquerque. The problem previously noted with the Central Albuquerque consolidation is not the fact that the consolidation occurred, but the manner in which the consolidation was accomplished.

SPECIFIC INSTRUCTIONS ON REMAND

{43} In our previous order, we remanded this matter to the district court to draw a redistricting map with the assistance of an expert under Rule 11-706. The district court was instructed to include the Multi-Tribal/Navajo Nation partial plan within any redistricting map that the district court will draw. In addition, we required the district court to reject all of the previously submitted plans because of the political advantage sought by the parties. The accusation that we ordered the district court to reduce Republican seats in the House originates in the imagination of the accuser. We asked the court to draw its own map with the desired goal being to draw a partisan-neutral map that complies with both the one person, one vote constitutional doctrine, the requirements of the Voting Rights Act, and considers other historical and legitimate state redistricting principles. Although it has been suggested that a partisan-neutral map is illusory, the history of this case proves otherwise. The parties were able to draw maps that gave them each a political advantage and with population deviations that likely would have passed constitutional scrutiny. A court, with a cautious eye toward neutrality, can make the good faith effort to draw a map that advantages neither political party.

{44} Other concerns were alluded to in the order with the expectation that the district court would give such concerns due consideration. However, the order does not specifically direct the district court what to do, if anything, about those concerns. The district court continues to have the discretion necessary to carry out its equitable jurisdiction.

{45} We provided the district court with the following instructions which we repeat here so as to document the instructions in this published opinion.

> In doing so, the district court should rely, as much as possible, on the evidence presently in the record, and it should not admit additional evidence from the parties. The district court should consider historically significant state policies as discussed herein through the use, where justified, of greater population deviations as set forth in the Legislative Council guidelines. At the district court's discretion, the parties may be permitted, but are not entitled, to file briefs identifying what state policies are supported by the evidence in the record that will assist the court in drawing a plan that results in less partisan performance changes and fewer divisions of communities of interest than the plan it adopted. Also in the district court's discretion, Brian Sanderoff would be a permissible candidate to serve as a Rule 11-706 expert, because of time constraints and his established expertise. Whether or not to use any of the maps that were introduced into evidence as a starting point, including Executive Alternative Plan 3, is within the discretion of the district court. The

parties shall have an opportunity to comment on a preliminary plan proposed by the district court before it ultimately adopts a final plan. The final map must take into account the following considerations:

1. *Population deviations.* Executive Alternative Plan 3 achieved very low population deviations, but it was at the expense of other traditional state redistricting policies, the most evident being the failure to keep communities of interest, such as municipalities, intact. Some cities were divided to maintain low population deviations among the different districts. On remand, the district court should consider whether additional cities, such as Deming, Silver City, and Las Vegas, can be maintained whole through creating a plan with greater than one-percent deviations. While low population deviations are desired, they are not absolutely required if the district court can justify population deviations with the non-discriminatory application of historical, legitimate, and rational state policies.

2. *Partisan performance changes.* On remand, the goal of any plan should be to devise a plan that is partisan-neutral and fair to both sides. If the district court chooses to begin with the plan it adopted previously, it should address the partisan performance changes and bias noted in this order, and if the bias can be corrected or ameliorated with enunciated non-discriminatory application of historical, legitimate, and rational state policies, including through the use of higher population deviations, then the district court should do so.

3. *As part of the review of partisan performance changes, the district court should consider the partisan effects of any consolidations.* Any district that results from a Democrat-Republican consolidation, if that is what the district court elects to do, should result in a district that provides an equal opportunity to either party. In the alternative, some other compensatory action may be taken to mitigate any severe and unjustified partisan performance swing. The performance of created districts as well as those left behind should be justified.

4. *Hispanic "Majority" District in House District 67.* It does not appear that the district court considered Hispanic citizen voting-age populations in reaching its decision, and it should do so on remand. Whatever its eventual form, the relevant Clovis community must be represented by an effective, citizen, majority-minority district as that term is commonly understood in Voting Rights Act litigation, and as it has been represented, at least in effect, for the past three decades.

CONCLUSION

{46} For all of the foregoing reasons, we remand this matter to the district court to draw its own House redistricting map, taking into consideration the legal principles we have announced herein. The district court was "urged to make every effort to conclude this

matter expeditiously, no later than February 27th, 2012, or otherwise advise this Court." All claims raised by Petitioners have been addressed in this Court's Order No. 33,386, dated February 10, 2012, or are considered to be without merit. We emphasize that the principles articulated herein apply only to court-drawn maps. After this opinion was filed and before it was released for official publication, the district court entered a final decision complying with this Court's remand order. We take this opportunity to publish the district court's final decision as Appendix A to our opinion to document the history of this case and for future reference in the event New Mexico courts are called upon in the future to reapportion elective offices.

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

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

PATRICIO M. SERNA, Justice

PETRA JIMENEZ MAES, Justice

RICHARD C. BOSSON, Justice

JONATHAN B. SUTIN, Judge
Sitting by designation, dissenting

SUTIN, Judge (dissenting).

{48} I respectfully dissent.

{49} Twelve years on the Court of Appeals has taught me to abide by rules relating to standard of proof and review. I therefore look at Judge Hall's work under that framework, instead of how the Majority frames its approach.

{50} The Majority reviews solely on a de novo basis. Majority Opinion ¶ 14. But the manner in which the Majority reviews on that basis necessarily combines weighing and finding facts as well as applying law. This case is not one involving pure questions of law. As the Majority acknowledges, Judge Hall sat as a court in equity. He had considerable discretion in arriving at his determinations. He considered all of the facts, and he made his determinations based on facts he thought supported his determinations. Judge Hall did not abuse his discretion—abuse of discretion is the traditional standard of review in equity. Judge Hall weighed and found facts, and nothing shows that his findings were not supported by substantial evidence—sufficiency of evidence is the traditional standard of review in regard to fact weighing and fact finding.

{51} The Majority justifies its approach for this reapportionment setting based on a theory that it "has a constitutional mandate to establish what the rule of law is and to clarify the law if it has not been interpreted correctly." Majority Order 13 (¶ 8). In my view, the Majority is out of bounds. Judge Hall did not interpret any law incorrectly. And, while the Majority has the prerogative to state what the rule of law is in New Mexico and to clarify the law, I see no reason for the Majority to have by-passed and ignored the traditional and important deference as to credibility determinations, fact finding, proof sufficiency, and discretion in equity given to trial judges, and then itself essentially assume the role of the trial judge while at the same time also then reviewing its own work. Long ago New Mexico stepped away from the territorial practice and procedure where a trial judge tried a case and, when the case was appealed, the same judge acting in the capacity of Supreme Court Justice reviewed his own decision for error. The Majority should not have stepped into Judge Hall's

judicial shoes in this case.

{52} I expressed a good deal of my thoughts in my necessarily hurried dissent attached to the Majority's Order entered in this matter on February 10, 2012. For what it is worth as the lone wolf in this case, I repeat that dissent below because it is the Majority's Opinion and not its Order that is published. Also, because of time constraints, I was unable to address in my dissent to the Order the merits of the issues that were decided by the Majority in that Order, I will address the merits here.

Clovis

{53} In regard to Clovis, looking at the totality of circumstances based on the proof presented, Judge Hall saw no Voting Rights Act violation. He was in no way required to continue in force the nearly twenty-eight-year-old, elephant-truncated, unnaturally divided district created in *Sanchez*. Majority Opinion ¶ 20. The burden was on those contending that no change should be made to that then legally gerrymandered district to prove that no change should be made. The Majority errs in placing the burden on Judge Hall to have shown that certain population changes occurred in the district over the years that required a change. Further, it appears that the resulting district retained an Hispanic voting age population above 50%. In addition, Judge Hall found that "[a]ll of the plans before the Court contain a significant number of Hispanic majority districts; however, the Court finds no persuasive evidence that Sec. 2 of the Voting Rights Act requires any particular Hispanic majority district be drawn. Judge Hall also found that "[o]f all the plans presented to the Court, Executive Alternate Plans 1, 2, and 3 maintain the highest number of districts with a Hispanic [voting age population] over 50%."

{54} I would not hang my hat as the Majority does on *League of United Latin American Citizens* (*LULAC*). Majority Order 8, 12 (¶ 7); Majority Opinion ¶¶ 17, 31, 38. "The unique question of law" in *LULAC* was "whether it was unconstitutional for Texas to replace a lawful redistricting plan 'in the middle of a decade,' for the sole purpose of maximizing partisan advantage." 548 U.S. at 456. *LULAC* is a congressional redistricting case with very different facts and issues. Within the *Gingles* totality of the circumstances, Voting Rights Act evaluation requirement, *LULAC* addressed the proportionality factor and then considered citizen voting age population on a statewide basis after the district court made a finding regarding statewide citizen voting age population. *Id.* at 438. *LULAC* does not set down a rule or principle that necessarily governs Judge Hall's determinations.

{55} Those challenging the reapportionment with respect to Clovis failed in Judge Hall's assessment to prove the *Gingles* factors that would require a conclusion that the Voting Rights Act was violated and a remedial district must be formed. Furthermore, beyond the *Gingles* factors, neither the Majority nor a party has pointed out where data showing the percent of Hispanic citizen voting age population in the district in question was proved. In fact, one must question whether any underlying evidentiary support even exists to support such data for the particular district at issue. Brian Sanderoff, who worked on this case for the Legislative Council Service, and who apparently is Judge Hall's new Rule 706 expert at the strong suggestion of the Majority, testified that there was no data indicating the exact percentage of Hispanic citizen voting age population in the existing districts or in the districts contained in any of the plans. I believe the Majority erred in requiring Judge

Hall to rethink the evidence, and the lack thereof, or obtain further evidence in order to arrive at what the Majority essentially holds is a mandatory Voting Rights Act remedial district. Majority Opinion ¶¶ 19-20; Majority Order 20-21 (¶ 4).

Minimum Population Deviation

{56} In regard to the one man-one vote requirement embedded in constitutional law, it is obvious that Judge Hall was very much aware of and attuned to the applicable United States Supreme Court and federal cases, as well as state case law. He knew the law on acceptable deviation from minimum population requirements. He did not misunderstand, misconstrue, or misapply the law in any regard. He applied the law correctly. He deviated where it was necessary under the Voting Rights Act or under any legitimate State interest to do so. In adopting the Native American Plan in order to protect Native American interests, the Executive and Judge Hall had to deal with population dispersion "ripple-effect" complications resulting from that plan's insertion in the map. Judge Hall did not deviate where the circumstances and proof offered failed, in his view, to establish any Voting Rights Act violation or to establish that a legitimate State interest would require deviation. I believe the Majority erred in concluding that Judge Hall misconstrued the law or did not apply the law correctly and in instructing Judge Hall to rethink the evidence and change his mind so as to provide for even further deviation notwithstanding his view that proof requiring any such deviation was lacking.

Partisan Effect

{57} I think the Majority is mistaken in thinking that the "public will" is measured solely or even primarily from an un-enacted legislative plan and is also mistaken in its thinking that plans can be fully partisan free. The legislative plan passed with all Republicans and some Democrats voting against passage. The Governor, elected by a will of the majority of voters, vetoed the plan. No attempt was made to override the veto. A highly qualified and experienced retired First Judicial District Court (Santa Fe) judge, who reflected no partisanship, scrupulously studied the facts and the law, and came to a considered and principled determination. Lawyers known to be highly partisan on both sides presented evidence and arguments. The Majority's view that "thoughtful consideration" means give more credence to the un-enacted legislative plan than to that offered and eventually modified by the Executive has no basis in law or reason. In no way has the "will of the majority of the people" or the "voice of the people" been "muzzle[d,]" Majority Opinion ¶¶ 21, 32-33, in the process here.

{58} In challenging partisan effect, Petitioners Jennings and Lujan, as well as Maestas, indicated in their opening briefs that unlawful partisan bias is to be "significant." In their petition for writ of superintending control, Petitioners Maestas and Egolf used the phrases "blatant partisan bias" and "demonstrably partisan effect." Petitioner Egolf used "severe" in his opening brief. Petitioners Jennings and Lujan also used the phrase "significant partisan change" in their response brief. The Majority faults Judge Hall for not "slow[ing] the process down enough to determine whether the *significant* partisan performance changes could have been ameliorated[.]" (Emphasis added.) Majority Opinion ¶ 40. Yet the Majority has not shown how any partisan effect here rises to a level of significance, severity, or blatancy sufficient to call for Judge Hall to rethink his work to arrive at "less partisan change[,]" *id.*; Majority

Order 20 (¶¶ 2-3), much less to arrive at the Majority's required neutrality. Nor has the Majority shown how a new plan addressing a purported Republican swing-seat advantage will not result in an attackable maintenance of some Democratic advantage. Judge Hall certainly did not indicate, with respect to swing seats, that there existed "significant" Republican partisan performance advantage and, when one considers Mr. Sanderoff's full testimony, Judge Hall could in his sound discretion have refused to view any Republican performance swing-seat advantage as justification for arriving at a different plan. Maintenance of and changes in seats of one party or the other is an understandable effect of the reapportionment process. As the majority recognizes, Judge Hall sat as a judge in a court of equity. Majority Order 6 (¶ 3). Considerably more must exist here to say that Judge Hall abused his discretion.

Other Matters

{59} Among other statements and implications in the Majority's Opinion that have given me pause are the following. First, Judge Hall, and thus his plan, did not "seek[]" partisan advantage. Majority Opinion ¶ 31. He did not try to "advance the purposes or the ability of one party to really elect a lot more people than the status quo." Majority Opinion ¶ 30 (internal quotation marks omitted). Judge Hall expressly did not allow partisan considerations to control the outcome of [his] decision." Furthermore, as I have discussed earlier in this dissent, Judge Hall's plan in no way produced any degree of even unintended partisan effect that required it to be overturned.

{60} Second, I believe that the Majority's various statements that attempt to show the Executive in bad light go nowhere. Despite implications to the contrary, nothing in the record indicates that those challenging Judge Hall's plan did not receive a fair hearing or were denied the opportunity to later examine the Executive's expert or to call their own expert back, and nothing indicates that the Executive acted in bad faith.

{61} Third, boiling the important cases down in terms of one man-one vote and population deviations based on legitimate state interests, cases in which the plans were enacted into law are inapposite. *Chapman* and *Connor* control here. *See also Reynolds*, 377 U.S. at 579 (stating that the "*overriding* objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the [s]tate" (emphasis added)). It bears repeating that Judge Hall did deviate, where he deviated he justified the deviation, and where Judge Hall did not deviate the record fails to reflect that those now challenging his plan justified deviations they felt were required under the law.

{62} Fourth, the Majority's "appearance of and actual scrupulous neutrality," Majority Opinion ¶ 31, principle does not hold water. It relies on misguided notions of "seek[ing] partisan advantage" and on "maintaining the political ratios as close to the status quo as is practicable[.]" *Id.* Return to the status quo can only mean return to the now, unconstitutional, over-ten-years-old-population districts—involving districts that have dramatically changed in population and districts that gave rise to the Democratic House seat total of thirty-eight and the Republican House seat total of thirty-two in 2011. There exists no recognizable validity to that status quo approach. Further, the partisan issue here is one seat gained by Republicans, hardly something to require Judge Hall to return to the creative drawing board in search

of the illusory notion of neutrality. Voters will "choose their representatives[,]" *id.*, just fine under Judge Hall's plan. The idea that Judge Hall was not "consistent and non-discriminatory" in applying legitimate State interests, *id.*, marginalizes, if not repudiates, a trial judge's basic and essential work and role in determining whether sufficient evidence exists to support a claim of inconsistency and discriminatory application of those interests. Such a notion outright and erroneously rejects Judge Hall's having given thoughtful consideration to the plans, policies, and interests. That rejection has no support in the record. Further, it seems to me a bit far fetched to engage in the hyperbolic phrases of "giv[ing] effect to the will of the majority of the people" and the "unaccept[ability] for courts to muzzle the voice of the people." Majority Opinion ¶¶ 32-33. Contrary to the view of the Majority, I believe that the integrity and legitimacy of the judiciary was not at risk in Judge Hall's hands nor were they diminished by Judge Hall's plan.

{63} Fifth, based on what I have discussed throughout my dissents, the view that Judge Hall's plan "did not undergo the same scrutiny for partisan bias that the majority of the plans that were previously considered had undergone[,]" Majority Opinion ¶ 40, is unsupported in the record.

Conclusion

{64} The Majority Opinion is long on the law but falls short on the battlefield decisions. Determinations expressly or impliedly holding that Judge Hall violated the Fourteenth Amendment and the Voting Rights Act are unsupported in the record. The actual effects about which the Majority is concerned, even if valid to any degree, are too insubstantial to require the remand and "do over" required of Judge Hall. Other than its references to the Clovis area with unsupportable reliance on citizen voting age population data, and its concern about partisan effect relating to one district in Central Albuquerque, the Majority points to no particular district it considers to be unlawfully established. Its tail-end instruction that Judge Hall "consider whether additional cities, such as Deming, Silver City, and Las Vegas[] can be maintained whole through creating a plan with greater than one-percent deviations." Majority Order 19 (¶ 1); Majority Opinion ¶ 45(1), has little, if any basis in the Majority's Order or Opinion. Based on the Majority's problematic review approach and erroneous intrusion into Judge Hall's bailiwick, on the Majority's unsupported view that Judge Hall incorrectly interpreted the law, on the Majority's vague analyses of actual error on Judge Hall's part requiring remand to revamp the plan, and on the minimal impact of whatever swing-seat advantage the Republicans may have gained, one must wonder why the Majority has gone to the lengths it has to overturn Judge Hall's plan.

{65} Based on what I have set out above and below, I respectfully dissent. The Majority should have affirmed Judge Hall and his plan, while at the same time setting out whatever rules or principles the Court thought constituted the rules courts of this State should follow in reapportionment cases.

{66} The foregoing dissent has been prepared as Judge Hall is no doubt attempting to create a new plan that follows the dictates of the Majority. That plan will no doubt be affirmed by the Majority, given what Judge Hall is instructed to do.[4] My only hope is that

[4] Different than the language and tenor of its Order, the Majority now attempts to ameliorate what it has instructed by saying that the Order did "not specifically direct the

Judge Hall does not expressly confess error.

Repeat of Dissent to Order Previously Entered

{67} The Majority's decision that its order be filed immediately has allowed me time and opportunity to only generally address why I oppose the remand requiring Judge Hall to revamp the plan according to the rules laid down by the Majority. The immediacy has not allowed me time and opportunity to rebut the Majority's determinations on the merits of the issues as contained in the order. Based on the detail in the order deciding the merits of the issues, and the requirement that Judge Hall change the plan, I tend to doubt that any follow-up Majority opinion will be needed, and I tend to doubt that the extensive detailed work required for a dissent will be useful.

{68} I respectfully oppose entry of the Majority's remand order. There exists no need to require Judge Hall to consider facts and law that he has already thoroughly considered. There exists no need for reconsideration of how Judge Hall applied the law of population deviation when it is clear that he understood the law and did not misapply it. Nor is there a need to remand for Judge Hall to reconsider facts (implying, it seems, to also change his mind) relating to any alleged Fourteenth Amendment or Voting Rights Act violation or relating to secondary factors such as communities of interest.

{69} Of course, this Court is not to rubber stamp Judge Hall's work and plan. At the same time, however, it is important to note that the Supreme Court's appointment of Judge Hall was purposeful and an excellent choice. Judge Hall was a highly respected judge for his fairness, good judgment, principled and rational decisions, seasoned analytic ability, and his ability to grasp complex issues. In his known judicial capacity, Judge Hall did not act arbitrarily. In these important circumstances, Judge Hall would not and did not, here, create a plan that he saw or felt or believed contained any partisan effect or bias that violated the Fourteenth Amendment. He would not have put forth a plan if the evidence supported a determination that the plan violated the Voting Rights Act. He would not have created a plan that would fail to withstand strict scrutiny. In his consideration of secondary factors, he would not have created a plan that, in his view, failed to protect communities of interest.

{70} Reapportionment cases are known for their rampant partisanship, whether at the legislative level or in the court. The cases are complex. Population increase over ten years requires change. Redistricting is necessary. Expert map drawers, political scientists, and historians are involved. Witness testimony and documentary evidence fills volumes. The quest for the perfectly neutral reapportionment map devoid of partisan effect or bias is illusory. Parties and courts quote what they want from the United States Supreme Court and lower federal courts, as well as from state courts, for favorable language to support their positions.

{71} The overriding goal is population equality and to serve the constitutional principle of "one man-one vote." Once in court, the search involves pathways through various proposed plans offered by partisans. Those in power want to keep their seats and obtain more seats; those out of power want to keep their seats and obtain more seats. The

district court what to do, if anything," about the Majority's "concerns[,]" and that the district court "continues to have the discretion necessary to carry out its equitable jurisdiction." Majority Opinion ¶ 44.

court must give thoughtful consideration to the plans and listen to the arguments. First and foremost, the court sits in equity and tries to structure a plan within the constraints of the Fourteenth Amendment and the Voting Rights Act.

{72} If, in drawing a plan, the court exceeds minimal population deviation, the court must justify the deviation based on legitimate state interests which appear to consist of traditional state redistricting policies and practices. Here, the court started with the clear constitutional mandate of minimum deviation from population equality. At some point, Judge Hall determined that he was required to substantially deviate from population equality with regard to Native American communities in order to satisfy the requirements of the Voting Rights Act. Judge Hall appropriately justified the deviation. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (explaining what proof is necessary for a court to find a violation of Section 2 of the Voting Rights Act).

{73} With respect to the population deviation that Judge Hall maintained at minimal levels, he had nothing to "justify" because that minimal deviation is what the law requires unless a deviation is necessary to satisfy legitimate state interests. Those attacking minimal deviation have the burden of advocating for a particular deviation and then justifying the deviation based on legitimate state interests. To the extent parties launched that attack, Judge Hall determined that the evidence presented was insufficient to require a deviation. To the extent that parties attacked Judge Hall's plan because it unfairly diluted Hispanic voting power, Judge Hall determined that the evidence presented was insufficient to support any claimed violation of the Fourteenth Amendment or the Voting Rights Act. Moreover, all of the plans split some communities of interest. Furthermore, communities of interest are defined in many different ways, they are what they are based on the eyes of the beholder, and are, for the most part, partisan driven.

{74} The parties now attacking Judge Hall's plan submitted extensive requested findings of fact and conclusions of law stating the various reasons why their respective plans should be adopted by the court. Judge Hall did not adopt their requested findings, thereby effectively finding against those parties and the propriety of their plans. The parties have not attacked with the required specificity Judge Hall's findings of fact, among which are: that his plan includes thirty districts with Hispanic voting age population over 50%, maintaining the highest number of districts with a Hispanic voting age population over 50%; that incorporating the Native American plans caused the number of swing districts of 49-51% to increase from five to eight, and the number of majority Republican performance districts (over 50%) to reach 34; that his plan avoids splitting communities of interest (particularly the Native American communities of interest) to a reasonable degree; that he gave thoughtful consideration to all plans (plus amended, modified, and alternative), including the unenacted Legislative Plan; that he considered the totality of circumstances when considering whether the plan violated the Voting Rights Act.

{75} The issues on which the Majority want to remand this case are intensely fact-based and fact-driven. This Court should not and has no need to (1) disregard the exceptional care Judge Hall took in determining whether the parties attacking the plan and advocating their own plans fulfilled their proof burdens and (2) draw a conclusion that, as a matter of law, those parties proved a

Fourteenth Amendment or Voting Rights Act violation or that some secondary factor necessarily overrides the plan.

{76} Nothing in this case shows that Judge Hall failed to consider all of the evidence presented. Nothing shows that he failed to give thoughtful consideration to everything offered by the parties. From the record and from his extensive findings of fact and conclusions of law, it is readily apparent that Judge Hall considered all of the evidence and gave thoughtful consideration to the presentations of the parties.

{77} Judge Hall looked at the various plans, discussed his concerns about several of them, and made suggestions to parties about how they might improve the palatability of their plans by considering certain changes. Some made changes; others did not. This was the process Judge Hall chose instead of attempting to draw a virgin plan. In fact, to adopt aspects of plans proposed by the executive and legislative parties following extensive testimony and plan modifications indicates a process that considers the will of the people.[5] I do not agree with the Majority that Judge Hall's process was flawed because it did not satisfy a requirement of judicial neutrality or independence.

{78} In my view, nothing in the Majority's cited case of *Peterson v. Borst*, 786 N.E.2d 668 (Ind. 2003), which involved a City-County redistricting plan, requires remand. I see no basis on which to question Judge Hall's or "the judiciary's" neutrality and independence given the nature of the trial; the manner in which Judge Hall conducted the trial; the parties' full opportunity to present their witnesses, documents, and arguments; Judge Hall's detailed study of the various plans; and his interactions with the parties and recommended plan changes. Judge Hall handled this case "in a manner free from any taint of arbitrariness or discrimination." *See id.* at 672 (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)).

{79} Ultimately, based on how he viewed all of the various plans and any modifications made, and based on how he evaluated the credibility of the witnesses, the models, the various analyses, and the reasonableness of testimony and counsel's arguments, Judge Hall thought that the Executive Plan, as modified, was a fair, reasonable, and appropriate plan.

{80} All plans suffered from partisan effect. Will any plan be devoid of some partisan effect? The parties that contend that the plan must be overturned state the standard to be "severe" and "significant" partisan bias. There exists no evidence in this case that Judge Hall intended or adopted a plan that violated the Fourteenth Amendment because of severe or significant partisan bias. Nothing in the plan shows any egregiousness, and nothing in the evidence indicates that any attempt at neutrality (which, although not a word used in the Order, is what I believe the Majority actually requires) or, even as the Order indicates, "less partisan effect," will relieve the challengers or the Majority of their view that any Republican advantage that results in seat gain from the status quo constitutes a partisan bias that violates the

[5] I note that the "will of the people" was involved here from start to finish. While the legislative plan passed the House, all Republicans and a few Democrats voted against passage, the Governor vetoed the plan, any veto override was unlikely and not attempted, Judge Hall rejected the legislative plan, and several parties advocating their interests fully presented their positions and views at trial.

Fourteenth Amendment. Democrats keep their statewide majority under the plan. Several districts with Republican advantage are competitive. Judge Hall's plan was in no way driven by partisan bias. Nothing in the record indicates that Judge Hall's goal, much less overriding goal, was to effect partisan change. If the Majority wants Judge Hall to move things around to obtain "less partisan effect," does that take us to some sort of status quo, and will the status quo violate population shifting requirements? The answer to the question of partisan bias can depend in part on tests or models used. Several were under consideration. Judge Hall was not required to apply any one of them in particular or to rely on them as the sole basis on which to decide whether the proof showed a partisan effect or bias that violated the Fourteenth Amendment. Furthermore, no evidence bound Judge Hall to find that there was actual harm or undue prejudice to Democrats, who continue to maintain a majority of the seats in the House.

{81} There exists no basis on which to learn more from Judge Hall on any issue. Nothing in the record shows that Judge Hall abused his discretion in any respect. He did not misapprehend or misconstrue the law. He was in no way arbitrary. He does not need to provide further explanation about his determinations. Nothing proves that the plan will create serious problems in the future. This matter is not in need of remand. Judge Hall's plan is an appropriate stopping place. The election process needs to go forward now, without a delay of reconsideration or instruction essentially requiring Judge Hall to reduce Republican seats, without the delay of a 706 expert already shown through his testimony to have opinions about issues in the case, and without a delay involving the required opportunity to comment on any new plan or any changes. The stopping point of Judge Hall's plan is eminently more wise and fair than the stopping point of the next, reconstituted plan, with no fair opportunity to follow allowing the party opposing the plan to obtain relief in this Court.

JONATHAN B. SUTIN, Judge

APPENDIX A

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

BRIAN F. EGOLF, JR., HAKIM BELLAMY, MEL HOLGUIN, MAURILIO CASTRO, and ROXANNE SPRUCE BLY	)	
Plaintiffs,		
v	)	NO. **D-101-CV-2011-02942**
DIANNA J. DURAN, in her official capacity as New Mexico Secretary of State, SUSANA MARTINEZ, in her official capacity as New Mexico Governor, JOHN A. SANCHEZ, in his official capacity as New Mexico Lieutenant Governor and presiding officer of the New Mexico Senate, TIMOTHY Z. JENNINGS, in his official capacity as President Pro-Tempore of the New Mexico Senate, and BEN LUJAN, SR., in his official capacity as Speaker of the New Mexico House of Representatives,	)	CONSOLIDATED WITH **D-101-CV-2011-02944** **D-101-CV-2011-02945** **D0101-CV-2011-03016** **D-101-CV-2011-03099** **D-101-CV-2011-03107** **D-202-CV-2011-09600** **D-506-CV-2011-00913**
Defendants.	)	

DECISION ON REMAND

This matter returns back before this Court on remand from the New Mexico Supreme Court. Following an evidentiary hearing on the merits regarding the redistricting of the New Mexico House of Representatives, this Court entered its Findings of Fact and Conclusions of Law and adopted a redistricting plan for the House of Representatives. In this Decision, the initial plan adopted by this Court will be referred to as the "First Court-Adopted Plan."

The First Court-Adopted Plan was reviewed by the New Mexico Supreme Court. The Supreme Court issued an Order (hereinafter "the Remand Order") returning the case to this Court with specific instructions on remand. Subsequently, the Supreme Court issued an Opinion (hereinafter "the Opinion") in Maestas, et al. v. Hall, No. 33386, which further addressed the issues in this case and the Remand Order.

The Remand Order directed this Court to draw a new reapportionment plan with the assistance of an expert under Rule 11-706 NMRA. The Remand Order stated that Brian Sanderoff of Research & Polling, Inc. would be a permissible candidate to serve in the role of a Rule 11-706 expert. Remand Order at pp. 18-19. This Court appointed Mr. Sanderoff as the Rule 11-706 expert. As suggested by the Remand Order, the parties were given an opportunity to file briefs identifying state policies that would assist the Court in drawing a plan that results in less partisan performance changes and fewer divisions of communities of interest. The Remand Order further directed that this Court "should rely, as much as possible on the evidence presently in the record, and it should not admit additional

evidence from the parties."[1] Remand Order at p. 18.

Following the receipt of the briefs and with the assistance of Mr. Sanderoff, the Court developed two preliminary plans which were provided to the parties for comment. The parties commented on the preliminary plans.[2]

This Court now adopts the plan identified as Preliminary Plan No. 1 without change. For purposes of this Decision, this plan will now be referred to as the Final District Court Plan. This written Decision is intended to set forth this Court's conclusions in light of the Remand Order and Opinion of the Supreme Court.

In the Remand Order, the Supreme Court identified four areas in which the Supreme Court agreed with certain determinations made in the First Court-Adopted Plan. Remand Order at pp. 17-18. First, the Supreme Court agreed that the Native American districts should be included without change in the final court map. Second, the Supreme Court concluded that this Court "appropriately exercised its equitable powers to insist on the consolidation of districts in the underpopulated regional areas of North Central and Southeastern New Mexico, as well as Central Albuquerque." Remand Order at p. 17. Specifically, the Supreme Court recognized the partisan neutral nature of a Democrat-Democrat consolidation in North Central New Mexico and a Republican-Republican consolidation in Southeastern New Mexico. Remand Order at p. 15. Third, the Supreme Court agreed that this Court was not required to adopt the Legislative Plan as long as it gave that plan thoughtful consideration.[3] Fourth, the

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[1] In what appears to be a violation of this Supreme Court directive, the Egolf Plaintiffs submitted an Affidavit from Theodore Arrington, a witness who testified during the trial. In response to a Motion to Strike Dr. Arrington's Affidavit, the Egolf Plaintiffs contend that the Affidavit is appropriate because it is a part of their "comment" on the Court's Preliminary Plans. This argument is not persuasive. Clearly, an affidavit from an expert witness is evidence and the Supreme Court was quite clear that the parties not submit additional evidence; therefore, this Court does not consider the Affidavit of Dr. Arrington or any of the arguments based on that specific evidence.

Using a slightly different approach, the Maestas Plaintiffs submitted two proposed redistricting maps to this Court, but contend that the maps submitted are "for illustrative purposes only." Maestas Brief on Remand at p. 5. While it may be arguable whether this approach violates the letter of the Supreme Court directive, it certainly violates the spirit of the Remand Order. As a result, this Court does not consider the actual maps submitted by the Maestas Plaintiffs, but does consider the comments contained in the Maestas briefs.

[2] Preliminary Plan No. 2 included a different pairing of legislators in the North Central region. Although one party had initially proposed this new pairing in the briefs, no party argued that this Court should adopt Preliminary Plan No. 2 in their comments on the proposed plans and several parties contended that Preliminary Plan No. 2 was not based on the evidence presented at trial. After considering the issue, this Court agrees that the existing court record does not support the adoption of Preliminary Plan No. 2.

[3] This Court's thoughtful consideration of the Legislative Plan is specifically addressed in the Findings of Fact and Conclusions of Law. See Findings of Fact Nos. 32-41 and Conclusions of Law 27-28.

Supreme Court agreed that this Court was not required to preclude Governor Martinez from introducing plans during the litigation. In addition, in the Opinion, the Supreme Court specifically required this Court to reject all previously submitted plans "because of the political advantage sought by the parties." Opinion at p. 32.

In the Remand Order, the Supreme Court noted that the starting point for the creation of a final plan was left to this Court's discretion. After consideration, this Court concludes that the most appropriate starting point is the First Court-Adopted Plan. This Court adopts the First Court-Adopted Plan as the starting point for two reasons. First, the parties had an opportunity during the course of trial to evaluate and present evidence regarding the First Court-Adopted Plan, both in its final form and in earlier iterations of the plan ultimately adopted by this Court. If this Court were to develop a completely new plan from scratch at this time, the parties' input would be limited to a three-day comment period which would seem insufficient for a completely new plan (as opposed to a modification of a plan on which they already had input).

The second reason that this Court has used the First Court-Adopted Plan as a starting point is that the Supreme Court agreed with two important components of the First Court Adopted-Plan, i.e., the inclusion of the Native American districts without change and the consolidations of certain districts. Of the plans submitted during trial, only the final few plans submitted by the Executive Defendants and the First Court-Adopted Plan included both the Native American districts without change and the basic consolidations which the Supreme Court approved (i.e., a Democrat-Democrat consolidation in North Central New Mexico, a Republican-Republican consolidation in Southeastern New Mexico and a Democrat-Republican consolidation in Central Albuquerque[4]). Because the other plans introduced at trial do not include these two important components, this Court rejected the other plans as potential starting points.

With that background, this Court addresses the specific instructions of the Supreme Court on remand as follows: [5]

1. *Population deviations.*

> On remand, the district court should consider whether additional cities, such as Deming, Silver City, and Las Vegas, can be maintained whole through creating a plan with greater than one-percent deviations. While low population deviations are desired, they, are not absolutely required if the district court can justify population deviations with the non-discriminatory application of historical, legitimate, and rational state policies.

Remand Order at p. 19.

In the First Court-Adopted Plan, the

All of those findings and conclusions are still applicable.

[4] The concerns of the Supreme Court regarding the Democrat-Republican consolidation in Central Albuquerque are addressed below.

[5] As to each of the Supreme Court's four specific instructions, this Decision sets out the specific directive language of the Remand Order

population deviation between districts ranged from +1.69% above the ideal population for a district to -4.99% below the ideal population for a district, a total range of 6.68%. The Remand Order of the Supreme Court directs this Court to determine whether additional cities can be maintained whole with additional deviations. [6]

[6] The Remand Order contains the following language: "In this case, the district court concluded that it was bound to a plus-or-minus one-percent population deviation with the exception of addressing Voting Rights Act infractions." Remand Order at pp. 13-14. This language was modified slightly in the Opinion which reads: "In this case, we interpret the district court to have concluded that it was bound to a plus-or-minus one-percent population deviation with the sole exception of addressing the requirements of the Voting Rights Act." Opinion at p. 27.

With all due respect to the Supreme Court, the Findings of Fact and Conclusions of Law do not support such an interpretation. This Court's Findings of Fact and Conclusions of Law do not adopt a +/- one percent deviation standard with the sole exception being violations of the Voting Rights Act. This Court made specific findings regarding Native American communities of interest. Findings of Fact Nos. 58, 59, 60, 67, 69 and 74. This Court also specifically concluded that more substantial deviations were justified not only based on the Voting Rights Act, but also based on significant state policies including protection of communities of interest. Conclusions of Law Nos. 24, 27, 33 and 34.

In fact, the standard adopted by the Supreme Court as to population equality and deviations is identical to the standard adopted and applied by this Court. In the Opinion, the Supreme Court examines the case law related to the application of legitimate and rational state policies on reapportionment plans and notes that, for plans which are "drawn by a legislature that have become law," ten-percent deviations are prima facie constitutional. Opinion at pp. 14-17. The Supreme Court goes on to set forth the standard as it relates to court-drawn plans:

> In contrast to legislatively-drawn plans, court-drawn plans are held to a higher standard, and "must ordinarily achieve the goal of population equality with little more than de minimus variation." *Chapman v. Meier,* 420 U.S. 2, 27 (1975). The United States Supreme Court has not defined what constitutes de minimus variations for a court-drawn plan. However, unlike a legislative body that does not have to articulate the policy reasons for minor deviations from ideal population equality, unless the range of deviations exceed ten percent, a court must enunciate the historically significant state policy or unique features that it relies upon to justify deviations from ideal population equality. *Connor v. Finch*, 431 U.S. 407, 419-20 (1977).

Opinion at pp. 17-18 (footnote omitted). In the footnote omitted here, the Supreme Court notes that court-drawn plans have had deviations of +/-4.96%, +/-6.6% and +/-9.26%, all percentages which are similar to the deviation of 6.68% in the First Court-Approved Plan.

Although some parties argued for a different standard during the trial, the legal standard on population equality that was adopted and applied by this Court matches the Supreme Court's recitation of the applicable law almost word-for-word. See Conclusions

In the Final District Court Plan, Las Vegas and Deming are maintained whole within a single district. In addition, in contrast to the First Court-Adopted Plan, Mountainair and Tijeras are each contained within a single district in the Final District Court Plan.

Because Silver City was specifically identified in the Remand Order, this Court and the Rule 11-706 expert examined Silver City closely to determine if it was possible to unify Silver City within one district while still complying with the criteria set forth by the Supreme Court in the Remand Order and Opinion. As explained below, this Court ultimately concluded that Silver City could not be unified without violating the Supreme Court's clear direction that the plan be partisan-neutral.

The southwest area of New Mexico presents difficult challenges in this redistricting cycle. Under the current map, three districts (Districts 32, 38 and 39) are included in Grant, Hildago, Luna and Sierra Counties. The largest communities in these counties are Silver City, Lordsburg, Deming and Truth or Consequences. Under the current map, Silver City is split between District 38 (which is a Republican performing district with a Republican incumbent) and District 39 (which is a Democrat performing district with a Democrat incumbent). The Republican incumbent in District 38 lives in Silver City. The Democrat incumbent in District 39 lives very near Silver City in Bayard.

Based on the most recent census, this area of New Mexico no longer has sufficient population to support three full House districts. In fact, the population in this area is sufficient to support approximately 2½ House districts. As a result, at least one of these districts must now extend into Dona Ana County (where some population increases have occurred) for additional population. This expansion into Dona Ana County is necessary even if population deviations are expanded to +/- 5 percent.

Unifying Silver City presents two problems. First, it is difficult (but not impossible) to unify Silver City and still keep Lordsburg, Deming and Truth or Consequences unified in a single district. In other words, unifying Silver City most often results in splitting at least one of the other three communities. All four communities cannot be kept intact without pairing additional incumbents and/or impacting the partisan neutrality of the plan.

More importantly, unifying Silver City results in partisan change to these districts. In the split of Silver City under the current map, the precincts within Silver City which are part of District 39 tend to be more Democratic, while the precincts within Silver City which are part of District 38 tend to be more Republican than those precincts in District 39. The incumbent in District 38 lives within the city limits of Silver City; therefore, in the absence of an additional pairing of incumbents[7], a unified Silver City would have

of Law Nos. 6, 8 and 17.

[7] This Court examined the possibility of pairing the two incumbents in the Silver City area. Under the Supreme Court directives, such a Democrat-Republican pairing would have to provide an equal opportunity to either party. Remand Order, p. 20. Accomplishing this goal would be very difficult without splitting communities other than Silver City. Moreover, the partisan performance measures for the newly created district would alter the partisan balance. Unlike the population growth in Rio Rancho

to be included within District 38. Because this would involve the inclusion of additional precincts which tend to be more Democratic, District 38 would change from a Republican majority district to a Democrat majority district if Silver City is unified in District 38.[8] The Court and the Rule 11-706 expert examined whether this partisan change could be avoided through the use of higher deviations; however, the partisan change occurs even if deviations are increased to +/- 5 percent.

For redistricting purposes, the competing interests here are unifying communities of interest as opposed to partisan neutrality. These competing interests cannot be accommodated by increased deviations up to +/- 5 percent. In the Remand Order and the Opinion, the Supreme Court emphasizes the importance of both partisan neutrality and unifying communities of interest; however, the Supreme Court does not give any guidance as to which of these two interests are to be given preference when they are in conflict and when that conflict cannot be removed with increased deviations.

This Court concludes that, in the particular circumstances present in southwestern New Mexico, maintaining partisan neutrality must take precedence over the admirable goal of unifying Silver City. This Court reaches this conclusion for several reasons. First, all plans must spilt some municipalities and communities of interest. Second, the current plan divides Silver City. Third, under most scenarios, unifying Silver City results in the split of at least one other substantial community in the region. Finally, the Supreme Court disapproved of this Court's adoption of the First Court-Approved Plan at least partially on the grounds that it had different partisan consequences than earlier versions of the Executive Plan. Many of the modifications from earlier versions of the Executive Plan were modifications made with the specific purpose of keeping identified communities of interest unified. See Findings of Fact Nos. 68 and 69 and Conclusions of Law 32 and 33. Because the Supreme Court concluded that the partisan effects of unifying additional communities of interest violated the requirement of partisan neutrality in the First Court-Approved Plan, this Court is hesitant to adopt a plan that unifies Silver City with attendant partisan consequences. [9]

2. *Partisan performance changes.*

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and the west side of Albuquerque which can clearly be identified as supporting two Republican and one Democrat seat, identifying the appropriate partisan makeup of a new seat in the southwest area of the state is virtually impossible.

[8] An explanation of the methodology used to determine whether a particular district is Republican majority or Democrat majority is set forth below. See p. 10.

[9] The Court and the Rule 11-706 expert examined additional suggestions to unify other municipalities submitted by the parties in their comments on the preliminary plans. When those suggestions were incorporated into the plan, the result generally was some change in the partisan neutrality of the plan. Not surprisingly, the change in partisan neutrality generally benefitted the political party aligned with the party proposing the change. After discussion of each suggested change, the Court concludes that the partisan consequences of the proposed changes outweigh the potential benefit of the proposed unification of the identified municipality; therefore, the suggested changes were not adopted.

> On remand, the goal of any plan should be to devise a plan that is partisan-neutral and fair to both sides. If the district court chooses to begin with the plan it adopted previously, it should address the partisan performance changes and bias noted in this order, and if the bias can be corrected or ameliorated with enunciated non-discriminatory application of historical, legitimate, and rational state policies, including through the use of higher population deviations, then the district court should do so.

Remand Order at p. 20.

In reviewing the Remand Order and Opinion, the Supreme Court identified the following partisan performance changes and bias in the First Court-Adopted Plan: 1) the First Court-Adopted Plan increased Republican swing seats from five to eight over prior executive plans (Remand Order at p. 14); 2) the number of majority Republican districts increased from 31 in the original executive plan to 34 in the First Court Adopted Plan (Remand Order at pp.14-15); and 3) the incumbent pairings in the First Court-Adopted Plan contributed to partisan performance changes. (Remand Order at p. 15).[10] While the Remand Order compares the First Court-Adopted Plan to earlier executive plans in terms of majority Republican districts and Republican swing seats, the Opinion focuses more on the status quo: "[M]aintaining the political ratios as close to the status quo as is practicable, accounting for any changes in statewide trends, will honor the neutrality required in such a politically-charged case." Opinion at pp. 21-22.

[10] The issue of incumbent pairings is addressed below.

The first step for this Court in carrying out the direction of the Supreme Court is to identify what constitutes the "status quo" in terms of the political ratios to be maintained. The Supreme Court gives no specific guidance on this issue. Both at the trial and in briefs submitted on remand, several parties argued that the Court should adopt the present political ratio between Republicans and Democrats in the New Mexico House of Representatives as the "status quo." See, e.g., Sena Plaintiffs Objections to Preliminary Plans No. 1 and 2, at p. 31. This Court rejects that approach because it places too much emphasis on the outcome of the most recent election. One need only consider the difference in results between the last two elections (2008 and 2010) to conclude that no single election accurately reflects the "status quo" for the State of New Mexico.

Instead, this Court concludes that a more appropriate measure of the "status quo" is the partisan make up of the current districts as reflected in the political performance data for each district as compiled by Research & Polling, Inc.[11] Although the trial testimony

[11] The Research and Polling partisan performance measurement is essentially the average of all statewide races that were held in New Mexico from 2004 to 2010, excluding outlier races in which a candidate won/lost by more than 20%. These results were then segmented at the legislative district level for each of the plans. This index does not include the legislative district races for various logistical and statistical reasons. The partisan performance measure is intended to show how the average statewide Democratic and Republican candidates have performed historically in each district. It is not intended to predict the outcome of each legislative race. The outcome of specific legislative races will be affected by many other factors such as the

contained some criticism of the Research and Polling formula, the formula does have the advantage of considering elections over the majority of the most recent decade, as opposed to focusing on a single election.

Applying this measure to the current districts, the political ratio for the "status quo" is 32 Republican majority districts and 38 Democrat majority districts. Because the Supreme Court Opinion mandates that the political ratios be maintained at the status quo, the Final District Court Plan incorporates the ratio of 32 Republican majority districts and 38 Democrat majority districts. [12]

In order to reach the political ratio under the status quo as required by the Supreme Court, this Court adjusted district boundaries for two districts so that those districts moved from slight Republican majority districts to slight Democrat majority districts. The two districts selected were District 32 and District 49. The Court selected these two districts because they are slight Democrat majority districts in the current plan. If one of the goals of the Supreme Court remand is to maintain the political ratios that exist under the "status quo," it made sense to consider these districts so that they do not change their slight majority Democrat status in the current plan. In addition, it should be noted that both of these districts remain competitive districts.

In the Remand Order and Opinion, the Supreme Court also noted that Republican swing seats increased in the First Court-Adopted Plan as compared to earlier executive plans. The First Court-Adopted Plan included eleven Republican majority districts within the swing seat category (defined as 50% to 53.9%) and five Democrat majority seats within the swing seat category. Although it is not completely clear, it appears that the Supreme Court was concerned that the First Court-Adopted Plan contained significantly more Republican majority seats in the swing category, thereby giving Republicans a slight advantage in closely contested districts. To address this concern, the Final District Court Plan includes a total of fifteen districts in the swing category. Of these, eight are Republican majority districts

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quality and resources of the candidates as well as the mood of the state and nation at the time of the election. Despite this, the partisan measure appears to be a very accurate indicator of the party's candidate that may win the general election. Currently there are only three incumbents who are of the opposite party of what the measure indicates. And in each case, the partisan percentage is very close to indicating a toss up race: 49.3%, 50.6%, and 51.8%.

[12] In responding to the preliminary plans, the James Plaintiffs contend that the political ratio in the Final District Court Plan is not 38-32 because District 24 is evenly split at 50 percent. There are three responses to this contention. First, the split is not exactly 50-50; the actual calculation for District 24 is 50.03% Republican. A 50-50 split appears in the map packet only because the table only identifies percentages to one-tenth of a percentage point. Second, District 24 is the district that results from the Republican-Democrat pairing in Albuquerque. The Supreme Court has directed that this district should provide an equal opportunity to either party. Remand Order at p. 20. Finally, the current plan includes one district, District 43, which appears as a 50-50 split in the map packet but in reality is 50.02% Republican. To the extent it is argued that the political ratio in the Final District Court Plan is 38 Democrat majority districts, 31 Republican districts and one evenly split district, that ratio would also match the current districts as well.

and seven are Democrat majority districts. In the current districts, there are nine Republican majority districts and six Democrat majority districts. While the distribution of those seats across the spectrum from 50% to 53.9% can never be identical between the parties, the distribution resulting in the Final District Court Plan is relatively symmetrical. See the Political Performance chart attached to Preliminary Plan No. 1.

Finally, it is worth noting that the Final District Court Plan maintains very similar political performance percentages in the individual swing districts, as compared to the current districts.[13] In the Opinion, the Supreme Court notes that "[c]ompetitive districts are healthy in our representative government because competitive districts allow for the ability of voters to express changed political opinions and preferences." Opinion at p. 31. In the Final District Court Plan, the competitive seats under the current plan remain competitive.

3. *As part of the review of partisan performance changes, the district court should consider the partisan effects of any consolidation.*

Any district that results from a Democrat-Republican consolidation, if that is what the district court elects to do, should result in a district that provides an equal opportunity to either party. In the alternative, some other compensatory action may be taken to mitigate any severe and unjustified partisan performance swing. The performance of created districts as well as those left behind should be justified.

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[13] In this regard, District 7 and District 8 may require some explanation. These two districts are in the Los Lunas/Belen area and are the subject of much argument from the parties because they are highly competitive districts. These districts are closely interrelated and changes in one district almost always affect the other. Consideration of these districts was further complicated by the fact that both share a boundary with District 49, which is a district that has been returned to a Democrat majority district under the mandate from the Supreme Court. To accomplish this, some Democrat leaning precincts in Belen were moved to District 49 while some Republican leaning precincts in Los Lunas were moved to District 8. Finally, there are communities within District 7 and District 8 which are split. In an apparent effort to gain a slight advantage in these competitive districts, some parties submitted suggestions under the guise of attempting to unify certain communities. Ultimately, the Final District Court Plan balanced these competing issues as follows: Both District 7 and District 8 remain as competitive districts, but District 7, which under the current plan had a Republican majority performance percentage, now has a Democrat majority performance percentage. Conversely, District 8, which under the current plan had a Democrat majority performance percentage, now has a Republican majority performance percentage. While both Los Lunas and Belen remain split under the District Court Final Plan, Los Lunas is now split between only two districts (District 7 and District 8) rather than three districts as is the case under the current plan.

Remand Order at p. 20. [14]

In the First Court-Adopted Plan, an incumbent pairing was created in central Albuquerque between Representative Al Park (Democrat) and Representative Jimmie Hall (Republican) in District 28. The Supreme Court concluded that this consolidation "resulted in a strongly partisan district favoring one party, in effect tilting the balance for that party without any valid justification." Remand Order at p. 16. The Supreme Court also observed that District 28 in the First Court-Adopted Plan was an "oddly shaped" district. Id.

In the Final District Court Plan, this Court again adopts a Democrat-Republican consolidation in Central Albuquerque because such a consolidation is consistent with the overall population trends of the state. Because the Supreme Court has directed that any such pairing must provide an equal opportunity to either party, the Final District Court Plan adopts an incumbent pairing between Representative Al Park (Democrat) and Representative Conrad James (Republican) in District 24. Due to the political makeup of the individual precincts, it would be difficult (if not impossible) to create a district which pairs Representative Park and Representative Hall and results in near equality in the political performance percentages. As a result, the Court identified District 24 as a district which could pair Representative Park with a Republican legislator and still produce near equality in the political performance percentages. While the resulting District 24 is not as compact as the Court would prefer, the district does maintain some approximation of the shape of the prior District 24.

4. *Hispanic "Majority" District in House District 67*

> It does not appear that the district court considered Hispanic citizen voting age populations in reaching its decision, and it should do so on remand. Whatever its eventual form, the relevant Clovis community must be represented by an effective, citizen, majority-minority district as that term is commonly understood in Voting Rights Act litigation, and it has been represented, as least in effect, for the past three decades.

Remand Order at p. 20-21. [15]

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[14] The final sentence in this provision of the Remand Order states: "[t]he performance of created districts as well as those left behind should be justified." This Court interprets this sentence to apply if this Court elected to include some consolidation other than those contained in the First Court-Adopted Plan. To the extent this Court needs to provide justification for the created districts in the Final District Court Plan, this Court would adopt the following statement of the Supreme Court: "The three new seats, two Republican and one Democrat, correctly reflected the political affiliation of the population in those high-growth areas on the west side of Albuquerque and in Rio Rancho, a result we do not question." Remand Order at p. 15.

[15] The first sentence of this remand provision sets forth a very serious allegation regarding this Court's prior decision. The Remand Order contends that this Court did not consider Hispanic citizen voting age populations in reaching the decision. The consideration of minority voting issues is one

of the central responsibilities of a Court in redistricting cases, both from a legal and a moral perspective. Given the Findings of Fact and Conclusions of Law, it is very difficult for this Court to understand how the Supreme Court could conclude that this Court did not consider Hispanic citizen voting age populations in reaching its decision. As it relates to the minority community in Clovis, this Court made specific findings regarding that community. Findings of Fact Nos. 64, 65 and 66. Most importantly, this Court made the specific finding that "Executive Alternate Plan 1 provides for a Hispanic majority VAP district in and around Clovis." Finding of Fact No. 66. This is the same district that is included in the First Court-Adopted Plan. The fact that the very district that contains the most significant Hispanic community in Clovis is a majority Hispanic voting age district should be a clear indication that this Court did consider Hispanic voting age populations in reaching a decision.

Moreover, a review of the entire First Court-Adopted Plan shows that this Court paid close attention to Hispanic voting age populations. This Court entered five Findings of Fact and Conclusions of Law specifically addressing Hispanic voting age population. Findings of Fact Nos. 64, 65, 66, and 71 and Conclusions of Law No. 26. Under the current plan, there are twenty-seven majority Hispanic voting age population districts. In the First Court-Adopted Plan, the number of majority Hispanic voting age population districts is increased to thirty. Of all the plans submitted to this Court by the Legislative Defendants, the James Plaintiffs, the Sena Plaintiffs, the Egolf Plaintiffs, the Maestas Plaintiffs, and the Executive Defendants, this Court selected a plan that had the highest number of majority Hispanic voting age population districts. This Court made an express finding to this effect. Finding of Fact No. 71.

The omission of these facts from the majority Opinion is important because the Opinion will become a permanent part of New Mexico law through its publication in the New Mexico Reports. Future readers of the majority Opinion, both in New Mexico and outside the state, will be left with the mistaken impression that this Judge failed to consider Hispanic voting age population in rendering a decision in this case, when in fact both the plan that was adopted and the Findings of Fact and Conclusions of Law demonstrate thorough consideration of minority populations.

During the trial, this Court heard evidence regarding the minority population in Clovis and the history of District 63. Under the current plan, the bulk of the Hispanic population in and around Clovis was included District 63, a geographically large district which stretched from Clovis east through Fort Sumner and Santa Rosa, extending to the western boundary of Guadalupe County. The incumbent in District 63 resides in Santa Rosa, approximately 100 miles from Clovis. Under the current plan, the Hispanic voting age population in District 63 is 54.6%. [16]

In the First Court-Approved Plan, the Court adopted a plan which changed District 63 and District 67. The First Court-Approved Plan reconfigured District 67 as a compact, majority Hispanic voting age population district which included the principle minority populations in Clovis and Portales. Previously, District 67 had not been a majority Hispanic voting age population district; therefore, the First Court-Approved Plan

[16] At the time of the litigation in *Sanchez v. King*, No. 82-00670M (D.N.M. 1984), the Hispanic population in District 63 was well below 50%.

added one additional majority Hispanic voting age population district to this area of the state. Under the First Court-Approved Plan, District 63 changed to a geographically large, but still compact, district which extended from Fort Sumner and Santa Rosa to the northeast corner of New Mexico. The Hispanic voting age population of District 63 remained relatively constant at 54.0%.

In adopting the First Court-Approved Plan, this Court noted the substantial increase in the number of majority Hispanic voting age population districts contained in the plan overall (Finding of Fact No. 71), but concluded, based on the totality of the circumstances, there was not "persuasive evidence that Sec. 2 of the Voting Rights Act requires any particular Hispanic majority district be drawn." Conclusion of Law No. 26. This Court was of the view that the burden of proof on the need for a particular minority-majority district rested with the party proposing such a district.

The Supreme Court Opinion shifts the burden of proof on this issue as it relates to a majority-minority district in Clovis: "Any redistricting plan ultimately adopted by the district court should maintain an effective majority-minority district in and around the Clovis area unless specific findings are made based on the record before the district court that Section 2 Voting Rights Act considerations are no longer warranted." Opinion at p. 14. This shift in the burden of proof changes the outcome. This Court cannot find on the present record that any party affirmatively proved that Section 2 Voting Rights Act considerations are no longer warranted; therefore, this Court interprets the remand from the Supreme Court to require that District 63 remain as close as possible to its present configuration and that, at a minimum, the percentage of the Hispanic voting age population not be decreased. These requirements are met in the Final District Court Plan. In the Final District Court Plan, 89.7% of the population in current District 63 is also contained within the boundaries of District 63. The Hispanic voting age population for District 63 in the Final District Court Plan is 57.0%, an increase of 2.4% over the current District 63. These changes do result in a decrease in the Hispanic voting age population in District 67 down to 39.7%, thereby reducing by one the total number of majority Hispanic voting age population districts in New Mexico.

For the reasons set forth above, this Court concludes that the District Court Final Plan complies with the Remand Order of the Supreme Court. Counsel for the Secretary of State is directed to immediately prepare an Amended Judgment and Final Order consistent with this Decision, obtain approval as to all counsel as to form, and submit it to the Court for immediate entry. [17]

Dated: _____

James A. Hall
District Judge Pro Tempore

Copies to counsel of record via e-filing system.

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[17] This Court would like to thank Brian Sanderoff, Michael Sharp and all the staff at Research and Polling, Inc. for their assistance as the Rule 11-706 expert. Their work was invaluable to this Court in addressing the issues raised in the remand from the Supreme Court.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMSC-007

Filing Date: March 6, 2012

Docket No. 32,570

CITY OF ALBUQUERQUE,

Petitioner-Petitioner,

v.

JUAN B. MONTOYA, Director of the Public Employee Labor Relations Board and the PUBLIC EMPLOYEE LABOR RELATIONS BOARD,

Respondents-Respondents,

and

AFSCME COUNCIL 18, LOCAL 624,

Real Party in Interest.

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Shelley B. Mund, Assistant City Attorney
Rebecca E. Wardlaw, Assistant City Attorney
Albuquerque, NM

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for Petitioner

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for Real Party in Interest

OPINION

MAES, Justice.

{1} The issue presented in this appeal is whether NMSA 1978, Section 10-7E-26(A) (2003), the grandfather clause of the Public Employee Bargaining Act (the Act), applies to the City of Albuquerque Labor-Management Relations Ordinance (the City Ordinance), as it pertains to the process for the appointment of interim members to the Labor-Management Relations Board of the City of Albuquerque (the Local Board). When the Local Board must meet during the absence of a member, Section 3-2-15(D) of the City Ordinance provides that the City Council President is to appoint an interim member "with due regard to the representative character of the [Local]

Board." Albuquerque, N.M. Rev. Ordinances ch. 3, art. II, § 3-2-15(D) (1974) (amended 2001). The Court of Appeals characterized the City Council President as "managerial personnel" and held that the President's appointment of a third member defeated the neutral makeup of the Local Board's membership. We disagree and hold that the City Council President does not serve in either a "management" or a "labor" capacity, and therefore the City Ordinance provision that provides a procedure by which the City Council President appoints a member to the Local Board during the absence of a member does not violate the Act's grandfather clause requirement that a local ordinance create a system of collective bargaining.

{2} Accordingly, we reverse the Court of Appeals' holding that, because "the [City Ordinance] establishing [the Local Board] is not eligible to be grandfathered pursuant to Section 10-7E-26(A)," the State Public Employee Labor Relations Board (the PELRB) has jurisdiction over the underlying matter. *City of Albuquerque v. Montoya*, 2010-NMCA-100, ¶ 1, 148 N.M. 930, 242 P.3d 497. We remand to the Court of Appeals for consideration of the other issues not previously addressed.

FACTS AND PROCEDURAL HISTORY

{3} In June 2007, the American Federation of State, County, and Municipal Employees Council 18, Local 624 (AFSCME), filed a prohibited practices complaint with the Local Board on behalf of Steve Griego, an AFSCME member. The complaint alleged that the City of Albuquerque (the City) discriminated against Griego by failing to hire him for an Electrician 3 position, a position for which he was qualified, because of his union activities. Following the prohibited practices complaint hearing, the "neutral" member of the Local Board recused from the matter. As a result of the deadlock, the two remaining members of the Local Board could not adjudicate AFSCME's complaint.

{4} Following the deadlock, AFSCME filed the same prohibited practices complaint with the PELRB. The City filed with the Local Board a motion for appointment of a neutral third member for the pending action. City Ordinance § 3-2-15(D). The Local Board issued an order directing the City and AFSCME to agree on a neutral third member to present to the City Council President for approval. If the City and AFSCME could not reach an agreement, then the remaining two Local Board members were to select a neutral third member to present to the City Council President. The City Council President subsequently solicited names from both the City and AFSCME. The City proposed either retired Chief Justice of the New Mexico Supreme Court Gene Franchini, or the neutral chair of Albuquerque's Personnel Board, Sean Olivas, to serve as the neutral third member. AFSCME did not respond to the City Council President's request. The City claimed that the "process failed due to [AFSCME's] refusal to participate." AFSCME claimed that according to the plain language of Section 3-2-15(D) of the City Ordinance, the appointment of a neutral third member was not warranted when the neutral member had recused from the proceedings. As a result of the parties' failure to agree on a neutral third member, the Local Board entered an order directing the two remaining members to petition the City Council President for appointment of the neutral third member.

{5} The same day the City filed with the Local Board its motion for appointment of a neutral third member, it filed with the PELRB a motion to dismiss the proceeding for lack of jurisdiction because the dispute remained

before the Local Board. Juan B. Montoya, Director of the PELRB (Director Montoya), determined that Section 3-2-15(D) of the City Ordinance was not grandfathered under the Act, and therefore the PELRB had proper jurisdiction over the complaint. Director Montoya's conclusion was based on a reading of Section 3-2-15(D) of the City Ordinance as conflicting with the requirement in Section 10-7E-10(B) of the Act that a local board be balanced in membership.

{6} The City then filed a petition in the Second Judicial District Court seeking the issuance of a writ to prohibit the PELRB from hearing AFSCME's complaint and to stay the PELRB proceedings. The district court granted the writ and ordered the PELRB to cease all proceedings related to the complaint, finding that Section 3-2-15(D) of the City Ordinance was grandfathered under the Act, and therefore, the Local Board, not the PELRB, had proper jurisdiction over the matter.

{7} The PELRB and AFSCME appealed to the Court of Appeals. The Court of Appeals reversed the district court, holding that "the ordinance establishing [the City's] labor board is not eligible to be grandfathered pursuant to Section 10-7E-26(A)." *Montoya*, 2010-NMCA-100, ¶ 1. The court explained that

> [t]he [Act] requires that a local board, like the PELRB, be a balanced and, therefore, neutral body. . . . Even though Section 3-2-15(D) requires the president of the city council to appoint an interim member with deference to the representational character of the board, the president's effort to incorporate neutrality in an often highly polarized environment is not sufficient to uphold the integrity of the essential process. . . . Section 3-2-15(D) of the Ordinance effectively removes from an employee the "bargaining" aspect of collective bargaining when it establishes a process whereby two-thirds of a local board could be comprised of appointees pursuant to management recommendations.

Id. ¶ 10.

{8} The City filed a petition for writ of certiorari, which we granted pursuant to NMSA 1978, Section 34-5-14(B) (1972) and Rule 12-502 NMRA. *City of Albuquerque v. Montoya*, 2010-NMCERT-010, 149 N.M. 65, 243 P.3d 1147. The question presented on appeal is:

> Did the Court of Appeals err in holding that a provision of the Labor-Management Relations Ordinance of the City of Albuquerque, which allows the president of the City Council to appoint an interim member of the City's Labor Board "with due regard to the representative character of the Board," is not entitled to grandfather status under [the Act] because the provision does not productively allow collective bargaining?

GRANDFATHER CLAUSE

{9} The Act, which "guarantee[s] public employees the right to organize and bargain collectively with their employers," NMSA 1978, § 10-7E-2 (2003), was first enacted in 1992. NMSA 1978, §§ 10-7D-1 to -26 (1992) (repealed effective July 1, 1999). Some public employers had existing systems in place for collective bargaining. Therefore, the Act included a grandfather clause which permitted

a public employer to preserve its collective bargaining system under certain circumstances. Section 10-7E-26. The Act's grandfather clause allows a public employer to preserve an existing collective bargaining system that was created prior to October 1, 1991, as long as the "system of provisions and procedures permit[s] employees to form, join or assist a labor organization for the purpose of bargaining collectively through exclusive representatives." Section 10-7E-26(A).

{10} In order for the City Ordinance at issue here to receive grandfather status, two requirements must be satisfied: "(1) the public employer must have adopted 'a system of provisions and procedures permitting *employees* to form, join or assist any labor organization for the purpose of bargaining collectively through exclusive representatives' and (2) the public employer must have taken such action prior to October 1, 1991." *City of Deming v. Deming Firefighters Local 4521* (*Deming*), 2007-NMCA-069, ¶ 9, 141 N.M. 686, 160 P.3d 595 (quoting *Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers* (*Regents*), 1998-NMSC-020, ¶ 24, 125 N.M. 401, 962 P2d 1236). In 1974 the City adopted the City Ordinance, which provides for collective bargaining by City employees. *See* Albuquerque, N.M., Ordinances ch. 3, art. II, § 3-2-2 (1974) (amended 1977). The City Ordinance was most recently revised in 2002, *see* parenthetical notation to Albuquerque, N.M., Rev. Ordinances ch. 3, art. II, § 3-2-18 (2002), and the method for appointing an interim member has not substantially changed since 1977. *See* parenthetical notation to Ordinances § 3-2-2; § 3-2-13. Because the City Ordinance was created prior to October 1, 1991, both parties agree that Subsection A of the Act's grandfather clause applies to this matter. Therefore, we only address whether the City Ordinance's provision allowing the appointment of an interim Local Board member by the City Council President contradicts the Act's definition of collective bargaining. Stated another way: Is the City ordinance grandfathered under the the Act to permit the City Council President to select an interim local board member?

STANDARD OF REVIEW

{11} Grandfather clauses are statutory provisions that "delineate a special exception from the general requirements of a statute." *Regents,* 1998-NMSC-020, ¶ 34. "The effect of these provisions is to narrow, qualify, or otherwise restrain the scope of the statute. They remove from the statute's reach a class that would otherwise be encompassed by its language." *Id.* Essentially, "[a] grandfather clause preserves something old, while the remainder of the law of which it is a part institutes something new." *Id.* ¶ 25. "[A] grandfather clause will be construed to include no case not clearly within the purpose, letter, or express terms, of the clause." *Id.* ¶ 27.

{12} Determining the applicability of a grandfather clause is a question of statutory construction which we review de novo. *Deming*, 2007-NMCA-069, ¶ 6; *see also Regents*, 1998-NMSC-020, ¶ 28 ("In establishing whether a party falls within the scope of a grandfather clause, courts will apply the rules of statutory construction that are appropriate in the interpretation of any statute."). "In construing a statute, our charge is to determine and give effect to the Legislature's intent." *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.3d 135. "In discerning the Legislature's intent, we are aided by classic canons of statutory construction, and [w]e look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *Id.*

(alteration in original) (internal quotation marks omitted). "We will not depart from the plain wording of a statute, unless it is necessary to resolve an ambiguity, correct a mistake or an absurdity that the Legislature could not have intended, or to deal with an irreconcilable conflict among statutory provisions." *Regents*, 1998-NMSC-020, ¶ 28.

DISCUSSION

{13} We begin with a discussion of the Act and the City Ordinance. The Act "guarantee[s] public employees the right to organize and bargain collectively with their employers." Section 10-7E-2. Thus, the Act creates a statewide labor board, the PELRB, NMSA 1978, §§ 10-7E-8 to -9, whose function is to "promulgate rules necessary to accomplish and perform its functions and duties as established in [the Act]," Section 10-7E-9(A). Section 10-7E-10(A) of the Act requires that the local board be balanced in membership and therefore a neutral body. The local board shall be comprised of one member appointed on the recommendation of individuals representing labor, one member appointed on the recommendation of individuals representing management, and one member appointed on the recommendation of the first two appointees.

{14} Section 3-2-15 of the City Ordinance establishes the Local Board, which is comprised of one member selected by a committee of labor organization representatives, and one member appointed by the other two members who serves as the neutral member of the Local Board. City Ordinance § 3-2-15(A)-(C) (Composition of the Local Board); *cf.* § 10-7E-10(B) ("The local board shall be composed of three members appointed by the public employer. One member shall be appointed on the recommendation of individuals representing labor, one member shall be appointed on the recommendation of individuals representing management and one member shall be appointed on the recommendation of the first two appointees."). The Act and the City Ordinance's language differs, however, when a member of a local board is temporarily absent versus when a member is unable to complete his or her two-year term.

{15} Under the Act, "[v]acancies shall be filled in the same manner as the original appointment, and such appointments shall only be made for the remainder of the unexpired term." Section 10-7E-10(C). The Act does not address if, or how, an interim member is to be selected during a board member's absence. The City Ordinance, however, does distinguish between a Local Board member's inability to complete his or her two-year term and a member's absence. When a Local Board member cannot complete the term, "a new member shall be selected for the remainder of the term in accord with the selection process of this article." City Ordinance § 3-2-15(D). When the Local Board must meet in the absence of a member, however, "the City Council [President] shall appoint an interim Board member from the public at large with due regard to the representative character of the Board." City Ordinance § 3-2-15(D).

{16} The Court of Appeals held in this case that the Local Board's process for selecting an interim board member did not qualify for grandfather status because it "essentially ignore[d] Section 10-7E-10(B) of the [Act], regarding as surplusage its requirement that a third neutral member of a local board be appointed pursuant to the recommendations of the other two members." *Montoya*, 2010-NMCA-100, ¶ 11; *see also* Section 10-7E-10(B). The Court of Appeals reasoned that Section 3-2-15(D) of the City

Ordinance created a process "whereby two-thirds of a local board could be comprised of appointees pursuant to management recommendations." *Id.* ¶ 10. The Court characterized the City Council President as "managerial personnel" and determined that even if he appointed an interim member "with deference to the representational character of the board, the [City Council] [P]resident's effort to incorporate neutrality in an often highly polarized environment [was] not sufficient to uphold the integrity of the essential process." *Id.*

{17} We disagree with the Court of Appeals' characterization of the City Council President as "managerial personnel." The City Ordinance does not define the City Council President's role as a managerial position. The City Ordinance defines the City Council, which includes the City Council President, as "the legislative body of the city." Albuquerque, N.M., Rev. Ordinances ch. 1, art. I, § 1-1-5(B) (1994). The City Council President is elected by his or her fellow City Council members and serves at the City Council's pleasure until December 1 of each odd-numbered year, or until a successor is selected. Albuquerque, N.M., Rev. Ordinances ch. 2, art. I, § 2-1-9 (1974) (amended 1990).

{18} The Mayor, not the City Council President, is "the elected officer of the city who exercises administrative control and supervision over the city and hires or appoints directors of all city departments." City Ordinance § 1-1-5. The Mayor, not the City Council President, is charged with appointing one member to the Local Board. City Ordinance § 1-1-5(B). The City Council President, an individual who serves in neither a "management" nor a "labor" capacity, appoints an individual to the Local Board only when an interim member is needed. Ordinance § 3-2-15(D). The City Ordinance ensures that the interim member does not alter the composition of the Local Board by requiring the City Council President to make the decision in light of the representative character of the Local Board. *Id.*

{19} Albuquerque's City Charter further confirms the division of function between the Mayor and the City Council. Article V of the Charter states that "[t]he Mayor shall control and direct the executive branch. . . . The Mayor shall be the chief executive officer with all executive and administrative powers of the city. . . ." Albuquerque, N.M., Rev. Ordinances, Charter of the City of Albuquerque, art. V, § 3. The Charter explicitly states that the City Council is "the legislative branch of the city," *id.*, art. IV, § 1, and that the "[City] Council shall not perform any executive functions except those functions assigned to the Council by this Charter," *id.* § 8.

{20} The Court of Appeals assumed that the City Council President, as management personnel, would be unable to fulfill his duty because of the "highly polarized environment" of a labor-management dispute. *Montoya*, 2010-NMCA-100, ¶ 10. This assumption, however, is contrary to our case law that "a public official is presumed to properly perform his or her duty." *Ruiz v. Vigil-Giron*, 2008-NMSC-063, ¶ 8, 145 N.M. 280, 196 P.3d 1286. Furthermore, as we have explained above, a plain reading of the City Ordinance reveals that the City Council President does not serve in a managerial or labor role.

{21} The City Ordinance in this case aligns with Subsection A of the Act's grandfather clause requirement that a local ordinance create a system of collective bargaining. The Act defines collective

bargaining as "the act of negotiating between a public employer and an exclusive representative for the purpose of entering into a written agreement regarding wages, hours and other terms and conditions of employment." NMSA 1978, § 10-7E-4(F). The City Ordinance defines collective bargaining as "a procedure whereby representatives of the city government and an employee organization meet, confer, consult, and negotiate with one another in a good-faith effort to reach agreement or otherwise resolve differences relating, or with respect, to wages, hours and other terms and conditions of employment." Albuquerque, N.M., Rev. Ordinances ch. 3, art II, § 3-2-3 (1974) (amended 1977). Although the City Ordinance provides a procedure by which the City Council President, an individual who is neither in a management nor labor position, appoints a member to the Local Board during the absence of a member, this provision does not violate the definition of collective bargaining under the Act.

CONCLUSION

{22} Accordingly, Section 3-2-15(D) of the City Ordinance, which provides for the appointment of an interim member of the Local Board if a regular member is absent, does not violate the grandfather clause requirement that a local ordinance create a system of collective bargaining. We reverse the Court of Appeals' holding that the PELRB has jurisdiction over the underlying matter and remand to consider the issues not previously addressed.

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

PETRA JIMENEZ MAES, Justice

WE CONCUR:

CHARLES W. DANIELS, Chief Justice

PATRICIO M. SERNA, Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

Certiorari Granted, March 23, 2012, No. 33,275

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-032

Filing Date: October 7, 2011

Docket No. 30,068

STATE OF NEW MEXICO ex rel. SOLSBURY HILL, LLC, d/b/a NEUMARK IRRIGATION,

Plaintiff/Appellee and Cross-Appellant,

v.

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant/Appellant and Cross-Appellee.

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for Appellee

Bingham, Hurst & Apodaca, P.C.
Lillian G. Apodaca
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for Appellant

OPINION

SUTIN, Judge.

{1} Defendant Liberty Mutual Insurance Company (Liberty) appeals from the district court's enforcement against its surety bond of the claim of lien of Plaintiff Solsbury Hill, LLC d/b/a Neumark Irrigation (Neumark) under New Mexico's Little Miller Act, NMSA 1978, § 13-4-18 to -20 (1923, as amended through 1987) (the Act), for material supplied by Neumark to a subcontractor on a public works project. The district court entered judgment against Liberty in the amount of $42,321.29, plus prejudgment interest at the rate of 18% per annum pursuant to the open account credit agreements between the subcontractor and Neumark.

{2} On appeal, Liberty claims the court erred because Neumark failed to prove actual delivery of the material and incorporation of the material into the project, which, in Liberty's view, are essential requirements for recovery, and it also asserts that the court erroneously placed the burden on Liberty to show lack of actual delivery and incorporation. Liberty also claims that it has no liability because Neumark failed to comply with the Act's requirements relating to notice of Neumark's claim on the bond and notice to the obligee of the bond under Section 13-4-19 (A), (B), and (C). And Liberty claims that the court erred in awarding prejudgment interest. Neumark claims on cross-appeal that the court erred in not awarding it attorney fees and post-judgment interest at the rate of 18%.

{3} We hold that Neumark was entitled to recover its claim for unpaid invoices for material supplied. We further hold that the Act permits recovery by Neumark of prejudgment and post-judgment interest and that Neumark was entitled to recover the prejudgment interest it was awarded and the post-judgment interest it sought at the rate of 18%. In regard to attorney fees, we hold that the Act permits recovery of attorney fees, and we remand for further proceedings on the issue of the amount of attorney fees to which Neumark is entitled.

BACKGROUND

{4} We rely for the most part on the district

court's findings of fact and conclusions of law. Pertinent findings are as follows. The City of Rio Rancho (the City) entered into a construction contract with Salls Brothers Construction, Inc. (the contractor) for the City's Unser Boulevard Widening Project (the project), part of which involved installing an irrigation system. Liberty was the surety on a payment bond for the project, the contractor entered into subcontracts with Desertscapes, Inc. (the subcontractor) for irrigation work, and Neumark accepted credit applications from the subcontractor for Neumark's supply of irrigation material for the project, which became the credit agreements between them. The credit agreements provided for interest at 18% per annum "from original due date."

{5} Liberty provided its payment bond pursuant to Section 13-4-18. A supplier may sue on the bond pursuant to Section 13-4-19(A), which reads:

> Every person, firm[,] or corporation who has furnished labor or material in the prosecution of work provided for in such contract . . . shall have the right to sue on such payment bond for the amount of the balance thereof unpaid at the time of the institution of such suit, and to prosecute such action to final execution and judgment for the sum or sums justly due him[.]

{6} Neumark supplied material to the subcontractor for installation of the irrigation system. The invoices for the delivery of the material showed the dates or approximate dates of delivery or pickup of the material. Neumark was not paid for certain material provided for the project. Neumark had a good faith belief that the material for the project was "being supplied for the prosecution of work specified in the contract for the [project]." The invoices for which Neumark asserted its claim under the Act were for material for the project.

{7} Neumark sent its notice of claim on the bond to the contractor by certified mail, return receipt requested, and the notice stated Neumark's claims with substantial accuracy. The contractor received the notice. Neumark filed the present action in September 2007 and mailed a notice of its claim on the bond to the City in July 2009.

{8} The court's pertinent conclusions of law relating to Liberty's appeal are:

> 4. Neumark supplied irrigation materials for the [project] in prosecution of the work provided for in the contract for the project.
>
> 5. Neumark had a reasonable good faith belief that the irrigation materials at issue for the [project], reflected in Neumark's invoices . . .[,] were being supplied for the prosecution of work specified in the contract for the [project].
>
> 6. [Liberty] produced no evidence to contradict that Neumark had a good faith belief that the materials were being provided for the bonded [project].
>
> 7. Neumark's notice on its claim on the bond for the [project], mailed to [the contractor] on May 22, 2007, substantially complied with the notice requirements of [the Act], [Section] 13-4-19(A).
>
> 8. Neumark's notice to [the contractor] of its claim on the bond for the [project] was timely.

> 9. [Liberty] is liable as surety on the bond issued pursuant to the [Act] for sums justly due to Neumark under its credit agreements with [the subcontractor] (not including attorney[] fees) for materials supplied for the [project].
>
> 10. Interest of 18% was justly due to Neumark and part of the balance unpaid on the . . . project at the time of the institution of the suit.

The court denied Neumark's claim for attorney fees on the ground that Liberty and the contractor were not parties to the credit agreements between Neumark and the subcontractor. The court further awarded Neumark post-judgment interest at the rate of 8.75% instead of at the rate of 18% requested by Neumark.

DISCUSSION

The Issue of Delivery and Incorporation of Material Raised by Liberty

{9} Liberty contends that the district court erred by allowing recovery by Neumark when Neumark failed to prove that it delivered the material and that the material was actually incorporated into the project. Liberty asserts "[i]t is well established in New Mexico that in order for a materials supplier to collect against a payment bond, the supplier must not only prove the materials were delivered but that they were incorporated into the project." Based on this assertion, Liberty contends that it was entitled to a judgment of dismissal of Neumark's claim under the Act. Liberty relies on *Crane O'Fallon Co. v. Via*, 56 N.M. 772, 251 P.2d 260 (1952), and *State ex rel. Goodmans Office Furnishings, Inc. v. Page & Wirtz Constr. Co.*, 102 N.M. 22, 690 P.2d 1016 (1984). Liberty also contends that the district court erroneously applied a "good faith" standard in allowing Neumark's claim.

{10} The question whether the Act requires a supplier to prove that the material supplied was delivered and incorporated in the project is a question of law, which we review de novo. *See Maes v. Audubon Indem. Ins. Group*, 2007-NMSC-046, ¶ 11, 142 N.M. 235, 164 P.3d 934 (stating that statutory interpretation is an issue of law, which appellate courts review de novo); *Allen v. Timberlake Ranch Landowners Ass'n*, 2005-NMCA-115, ¶ 13, 138 N.M. 318, 119 P.3d 743 ("Conclusions of law by the district court are reviewed de novo.").

{11} Furthermore, "on appeal, the evidence is to be viewed in the aspect most favorable to the action of the court which is being appealed" and "[e]very reasonable intendment and presumption will be resolved against appellants in favor of proceedings in the trial court." *Lopez v. N.M. Bd. of Med. Exam'rs*, 107 N.M. 145, 146, 754 P.2d 522, 523 (1988); *see also Allen*, 2005-NMCA-115, ¶ 13 ("We resolve all disputed facts and indulge all reasonable inferences in favor of the trial court's findings.").

{12} Neither *Crane O'Fallon* nor *Goodmans Office Furnishings* supports Liberty's view of New Mexico law. In *Crane O'Fallon*, the sole issue on appeal was whether the plaintiff met the statutory notice requirement. 56 N.M. at 775, 776, 778, 251 P.2d at 262, 263, 264. Our Supreme Court reversed the district court's holding in favor of a supplier, holding that the supplier failed to give a timely statutory notice to the surety. *Id.* at 778-81, 251 P.2d at 264-66. The supplier's recovery in *Crane O'Fallon* depended on one particular item, a lavatory, constituting the last item of material furnished to the subcontractor. *Id.* at 773-74, 251 P.2d at 261-

62. It turned out that the lavatory the supplier delivered was not the one called for in the contract specifications, was an item for which no change order was issued, was never installed in the building that was being constructed, and remained uncrated in a storage room. *Id.* at 773-74, 776, 251 P.2d at 261-62, 263. The contractor knew nothing about the planned substitution, did not consent to it, and upon its arrival declined to receive or install it. *Id.* at 777, 251 P.2d at 263. The Court determined that the supplier's notice of claim was not timely because the supplier could not use the substitute lavatory to prove when the last item of material was furnished. *See id.* at 772-81, 251 P.2d at 260-66.

{13} Liberty does not contend that *Crane O'Fallon*'s ultimate determination or the analysis from which the determination was derived controls the outcome in this case. Indeed, it could not contend as much given the significant difference in facts and because, in *Crane O'Fallon*, the material was not called for in the contract or expected to be incorporated into the project and undisputedly was never taken from its crate or used in the project. We do not read *Crane O'Fallon* to support Liberty's view that Neumark had to prove that it delivered the material and that the material was actually incorporated into the project.

{14} Liberty, in fact, cites *Crane O'Fallon* only for the following statement, arguing that *Crane O'Fallon* rejected a good faith standard.

> Apparently, the trial court took the view advanced by counsel for [the] plaintiff that if materials were furnished to a subcontractor by a materialman who at the time of furnishing them believed in good faith they were to be used in the performance of a public building contract, a recovery on the bond could be had therefor whether or not such materials were actually used in a due performance of the contract; provided, of course, the statutory notice was duly given within [ninety] days after furnishing of the last item thereof.

Id. at 776, 251 P.2d at 262. Given the facts and holding in *Crane O'Fallon* and the indefiniteness of this statement, plus the facts that in the case before us the district court determined that Neumark provided material for the project, that the invoices for which Neumark asserted its claim covered material for the project, and that Neumark supplied material for the project in prosecution of the work provided for in the contract for the project. We are not willing to consider the statement as having any precedential value or to be controlling under the present facts.

{15} In *Goodmans Office Furnishings*, our Supreme Court affirmed allowance to the contractor and surety of a credit for excess material and equipment delivered but not used in the project. 102 N.M. at 23, 24, 690 P.2d at 1017, 1018. The supplier did not contest the fact that a portion of what it supplied had not been used in the project, but nevertheless claimed that the mere delivery of the material for use in the project, as opposed to actual incorporation, was sufficient to allow recovery on the surety's bond. *Id.* at 24, 690 P.2d at 1018. The Court disagreed with the supplier. *Id.* The circumstances in *Goodmans Office Furnishings* are also significantly different from those in the present case. The supplier sought payment even though it acknowledged that the material was in excess of what was required for the project and was not material to be incorporated in the project. *Id.*

{16} In neither *Crane O'Fallon* nor *Goodmans Office Furnishings* was the issue on appeal the issue presented in the case before us. Neither case stands for the bright-line rule that Liberty advocates, namely, that a subcontractor must prove that materials supplied for a project were actually delivered to the project and incorporated in the project in order for the supplier to recover on the surety's bond. Apparently understanding this, Liberty turns to two Tenth Circuit Court of Appeals cases decided under the Miller Act, 40 U.S.C.A. § 270 (West 2006) (current version at 40 U.S.C.A. § 3131), the act on which New Mexico's Little Miller Act is modeled. *See State ex rel. Nichols v. Safeco Ins. Co.*, 100 N.M. 440, 446, 671 P.2d 1151, 1157 (Ct. App. 1983) (stating that the Act is modeled after the federal Miller Act). The federal cases are *United States ex rel. State Elec. Supply Co. v. Hesselden Constr. Co.*, 404 F.2d 774 (10th Cir. 1968), and *St. Paul-Mercury Indem. Co. v. United States ex rel. H.C. Jones*, 238 F.2d 917 (10th Cir. 1957). Liberty at the same time acknowledges that the Tenth Circuit Court of Appeals "does not require that a supplier prove that the materials were actually incorporated into the [p]roject." But Liberty asserts that these cases require "the supplier prove that the materials were actually delivered for use on the [p]roject." These cases do not assist Liberty.

{17} The district court found and concluded that Neumark supplied the material to the subcontractor for the project and in the prosecution of the work provided for in the contract. Liberty did not specifically challenge these determinations regarding the supply of material as lacking substantial evidence support. *See Mayeux v. Winder*, 2006-NMCA-028, ¶ 12, 139 N.M. 235, 131 P.3d 85 ("[The p]laintiffs do not appear to actually argue that the trial court's findings were not supported by substantial evidence. Nor do [the p]laintiffs identify any of the trial court's findings to which they take exception."); *see also* Rule 12-213(A)(4) NMRA ("A contention that a . . . finding of fact is not supported by substantial evidence shall be deemed waived unless the argument identifies with particularity the fact or facts that are not supported by substantial evidence[.]"). The court's unchallenged findings as to supply of the material stand even though Liberty may have produced evidence supporting its own view. *See Mayeux*, 2006-NMCA-028, ¶ 11 (stating that when an appellate court reviews "a trial court's factual findings, the presence of evidence supporting the result opposite from that reached by the trial court is not relevant"). Under such circumstances, an appellate court "need not conduct a thorough review for substantial evidence." *Id.* ¶ 13.

{18} We conclude that the Act does not require that Neumark prove anything beyond the fact that it supplied the material to the subcontractor for and in the prosecution of the work provided for in the contract and also supplied the material for the project, as found by the district court. We note that in the district court, Liberty required no more than this when it requested the court to enter the following conclusions of law:

> 4. A subcontractor or supplier may not recover on the bond unless they deliver material or perform labor called for under the terms of the prime contract.
>
> 5. The burden of proof remains upon a materialman to prove by reliable evidence from which it can be reasonably inferred that the materials were furnished in the prosecution of the work provided for in the prime contract.

> 6. Where labor and materials are actually furnished in the prosecution of the work, the [Act] does not require that the material that has been furnished be incorporated into the work in order to recover under the payment bond.

(Citations omitted.) Indeed, the Act itself protects those who "furnished labor or material in the prosecution of work provided for in [the] contract[.]" Section 13-4-19(A).

{19} Furthermore, although not in our view the controlling determination by the district court on the issue of supply of the material, the court determined that Neumark "had a reasonable good faith belief that the irrigation materials . . . for the [project], reflected in Neumark's invoices . . . were being supplied for the prosecution of work specified in the contract for the [project]." Federal cases interpreting the Miller Act hold that it is not a plaintiff's burden to prove that the materials were actually delivered to the project: "As long as there is good faith . . . delivery to the job site or actual use in the prosecution of the work is immaterial to a right of recovery.'" *United States ex rel. Krupp Steel Prod., Inc. v. Aetna Ins. Co.* (*Krupp I*), 831 F.2d 978, 980 (11th Cir. 1987) (internal quotation marks and citation omitted); *see also United States ex rel. Westinghouse Elec. Supply Co. v. Endebrock-White Co.*, 275 F.2d 57, 60 (4th Cir. 1960) ("Neither delivery of the material to the prime contract job site nor actual incorporation of the material into the work is required."). The case of *United States ex rel. J.P. Byrne & Co. v. Fire Ass'n of Philadelphia*, 260 F.2d 541, 545 (2d Cir. 1958), illustrates the important policy reasons why a supplier should not be saddled with proof of actual delivery to the job site.

> [R]equiring the supplier to trace specific materials after they have left his control may often place upon him an impossible burden of proof even when the items involved were in fact consumed. Moreover, even if appropriate tracing measures could be devised, the courts, in enforcing one remedial policy, should be hesitant to compel an industry to accept what may be artificial and burdensome accounting practices.

Id.

{20} This interpretation of the Act comes within New Mexico and federal law requiring that the Act and the Miller Act be construed liberally in favor of the claimant. *See Goodmans Office Furnishings*, 102 N.M. at 25, 690 P.2d at 1019 ("[T]he statute is remedial in nature and . . . its principal purpose is to protect the supplier of labor and materials, and . . . it should be liberally construed to effectuate the obvious legislative intent." (internal quotation marks and citation omitted)); *see also United States ex rel. Moody v. Am. Ins. Co.*, 835 F.2d 745, 747 (10th Cir. 1987) ("In general, the Miller Act is entitled to a liberal construction and application in order properly to effectuate the [c]ongressional intent to protect those whose labor and materials go into public projects." (internal quotation marks and citation omitted)); *Krupp I*, 831 F.2d at 980 ("The [Miller] Act is highly remedial in nature, and its terms should be liberally construed." (internal quotation marks and citation omitted)). Where, as here, the district court was fully satisfied that the material was supplied to the subcontractor and for the project and that Neumark supplied the material with a reasonable good faith belief that the material was supplied for the prosecution of the work specified in the

contract, we see no reason to reject the approach as reflected in the federal cases.

{21} We hold that the district court's findings of fact and conclusions of law in regard to Neumark's supply of the material support the court's determination that Neumark was entitled to recover on Liberty's payment bond under the Act.

The Notice Issues Raised by Liberty

{22} Liberty raises two notice issues. It asserts that Neumark's notice of claim was not timely and did not substantially comply with the notice requirements in Section 13-4-19(A). Liberty also asserts that Neumark failed to provide notice to Liberty's payment bond obligee, the City, of the beginning of the lawsuit, and therefore did not comply with the notice requirement in Section 13-4-19(B). Thus, Liberty contends, the district court erred failing to hold in Liberty's favor on these points.

Notice of Claim

{23} The Act sets out the following notice of claim requirements for recovery on a payment bond: (1) written notice must be served on the contractor; (2) the notice must state the amount of the claim with substantial accuracy; (3) the notice must be served on the contractor within ninety days of the last provided material; (4) the notice must be served by registered mail in an envelope; and (5) the notice must be addressed to the contractor at any place the contractor maintains an office or conducts business, or the contractor's residence. Section 13-4-19(A). Liberty contends that Neumark met only the first of these requirements, namely, that the notice was written. We consider this to be an issue of substantial compliance with the Act's notice requirement, which we review de novo. *See Martinez v. Sedillo*, 2005-NMCA-029, ¶ 3, 137 N.M. 103, 107 P.3d 543 (stating that matters of statutory construction are reviewed de novo); *see also Moody*, 835 F.2d at 748 (reviewing de novo the issue of the sufficiency of a notice under the Miller Act).

{24} Liberty complains that notice was served by certified, not registered, mail at the contractor's post office box and that the amount stated as being owed did not include amounts in invoices produced at trial. Based on several factors it sets out in its brief in chief, Liberty argues that, "more importantly," the notice was not mailed within ninety days of last providing materials. In that regard, Liberty argues that even if it were arguable that "the last two Neumark invoices were properly identified as being for the [project], these items were clearly for repair or corrective work" and under federal Miller Act cases, "repairs, replacement parts[,] or corrective work do not toll the [ninety]-day notice period."

{25} The district court found that Neumark mailed notices of claim on May 22, 2007, by certified mail to each of the contractor's addresses as reported by the contractor to the New Mexico Public Regulation Commission, as shown by the Commission's on-line records. The court also found that the contractor actually received notice. The court's findings further indicate the amount claimed for material did not include amounts for tools or equipment rather than irrigation material and that the notice to the contractor stated the amounts with substantial accuracy. Finally, the district court found that Neumark last supplied material to the project on May 3, 2007. Liberty does not challenge these findings.

{26} From the findings, one can reasonably infer that the court determined that Neumark's invoices accurately stated the amounts owed to Neumark. And the court concluded that Neumark's notice of claim "substantially complied with the notice requirements of... [Section] 13-4-19(A)" and was timely. Under our standard of liberal construction of the Act to protect a supplier of material, together with the district court's unchallenged findings of fact, we cannot say that the court erred in concluding that Neumark substantially complied with the notice requirement pursuant to Section 13-4-19(A). *See Moody*, 835 F.2d at 747-48 (holding that a Miller Act notice was sufficient although not sent by registered mail, when it was actually received, noting that the Supreme Court had "stated that the manner of notice specified in the [Miller] Act is merely to assure receipt of the notice, not to make the described method mandatory so as to deny right of suit when the required written notice within the specified time had actually been given and received" (internal quotation marks and citation omitted)).

Notice to the Obligee

{27} Under the Act, the claimant must "notify the obligee named in the bond of the beginning of [the] action, stating the amount claimed, and no judgment shall be entered in such action within thirty days after giving such notice." Section 13-4-19(B). Liberty argues that Section 13-4-19(B) "required Neumark to provide notice to the City . . . of the beginning of its lawsuit so that the City . . . might have the opportunity to also commence an action regarding Neumark's claims within the one-year statute of limitation" in Section 13-4-19(C) that restricts the time an obligee can sue after the date of final settlement of a contract. Liberty then argues that, by the time the City received notice, the City was not able to file an action pertaining to Neumark's action and, therefore, the district court had no jurisdiction to issue a judgment. We consider this to be an issue of substantial compliance with the Act and an issue of statutory interpretation, and we review such issues de novo. *See Martinez*, 2005-NMCA-029, ¶ 3.

{28} The district court found that Neumark mailed written notices of its claim on the bond to the City on July 23 and 24, 2009. The court concluded that "[f]ailure by [Neumark] to notify the obligee of this action until July 2009[] does not bar [Neumark's] claims, as no judgment was entered within thirty (30) days after giving notice." Judgment was entered on October 16, 2009.

{29} Neumark interprets the statute to require notice only "of the beginning" of the action and not "at the beginning" of the action. The district court did not address this distinction in its findings of fact and conclusions of law, but apparently determined that the City was not prejudiced because judgment had not been entered before it received notice. We cannot hold that the court erred.

{30} Liberty has provided no persuasive argument or authority to support its view that the lateness of the notice to the obligee constitutes reversible error. We reject Liberty's contention that the district court was without jurisdiction to entertain Neumark's action on the bond. Liberty provides no rationale, much less authority, to support an argument that the notice requirement is jurisdictional and that a failure to provide notice to the obligee at the beginning of the claimant's action on the bond deprives the court of jurisdiction to entertain that action. Further, even were one to construe the statute to intend that notice to the obligee on the bond be at the beginning of Neumark's action, we

see no basis on which Liberty should be relieved of liability. Liberty does not refer us to any evidence showing that it or the City was in any way prejudiced by the timing of the notice to the City; showing that the City lacked knowledge of Neumark's claim and lawsuit; showing that, had the City known of Neumark's action earlier, the City would have sought to intervene in the action; or showing that, after notice, the City desired to intervene but because of time restraints was unable to do so.

The Prejudgment Interest Issue Raised by Liberty

{31} Liberty contends that the district court erred in awarding prejudgment interest to Neumark based on the open account credit agreement terms. We review this legal issue de novo. *See Martinez*, 2005-NMCA-029, ¶ 3.

{32} The court determined that Neumark and the subcontractor agreed to an interest rate of 18% on open accounts. The court concluded that "[i]nterest of 18% was justly due to Neumark and part of the balance unpaid on the . . . project at the time of the institution of the suit." This determination was immediately preceded by determinations that Liberty was "liable as surety on the bond issued pursuant to the . . . Act for sums justly due to Neumark under its credit agreements with [the subcontractor] (not including attorney[] fees) for materials supplied[.]" The court stated further that, with respect to prejudgment interest, NMSA 1978, Section 56-8-5 (1983) provided that "[i]n current or open accounts there shall not be collected more than [15%] interest annually thereon, thirty days after the delivery of the last article or service; provided that the parties may set a higher rate by agreement." The court reiterated that "[the subcontractor] and Neumark agreed to an interest rate of 18% on open accounts."

{33} Liberty argues that the prejudgment interest award was erroneous because there existed no privity of contract between the contractor and Neumark and that the open account statute, Section 56-8-5, does not extend to third parties. Liberty also emphasizes the existence of the words "the parties" in Section 56-8-5 and argues that it cannot be held liable for interest pursuant to a contract to which its obligor, the contractor, was not a party, or pursuant to Section 56-8-5, "as it is clear the statute contemplates an agreement between contracting parties." Liberty also argues that the Act does not specify that interest may be awarded to a subcontractor's supplier. Liberty asserts further that the contractor should have no liability when it has no say or control in regard to interest obligations between subcontractors and their material suppliers. Liberty sets out what it considers to be various practical reasons why the Act does not provide for recovery of interest. And Liberty argues that denial of prejudgment interest "is in keeping with the majority of Miller Act case law, which does not award attorney[] fees unless there is privity of contract."[1]

{34} We are not persuaded by Liberty's

[1] Liberty's majority of Miller Act case law on the issue of awarding attorney fees consists of the following cases: *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116 (1974); *Moody*, 835 F.2d 745; *United States ex rel. C.J.C., Inc. v. W. States Mech. Contractors, Inc.*, 834 F.2d 1533 (10th Cir. 1987); *Krupp I*, 831 F.2d 978; *United States ex rel. L.K.L. Assocs. v. Crockett & Wells Constr., Inc.*, 730 F. Supp. 1066 (D. Utah 1990); *Goodmans Office Furnishings*, 102 N.M. 22, 690 P.2d 1016.

arguments. Liberty does not provide authority that equates prejudgment interest with attorney fees in terms of either a privity-of-contract requirement or the propriety of recovery under the Miller Act. In fact, one of the attorney fee cases on which Liberty relies, *C.J.C.*, 843 F.2d at 1541-43, denies attorney fees but upholds an award of prejudgment interest. Liberty also fails to cite and discuss the several other federal cases that specifically allow recovery of prejudgment interest.

{35} The Act permits recovery "for the sum or sums justly due[.]" Section 13-4-19(A). *United States ex rel. Maddux Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 86 F.3d 332 (4th Cir. 1996), provides the Miller Act guideline with respect to an award of interest.

> The Miller Act does not, by its own terms, provide for attorney[] fees or interest. Several circuits have held, however, that interest and attorney[] fees are recoverable if they are part of the contract between the subcontractor and supplier. The rationale of those decisions—that attorney[] fees and interest may be sums justly due under the Miller Act—is consistent with this court's rulings that contractors and their sureties are obligated to pay amounts owed by their subcontractors to suppliers.

Id. at 336 (internal quotation marks and citations omitted).[2] In *D & L Constr. Co.*, 332 F.2d at 1013, the court stated:

> The liability of the surety is measured by that of the prime contractor covered by the bond. The liability of the prime contractor to a project supplier of a subcontractor is governed by the subcontractor's obligation. Where there is no express contract for interest or attorney[] fees, it is necessary to look to state law to measure the extent of the subcontractor's obligation. In such a situation, state law will determine when interest is allowable and the rate of interest. Such a condition does not exist where, . . . interest and attorney[] fees are covered by express contract.

(Footnote omitted.) *D & L Construction* held that the interest rate agreed to in the contract between the subcontractor and the supplier was "by [the] contract made part of the purchase price of the materials and are sums justly due to [the supplier]." *Id.*; *see also State ex rel. Bob Davis Masonry, Inc. v. Safeco Ins. Co. of Am.*, 118 N.M. 558, 560-62, 883 P.2d 144, 146-48 (1994) (holding that a subcontractor was entitled to sue the surety "for all contract liability" on a surety's payment bond, including prejudgment interest, where such interest was awardable against the contractor under a New Mexico statute, the bond required the surety "to pay claimants such sum or sums as may be justly due claimant" and the Act entitled the claimant to sue on the bond for such "sum or sums justly due"). We agree with the district court that

[2] Supportive cases cited in *Maddux Supply* are the following: *United States ex rel. Se. Mun. Supply Co. v. Nat'l Union Fire Ins. Co. of Pittsburg*, 876 F.2d 92, 93 (11th Cir. 1989) (per curiam); *United States ex rel. Carter Equip. Co. v. H.R. Morgan, Inc.*, 554 F.2d 164, 166 (5th Cir. 1977); *Travelers Indem. Co. v. United States ex rel. W. Steel Co.*, 362 F.2d 896, 899 (9th Cir. 1966); *D & L Constr. Co. v. Triangle Elec. Supply Co.*, 332 F.2d 1009, 1012-13 (8th Cir. 1964).

prejudgment interest is awardable as a sum or sums justly due under Section 13-4-19(A) where the supplier and subcontractor agree to the interest in their contract.

The Issues of Attorney Fees and Post-Judgment Interest Raised by Neumark

{36} In its cross-appeal, Neumark argues that the district court erred in holding that recovery of attorney fees was not permitted under the Act. The district court denied attorney fees based on the determination that neither Liberty nor the contractor was a party to the credit agreements. The court concluded that "[a]bsent privity of contract, a payment bond claimant cannot recover attorney[] fees from a contractor."

{37} Liberty argues that the Act does not provide for attorney fees and that under the plain reading of the Act, a claimant has a right to recover only the amount of the balance unpaid at the time of the action and that the statute only allows recovery for the material actually furnished under the contract "in respect of which a payment bond is furnished[.]" Liberty also argues that "[f]ederal courts interpreting the federal Miller Act have ruled that absent a provision in the contract or payment bond awarding attorney fees, a Miller Act plaintiff can only recover under one of the recognized exceptions to the general principle that each party should bear the costs of its own legal representations."

{38} Liberty relies on several federal cases to support its position regarding attorney fees. In *F.D. Rich*, 417 U.S. 116, which involved a material supplier to a subcontractor, *id.* at 119-20, the Court held that it was error to award the supplier attorney fees against the Miller Act surety's payment bond. *Id.* at 121, 126-31. The court's holding was based on various factors. There existed no contractual provision concerning attorney fees, and the American Rule precluded an award of attorney fees. *Id.* at 126, 128-29. The Miller Act does not explicitly provide for an award of attorney fees to a successful plaintiff, and an award under the Miller Act could not be based on state law. *Id.* at 126-27. Under the circumstances in *F.D. Rich*, recovery of the fees could not be considered under "sums justly due [under Section] 270b(a)[.]" *Id.* at 128-29; *see* 40 U.S.C.A. § 3133.

{39} In *C.J.C.*, citing *F.D. Rich*, the Court indicated that "[t]he question of attorney[] fees in a Miller Act action is a matter of federal law," and "[t]he Act does not provide attorney[] fees for the prevailing party." *C.J.C.*, 834 F.2d at 1542-43. The court stated that "[a]bsent a provision in the contract or payment bond awarding attorney[] fees, a Miller Act plaintiff may only recover under one of the federally recognized exceptions to the general principle that each party should bear the costs of its own legal representation." *Id.* at 1543 (internal quotation marks and citation omitted). The court stated further that "[w]hen the agreement between the contractor and the subcontractor provides for attorney[] fees, the subcontractor may recover from the contractor and its Miller Act surety consistent with the terms of that agreement." *Id.* at 1548; *see also United States ex rel. D & P Corp. v. Transamerica Ins. Co.*, 881 F. Supp. 1505, 1510 (D. Kan. 1995) (denying attorney fees claimed by a subcontractor based on *C.J.C.* on the ground that none of the prerequisites for the award under federal law were established); *L.K.L. Assocs.*, 730 F. Supp. at 1066-68 (denying attorney fees based on *F.D. Rich*, *Krupp I*, and *C.J.C.* and interpreting *C.J.C.* as "holding that the attorney[] fees provision must be included in either the *general* contract or the payment bond").

{40} Liberty relies, too, on language in

Goodmans Office Furnishings, namely, "[a]bsent authority or rule of the court, attorney fees are not recoverable as an item of damage" and also relies on *Goodmans Office Furnishings* because, in response to the supplier's claim for attorney fees based on its contract with the subcontractor, our Supreme Court found that no contract existed between the supplier and the contractor. *See* 102 N.M. at 23, 24, 690 P.2d at 1017, 1018.

{41} Neumark relies on several federal cases that show why Liberty's cases are not persuasive and that hold that a material supplier to a subcontractor can recover attorney fees against the surety's payment bond when the contract between the material supplier and subcontractor provides for recovery of attorney fees.[3] The court in *Trustees*, 785 F. Supp. at 897, persuasively rejects the cases on which Liberty relies. First, the court distinguishes *F.D. Rich* and points out that the Eleventh Circuit abandoned the reasoning in *Krupp I*, citing *Se. Mun. Supply*, 876 F.2d at 93; *Krupp II*, 923 F.2d at 1527. The court in *Trustees* further points out that the continued vitality of *L.K.L. Associates* was dubious, because it took its direction from *Krupp I*. *Trustees*, 785 F. Supp. at 898. And, lastly, the court in *Trustees* rejected *C.J.C.*, stating that

> [l]anguage in [*L.K.L. Associates*] suggests that in [*C.J.C.*], the Tenth Circuit implicitly followed the approach of *Krupp I*. In *C.J.C.*, . . . however, the court merely followed the holding of *F.D. Rich* that the American Rule applies in Miller Act cases unless there is a contractual agreement to the contrary or circumstances justifying an award under the bad faith or other exception to the American Rule. *C.J.C.*, . . . is not inconsistent with the majority rule that attorney fees in a Miller Act case can be awarded to [a] third party based on a contractual agreement between that party and a subcontractor.

Trustees, 785 F. Supp. at 898 n.1 (citations omitted). The court indicated that "[a] majority of courts follow [the] approach" of the Eleventh Circuit in *Se. Mun. Supply Co.*, and *Krupp II*, citing most of the cases Neumark cites to this Court. *Trustees*, 785 F. Supp. at 897-98.

{42} We note that *Maddux Supply* arrived at its holding with respect to recovery of attorney fees, as well as interest, based in part on the liberal construction of the Miller Act required by the United States Supreme Court in *United States ex rel. Sherman v. Carter*, 353 U.S. 210, 216 (1957). *Maddux Supply*, 86 F.3d at 335-36; *see also Se. Mun. Supply*, 876 F.2d at 93 (affirming an award of attorney fees under the Miller Act based on *Carter*); *Travelers Indem.*, 362 F.2d at 899 (same); *D & L Constr.*, 332 F.2d at 1012 (same). Along with its guidance that the Miller Act "should receive a liberal construction to effectuate its protective purposes[,]" in considering a direct contract with the general contractor, *Carter*

[3] The cases on which Neumark relies are the following: *Maddux Supply*, 86 F.3d at 336; *United States ex rel. Krupp Steel Prods., Inc. v. Aetna Ins. Co.* (*Krupp II*), 923 F.2d 1521, 1527 (11th Cir. 1991); *Se. Mun. Supply*, 876 F.2d at 93; *Carter Equip.*, 554 F.2d at 166; *Travelers Indem.*, 362 F.2d at 899; *D & L Constr.*, 332 F.2d at 1012-13; *United States ex rel. Trustees of Colo. Laborers Health & Welfare Trust Fund v. Expert Envtl. Control, Inc.* (*Trustees*), 785 F. Supp. 895, 898 (D. Colo. 1992); *IBEX Indus., Inc. v. Coast Line Waterproofing*, 563 F. Supp. 1142, 1146 (D.D.C. 1983).

held that reasonable attorney fees could be awarded as a sum or sums justly due under the Miller Act where the contract terms expressly provided for allowance of the fees. 353 U.S. at 216, 220. We note that this Court in *Nichols* also relied on *Carter* in affirming an award of attorney fees in an action on a surety bond furnished under the Act involving a direct contract with the general contractor. *Nichols*, 100 N.M. at 446, 671 P.2d at 1157.

{43} We are not convinced, as Liberty suggests, that we need only turn to *Goodmans Office Furnishings* as controlling authority on the issue of recovery of attorney fees under the Act. In its very short discussion of the question, our Supreme Court in *Goodmans Office Furnishings*, 102 N.M. at 23, 690 P.2d at 1017, gives no indication of what particular positions and authorities were presented on the issue to the district court or on appeal. Nor did the Court cite any authority on the question whether attorney fees were awardable, and the Court disposed of the matter by merely stating that it would not reverse the district court "unless it appears that its findings and conclusions cannot be sustained either by evidence or permissible inferences therefrom." *Id.* at 24, 690 P.2d at 1018. *Goodmans Office Furnishings*' discussion on the question is not sufficiently developed to bind this Court as precedent, particularly given the body of federal law under the Miller Act on the issue that permits an award of attorney fees when a state statute or a contract allows for attorney fees.

{44} We hold that attorney fees are awardable as a sum or sums justly due under Section 13-4-19(A) where, as here, the contract between the subcontractor and supplier provides for an award of attorney fees incurred by Neumark in endeavoring to collect amounts due and unpaid under its credit agreements with the subcontractor.

{45} Neumark also cross-appeals asserting that the court erred in not awarding 18% post-judgment interest. The statute on post-judgment interest, NMSA 1978, § 56-8-4(A)(1) (2004), provides:

> Interest shall be allowed on judgments and decrees for the payment of money from entry and shall be calculated at the rate of eight and three-fourths percent per year, unless: . . . the judgment is rendered on a written instrument having a different rate of interest, in which case interest shall be computed at a rate no higher than specified in the instrument[.]

{46} The contract interest rate provision is broad enough to cover post-judgment interest as well as prejudgment interest. We see no reason why the rationales and authorities permitting prejudgment interest and attorney fees to be awarded should not also apply to post-judgment interest. We hold that Neumark is entitled to post-judgment interest in the amount permitted under the credit agreements. *See id.*; *Weststar Mortg. Corp. v. Jackson*, 2002-NMCA-009, ¶ 55, 131 N.M. 493, 39 P.3d 710, *rev'd on other grounds by* 2003-NMSC-002, 133 N.M. 114, 61 P.3d 823.

CONCLUSION

{47} We hold in favor of Neumark on all issues. We therefore reverse the district court's determinations against Neumark on attorney fees and post-judgment interest and affirm on all other issues. We remand for further proceedings in regard to what amount of reasonable attorney fees, in the exercise of the court's discretion, should be awarded to Neumark.

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

JONATHAN B. SUTIN, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

TIMOTHY L. GARCIA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-033

Filing Date: February 15, 2012

Docket No. 30,454

JACKSON CONSTRUCTION, INC., A New Mexico Corporation, and PAUL JACKSON, Qualifying Party for Jackson Construction Inc.,

Petitioners-Appellees,

v.

GLENN R. SMITH, in his capacity of Director, STATE OF NEW MEXICO WORKERS' COMPENSATION ADMINISTRATION,

Respondent-Appellant.

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for Appellees

Workers' Compensation Administration
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for Appellant

OPINION

HANISEE, Judge.

{1} Paul Jackson is the sole owner of Jackson Construction, Inc. (JCI), a New Mexico-licensed general contractor. JCI does not employ any workers or executives other than Mr. Jackson, who serves as JCI's president and sole board member. In 2008, Mr. Jackson affirmatively elected to exempt himself from coverage by the Workers' Compensation Act (the Act). We are asked to decide in light of Mr. Jackson's election, whether JCI remains subject to the Act and must nevertheless procure workers' compensation insurance. We hold that JCI is required to do so under a plain-meaning reading of NMSA 1978, Section 52-1-6(A) (1990), which states that the Act "shall apply to *all* employers engaged in activities requir[ing a construction license]

. . . regardless of the number of employees." (Emphasis added.) We thus reverse the district court's decision and affirm the order of the Workers' Compensation Administration (the WCA).

I. STANDARD OF REVIEW

{2} The issue on appeal concerns the scope of Section 52-1-6(A), which defines the classes of employers that are subject to the Act. We must ascertain whether the Legislature intended those classes defined in Section 52-1-6(A) to encompass construction corporations such as JCI, whose only employees are executives that have opted out of the Act's coverage. The issue is one of statutory construction, which we review de novo. *Republican Party of New Mexico v. New Mexico Tax. & Rev. Dep't*, 2010-NMCA-080, ¶ 8, 148 N.M. 877, 242 P.3d 444, *cert. granted*, 2010-NMCERT-008, 148 N.M. 943, 242 P.3d 1289. Our approach to statutory construction is to first examine the plain meaning of the statute at issue. If the plain meaning is clear—"not vague, uncertain, ambiguous, or otherwise doubtful"—we apply the statute as written, without second guessing the Legislature's selection from among competing policies or differing ways of effectuating a particular legislative objective. *State ex rel. Helman v. Gallegos*, 117 N.M. 346, 352, 871 P.2d 1352, 358 (1994).

II. DISCUSSION

A. The Plain Meaning of Section 52-1-6(A) Subjects JCI to the Act

{3} Section 52-1-6(A), reads as follows: "The provisions of the Workers' Compensation Act . . . shall apply to employers of three or more workers; provided that *act shall apply to all employers engaged in activities required to be licensed under the provisions of the Construction Industries Licensing Act . . . regardless of the number of employees*." (Emphasis added.) There are two prongs to the portion of this section relevant to determining which construction entities are subject to the Act: (1) the entity must be an employer under the Act, and (2) the entity must engage in activities requiring a construction license. There appears to be no dispute that JCI meets the criteria under the second prong, in that JCI engages in activities requiring a properly maintained construction license. Accordingly, we focus our analysis on the first prong, whether or not JCI is an employer under the terms of the Act.

{4} The Act provides a definition of employer that states "'employer' includes any person or body of persons, corporate or incorporate . . . *employing workers* under the terms of the Workers' Compensation Act." NMSA 1978, § 52-1-15 (1989) (emphasis added). The Act then defines worker as:

> As used in the Workers' Compensation Act . . . , unless the context otherwise requires, "worker" means any person who has entered into the employment of or works under contract of service or apprenticeship with an employer, except a person whose employment is purely casual and not for the purpose of the employer's trade or business. The term "worker" shall include "employee" and shall include the singular and plural of both sexes.

Section 52-1-16(A). Reading Section 52-1-6(A) within the context of the provided definitions, it is apparent that for a construction employer to be subject to the Act, it must employ at least one "worker." Applying the definition to the traditional form of third-party construction labor is

straightforward enough. But applying the definitions to owners, shareholders, and executives of corporations proves more difficult. Given Section 52-1-6(A) and its one-worker requirement for construction companies, the question whether JCI is subject to the Act turns on whether Mr. Jackson can be counted as a worker. Because the Act does not itself resolve this question, we consider it to be ambiguous in this respect and must now ourselves determine when an officer, shareholder, or executive is considered a "worker" under the Act. *See N.M. Dep't of Health v. Compton*, 2001-NMSC-032, ¶ 18, 131 N.M. 204, 34 P.3d 593 (noting that when the court is confronted with legislative silence on a particular issue, we resort to other statutory construction aids, keeping in mind that our goal is to facilitate the operation of the act in question and any specified goals of the Legislature); *see also Sunwest Bank v. Nelson*, 1998-NMSC-012, ¶ 14, 125 N.M. 170, 958 P.2d 740.

{5} For guidance, we turn to *Garcia v. Watson Tile Works, Inc.*, 111 N.M. 209, 803 P.2d 1114 (Ct. App. 1990). *Garcia* provides an instructive framework for analyzing whether officers, shareholders or executives are counted as "workers" in determining if an employer is subject to the Act. *Garcia* recognized three distinct classes of personnel associated with entities potentially subject to the Act: (1) non-worker executives, (2) executive employees, and (3) workers. *Id.* at 210-11, 803 P.2d at 1115-1116. With respect to the first category, this Court held that non-worker executives are *not* to be counted in determining which employers are subject to the Act under Section 52-1-6(A). *Garcia*, 111 N.M. at 210, 803 P.2d at 1115. But executive employees and workers are to be counted—even when those executive employees use the opt-out provision as contained in NMSA 1978, Section 52-1-7 (2003). *Garcia*, 111 N.M. at 210-11, 803 P.2d at 1115-16 ("We note that subsection E of Section 52-1-7 specifically provides that those who elect not to be covered are nonetheless to be counted in determining whether the employer comes within the Act.").

{6} With respect to the case at bar, the record below supports the finding that Mr. Jackson is an executive employee. While the WCA's findings could be mistakenly construed to conclude that JCI had no workers—including Mr. Jackson, such an interpretation is contradicted by (1) the recitation of facts in both parties' briefs, (2) Mr. Jackson's own affirmative election form, and (3) his testimony during the administrative hearing. The WCA's brief states, "[JCI] is comprised solely of one employee, Paul Jackson[.]" JCI's brief is also in accord, stating, "Paul Jackson considers himself as the 'executive employee' of [JCI.]" Additionally, Mr. Jackson signed and filed an affirmative election form with the WCA establishing that "I, PAUL DOUGLAS JACKSON, am a 'worker' as defined in [the Act, and] I am employed by JACKSON CONSTRUCTION, INC[.]" And finally, Mr. Jackson's own testimony before the WCA maintained his position that he is the "executive employee" of JCI. Given the substantial evidence in the record and the absence of any to the contrary, we think the more accurate construction of the WCA's findings is that JCI did not employ any workers apart from Mr. Jackson. As an actual employee, Mr. Jackson would therefore not fall under the class of executives recognized in *Garcia* as non-workers.

{7} JCI largely agrees that Mr. Jackson is an executive employee and that a reading of the plain language of Section 52-1-6(A) in concert with Section 52-1-7 would result in Mr. Jackson being counted to determine JCI's one-worker status. JCI instead focuses its

argument on two related points: (1) Mr. Jackson's affirmative election form should exempt him from being considered as JCI's worker, as a matter of policy, and (2) a reading of the plain language of the statute would contravene legislative intent and result in an absurdity (i.e. requiring entities to maintain insurance, even when their only qualifying employee has elected to forego coverage). We are not persuaded by either argument.

B. An Executive Employee Affirmative Election Does Not Exempt the Employer From Being Subject to the Act

{8} JCI's argument that Mr. Jackson's affirmative election form should exempt him from being considered as JCI's worker is based on the following two rationales: (1) the definition of employer includes an inherent requirement that qualifying workers "be covered by workers' compensation insurance," and (2) Mr. Jackson is the sole shareholder of JCI and should be treated as a sole proprietor, rather than an employee. While we agree that the definition of employer requires that the entity "employ[] workers under the terms of the Workers' Compensation Act," we disagree that the language requires that *all* counted workers actually be eligible for workers' compensation insurance coverage. Section 52-1-15.

{9} There are several instances in which a worker is counted to determine whether an employer is subject to the Act but is not ultimately covered under the Act's provisions. *See, e.g.*, *Howie v. Stevens*, 102 N.M. 300, 302, 694 P.2d 1365, 1367 (Ct. App. 1984) (recognizing that an illegally employed minor would presumably be counted to determine application of the Act to the employer but has the right to circumvent the Act's coverage and pursue remedies in tort), *Garcia*, 111 N.M. at 211, 803 P.2d at 1116 (holding that past employees who were regularly employed are still to be counted to determine worker minimums even though those workers are now no longer employees and thus ineligible for coverage). But the most important example is contained in Section 52-1-7(E) itself, which mandates that executive employees are to be counted, even if they have "filed an affirmative election not to be subject to [the Act]."

{10} JCI argues for a construction of Section 52-1-7(E) that would limit its reach to only those non-construction employers with three or more workers. We disagree that Section 52-1-7(E) is meant to apply so narrowly. As discussed above, construction employers must also employ a specific number of workers to be considered employers—at least one. Furthermore, the two clauses of Section 52-1-6(A) are contained in the same sentence, and the Legislature has provided no structural evidence that they are to be read separately. Finally, Section 52-1-7(E) contains no express language indicating that its reach only applies to one clause of the sentence contained in Section 52-1-6(A), but not the other. Rather than re-structuring the Legislature's language in such a result-oriented manner, we give it its plain import: Executive employees may exempt themselves from coverage but are still counted in determining whether their employer is subject to the Act.

{11} As for JCI's second point in support of its contention that Mr. Jackson's affirmative election form should exempt it from coverage, we are similarly unpersuaded. JCI goes to great lengths, as did the district court below, to analogize Mr. Jackson's corporate position

as sole shareholder and lone employee to that of a sole proprietor. While we have no precedent suggesting why such an analogy should matter, both JCI and the district court rely for support on a past decision of the Second Judicial District Court, *Jogi v. New Mexico Workers' Comp. Admin.*, No. CV 2007-08948, slip op. (N.M. Dist. Ct. Feb. 29, 2008). We remind counsel that decisions of the district court, even in their appellate capacity, have no precedential effect in this Court. *Inc. Cnty. of Los Alamos v. Montoya*, 108 N.M. 361, 364, 772 P.2d 891, 894 (Ct. App. 1989) ("Unpublished case law from state district or federal courts is instructive, but not binding on this court."). This is true even where, as in *Jogi*, this Court subsequently denied a petition for writ of certiorari. *State v. Myers*, 2011-NMSC-028, ¶ 25, 150 N.M. 1, 256 P.3d 13 (stating that a denial of a writ for certiorari does not "indicate any affirmation or adoption of law" and has no precedential value).

{12} Without suggesting any approval for the decision rendered in *Jogi*, we note that its facts are distinguishable from those in the case before us. In *Jogi*, a sole proprietor named Bjorn Jogi operated the construction company Bjorn Construction. The company never employed any workers other than Mr. Jogi, who affirmatively elected to exempt his company from the Workers' Compensation Act. After an administrative hearing, the WCA found Bjorn Construction subject to the Act. Mr. Jogi appealed to the Second Judicial District Court, which reversed and held that Bjorn Construction was *not* an employer under the Act.

{13} While there are similarities between Mr. Jogi's sole-proprietor-run construction company and Mr. Jackson's solely owned and operated construction corporation, the affirmative election forms filed in each case are distinct and appear to seek entirely different legal ends. Mr. Bjorn's affirmative election form was entitled, "Exemption for Construction Industry Licensees Who Are Not Employers (Sole Proprietors or Partners)," which appears to affirm that Bjorn Construction is not to be considered an employer. Mr. Jackson's form on the other hand, was entitled "New Mexico Executive Employee Affirmative Election Form," which appears to exempt only Mr. Jackson from coverage, not JCI as a whole.

{14} The difference is likely rooted in the legal distinction between sole proprietorships and corporations. A "corporation is a legal entity, separate from its shareholders, directors, and officers[, who] are not personally liable for the acts and obligations of the corporation." *Stinson v. Berry*, 1997-NMCA-076, ¶ 17, 123 N.M. 482, 943 P.2d 129. While a sole proprietor is simply "a single individual who owns all the assets of a business, is solely liable for its debts and employs in the business no person other than himself." Section 52-1-7(F)(2). We thus remain unconvinced that the reasoning used in *Jogi* should be imported to the case at bar.

C. The Interpretation of the Statute Is Neither Absurd nor Contrary to Legislative Intent

{15} JCI's final argument is that the provision of the act that requires companies to provide coverage for injured workers—whose only employees are exempt from coverage—to nonetheless procure insurance, is absurd and does not serve the Legislature's purpose. The argument fails for at least two reasons: (1) the coverage is not superfluous as JCI asserts, and (2) rational policy arguments exist for the Legislature's adoption of a bright-line rule that subjects *all* construction employers to the Act.

{16} Contrary to JCI's assertion that requiring construction corporations like itself to obtain coverage would contravene legislative intent, we point to several instances in which such coverage would be useful and protective of workers. As Mr. Jackson acknowledged during his administrative hearing before the WCA, if a construction-related accident occurred and his subcontractor was not in compliance with the Act, JCI as general contractor could be held liable to the injured worker under certain circumstances. Related to this point, Mr. Jackson also acknowledged that he did not routinely execute formal contracts with his subcontractors, nor did he ensure definitively that his subcontractors carried the required workers' compensation coverage. Second, situations can develop between a general contractor and a subcontractor, such that the general contractor inadvertently becomes a "constructive employer" of the subcontractor's employees. *See Harger v. Structural Servs., Inc.*, 121 N.M 657, 660-61, 916 P.2d 1324, 1327-28 (1996) (recognizing the creation of "constructive employer[s]" under NMSA 1978, Section 52-1-22 (1989)).

{17} With respect to JCI's assertion that our construction of Section 52-1-6(A) results in an absurdity, we point to rational policy arguments in support of such a rule. The Legislature's decision to adopt a rule that requires a heightened standard of participation by small construction employers can be attributed to the inherent dangerousness of construction activity. While we cannot know for certain that our Legislature's focus was to address dangerousness due to the lack of subject-specific legislative history in New Mexico, other States have cited that rationale as supporting similar changes to their own workers' compensation acts. *See, e.g., Ficocelli v. Just Overlay, Inc.*, 932 So.2d 1230, 1233 (Fla. Dist. Ct. App. 2006) ("[I]n 1989, the legislature extended coverage to employees of construction industry employers who employ one or more employees . . . to ensure that workers performing inherently dangerous work in the construction industry would be covered, even when they are working for small employers[.]"). Interestingly, the changes in our own Act requiring increased participation by small construction companies occurred shortly after the change by the Florida legislature. *See* § 52-1-6 ("[E]nacted by Laws 1990 (2nd S.S.), ch. 2, § 4."). Finally, such a rationale certainly supports the election by our Legislature to focus on the nature of a business's activity—construction—rather than its size, and can be seen as neither absurd nor contrary to the Act's purposes.

VI. CONCLUSION

{18} We construe Section 52-1-6(A) to require all incorporated construction employers to abide by the strictures of the Act, even those who employ only executive employees that have elected to individually opt out of coverage under Section 52-1-7. We thus reverse the district court and affirm the WCA's determination that JCI as a construction employer is subject to the Act and must procure the required workers' compensation insurance.

{19} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:

LINDA M. VANZI, Judge

TIMOTHY L. GARCIA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-034

Filing Date: February 16, 2012

Docket No. 29,763

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

DEBBIE GONZALES,

Defendant-Appellee.

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OPINION

CASTILLO, Chief Judge.

{1} The State listed Dr. Clarissa Krinsky as an expert witness to testify about the circumstances of the death of Jeff Packer, the victim in this case. Dr. Krinsky did not perform the autopsy on Packer, and the State explained that it was not going to offer the autopsy report into evidence. Defendant filed a pre-trial motion to exclude Dr. Krinsky as the State's expert witness arguing that because Dr. Krinsky did not perform the autopsy, allowing her to testify would violate Defendant's Sixth Amendment right to confront a witness against her—in this case the author of the autopsy report itself, who was not going to testify. The district court granted the motion. We hold that based on the record before us, the complete exclusion of the testimony of Dr. Krinsky was error. We reverse and remand with instructions to proceed with a trial to evaluate Dr. Krinsky's status as a witness and her testimony within the boundaries of the Confrontation Clause of the Sixth Amendment and the New Mexico rules of evidence.

I. BACKGROUND

{2} This case comes to us on interlocutory

appeal. Because a trial has not been held, we rely only on the information set forth in the record and in the August 6, 2009, hearing before the district court on the motion to exclude the witness. Defendant was charged with second degree murder for the stabbing death of Packer. Dr. Timothy Williams, a forensic pathology fellow at the Office of Medical Investigator (OMI), performed the autopsy on Packer. Dr. Williams now lives in the state of Washington, and the State claims it elected not to bring him back to New Mexico to testify as to his autopsy report because of "expense and logistical difficulty." Although the State has represented that it will not seek to introduce the autopsy report itself into evidence, its witness list included Dr. Krinsky, another OMI forensic pathologist. Defendant filed a motion to exclude Dr. Krinsky as a witness, and the district court granted the motion.

II. DISCUSSION

A. Autopsy Report

{3} We begin by disposing of a preliminary matter—whether the autopsy report should be considered testimonial and therefore subject to the protections of the Sixth Amendment under *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 2531-32 (2009). Although the Supreme Court did not decide the issue of autopsy reports in *Melendez-Diaz*, it observed that "[s]ome forensic analyses, such as autopsies . . . cannot be repeated," and therefore the Confrontation Clause is crucial in such instances to protect a defendant's Sixth Amendment rights. *Id.* at ___ n.5, 129 S. Ct. at 2536 n.5.

{4} Just recently, the Court held that a document "created solely for an evidentiary purpose, . . . made in aid of a police investigation, ranks as testimonial." *Bullcoming v. New Mexico* (*Bullcoming II*), ___ U.S. ___, ___, 131 S. Ct. 2705, 2717 (2011) (internal quotation marks and citation omitted). Some jurisdictions, even in the wake of *Melendez-Diaz*, hold that autopsy reports are in a separate category distinct from other forensic reports and consider them to be non-testimonial. *See* George M. Tsiatis, Note, *Putting* Melendez-Diaz *on Ice: How Autopsy Reports Can Survive the Supreme Court's Confrontation Clause Jurisprudence,* 85 St. John's L. Rev. 355, 381 (2011) (declaring that autopsy reports are "precariously positioned" and worthy of "special consideration"). In *Jaramillo*, we recently decided that an autopsy report submitted into evidence was considered testimonial when done in support of a law enforcement homicide investigation and for use in prosecution of a criminal case. *State v. Jaramillo*, 2012-NMCA-029, ¶¶ 13-14, 272 P.3d 682, *cert. denied*, 2012-NMCERT-002 (No. 33,401, February 16, 2012). In the case before us, the State has represented that it will not seek to introduce the autopsy report. Consequently, we need not decide whether the autopsy report in this case would be testimonial hearsay. Our question is limited to whether Defendant's Confrontation Clause rights under the New Mexico and United States constitutions prohibit Dr. Krinsky from testifying as an expert witness as to the circumstances of Packer's death. After our opinion in *Jaramillo* and the Supreme Court's recent opinion in *State v. Cabezuela*, 2011-NMSC-041, ¶¶ 48-52, 150 N.M. 654, 265 P.3d 705 (discussing the admissibility of testimony from a pathologist who had been present at the autopsy, but had not performed it and relied on records prepared by the other doctor), we conclude that guidelines for the district court's work on this question exist, but that the question was not adequately analyzed with regard to Krinsky's proposed testimony. Our explanation follows.

B. Standard of Review

{5} We have two standards of review in this case. "Questions of admissibility under the Confrontation Clause are questions of law, which we review de novo." *State v. Aragon*, 2010-NMSC-008, ¶ 6, 147 N.M. 474, 225 P.3d 1280. Generally, we review admissibility of evidence, including expert opinion, for an abuse of discretion. *See State v. Alberico*, 116 N.M. 156, 169, 861 P.2d 192, 205 (1993).

C. Dr. Krinsky's Testimony

{6} In the case before us, the district court relied on the Confrontation Clause and determined that because Dr. Krinsky had not conducted the autopsy of Packer, she could not testify to his manner of death. Both the United States and New Mexico constitutions use the same words to guarantee the right of a criminal defendant at trial "to be confronted with the witnesses against him[.]" U.S. Const. amend. VI; N.M. Const. art. II, § 14. The Sixth Amendment applies to the states through the Fourteenth Amendment. *State v. Lopez*, 2000-NMSC-003, ¶ 14, 128 N.M. 410, 993 P.2d 727. "The Confrontation Clause guarantees the accused in a criminal trial the right to be confronted with the witnesses against him, regardless of how trustworthy the out-of-court statement may appear to be." *State v. Mendez*, 2010-NMSC-044, ¶ 28, 148 N.M. 761, 242 P.3d 328 (internal quotation marks and citation omitted).

{7} The State sought to introduce the testimony of Dr. Krinsky as an expert witness. Under Rule 11-702 NMRA, a witness who qualifies as an expert "by knowledge, skill, experience, training or education" may testify if such "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue[.]" Rule 11-703 NMRA, which tracks with the Federal Rule of Evidence 703, describes the bases of expert testimony:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, *the facts or data need not be admissible* in evidence in order for the opinion or inference to be admitted.

Rule 11-703 (emphasis added). Rule 11-703 also states that otherwise inadmissible facts or data "shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." "However, the disclosure of this otherwise inadmissible information is to assist the jury in evaluating the expert's opinion, not to prove the substantive truth of the otherwise inadmissible information." *United States v. Pablo*, 625 F.3d 1285, 1292 (10th Cir. 2010). "[W]here an expert witness discloses otherwise inadmissible out-of-court testimonial statements on which she based her opinion, the admission of those testimonial statements under Rule 703 typically will not implicate a defendant's confrontation rights because the statements are not admitted for their substantive truth." *Pablo*, 625 F.3d at 1292.

{8} The Confrontation Clause and Rule 703 can be at odds. As the 10th Circuit pointed out in *Pablo*, there is a danger that prosecutors will use surrogate witnesses disguised as

experts in order to introduce evidence that otherwise would trigger the Sixth Amendment's Confrontation Clause:

> If an expert simply parrots another individual's testimonial hearsay, rather than conveying her independent judgment that only incidentally discloses testimonial hearsay to assist the jury in evaluating her opinion, then the expert is, in effect, disclosing the testimonial hearsay for its substantive truth and she becomes little more than a backdoor conduit for otherwise inadmissible testimonial hearsay.

Pablo, 625 F.3d at 1292. The Committee Commentary to Rule 11-703 states that the rule

> is intended to strike a balance between an expert's need to rely upon sources of information used in the expert's field in arriving at decisions, but at the same time to avoid using the expert witness as a conduit for inadmissible evidence to be transmitted to the jury and improperly used as substantive evidence.

{9} Thus, while there is no argument that under the rules of evidence an expert may rely for his or her opinion on facts and data that themselves are not admissible, the question remains whether the inclusion of underlying facts or data from another source in an expert's testimony in a given circumstance is admissible or violates the constitutional rights of a criminal defendant. To answer this question, we look for guidance from recent United States Supreme Court, New Mexico and Tenth Circuit cases as we analyze this problem.

1. United States Supreme Court Cases

{10} In a series of decisions in the past seven years, the United States Supreme Court has redefined the type of witness statements that trigger the Confrontation Clause rights of criminal defendants under the Sixth Amendment of the United States Constitution. Starting in 2004, the Court abandoned its evidentiary test of reliability and guarantees of trustworthiness when judging whether hearsay testimony is admissible under the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 61-62 (2004). The Court instead distinguished between testimonial and non-testimonial evidence and ruled that the former always triggers the Sixth Amendment right of confrontation. *Crawford*, 541 U.S. at 51. The Court did not define "testimonial" but gave examples:

> *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, . . . extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, . . . statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]

Id. at 51-52 (second alteration in original) (internal quotation marks and citations omitted). More recently, the Court clarified

that certificates of analysis from forensic testing are testimonial statements subject to the Confrontation Clause, thus requiring that the witness be available at trial for cross-examination, because the statements "are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" *Melendez-Diaz*, ___ U.S. at ___, 129 S. Ct. at 2532 (quoting *Davis v. Washington*, 547 U.S. 813, 830 (2006)). The *Crawford* Court did acknowledge, parenthetically, that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U.S. at 59 n.9 (citing *Tennessee v. Street*, 471 U.S. 409 (1985) for the proposition that the confession of an accomplice may be admitted for non-hearsay purpose of rebutting the defendant's testimony about his own confession being coerced through the accomplice's statement). One scenario in which testimonial statements are offered for a purpose other than as substantive evidence is when they are used, as we noted above, under Rule 11-703, as underlying facts and data relied on by an expert witness. The United States Supreme Court cautions, though, that "*ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them." *Crawford*, 541 U.S. at 51.

{11} In 2009, the United States Supreme Court built on *Crawford* and stated in *Melendez-Diaz* that the introduction of a drug analyst's certificate of analysis required that the witness be available for cross-examination by the defendant, otherwise the evidence is inadmissible. *Melendez-Diaz*, 557 U.S. 305, 129 S. Ct. at 2532. While the Court discussed concerns about the potential burden on prosecutions of tracking down unavailable analysts, sometimes years after the original forensic testing was conducted, to testify at trial, it concluded: "The Confrontation Clause . . . is binding, and we may not disregard it at our convenience." *Id.* at ___, 129 S. Ct. at 2540. As the dissent in *Melendez-Diaz* suggested, "The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second[.]" *Id.* at ___, 129 S. Ct. at 2546 (Kennedy, J., dissenting). Requiring the original witness to be presented for confrontation by the defendant, the Court declared, "is one means of assuring accurate forensic analysis." *Id.* at ___, 129 S. Ct. at 2536.

{12} After the appellate briefing in the case before us, the United States Supreme Court decided *Bullcoming II*, ___ U.S. ___, 131 S. Ct. 2705, which overruled the New Mexico Supreme Court's decision, *State v. Bullcoming* (*Bullcoming I*), 2010-NMSC-007, 147 N.M. 487, 226 P.3d 1 (allowing a substitute expert to testify about a chemical report conducted by another analyst). The United States Supreme Court concluded that such "surrogate" testimonial evidence offends the accused's "right . . . to be confronted with the analyst who made the certification[.]" *Bullcoming II*, ___ U.S. at ___, 131 S. Ct. at 2710. Testimonial evidence "may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness." *Id.* at ___, 131 S. Ct. at 2713. The Court stated that the Sixth Amendment "does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." *Id.* at ___, 131 S. Ct. at 2716. The Court concluded that the introduction of testimony through a substitute or surrogate witness attesting to the original analyst's report violated the defendant's right to

confrontation. *See id.* at ___, 131 S. Ct. at 2710.

{13} The case before us, however, can be distinguished from *Bullcoming II*, because here the original report—the autopsy performed by Dr. Williams—will not be introduced into evidence. Further, Dr. Krinsky's testimony is to be offered through her role as an expert witness, not as a surrogate introducing the report of Dr. Williams. And, according to the proffer of the State, Dr. Krinsky will not parrot the findings of Dr. Williams, but she will instead offer her own opinions and conclusions. In *Bullcoming II*, Justice Sotomayor sided with the majority in barring the surrogate testimony but penned a concurring opinion "to emphasize the limited reach of the Court's opinion," *id.* at ___, 131 S. Ct. at 2719 (Sotomayor, J., concurring), and to "highlight some of the factual circumstances that this case does *not* present." *Id.* at ___, 131 S. Ct. at 2721-22. Justice Sotomayor emphasized that *Bullcoming* was "not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence." *Id.* at ___, 131 S. Ct. at 2722 ("As the Court notes . . . the [s]tate does not assert that Razatos offered an independent, expert opinion about Bullcoming's blood alcohol concentration."). "We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence." *Id.* The case before us, therefore, presents a different factual matrix than that in *Bullcoming I*.

2. New Mexico Cases

{14} Our own Supreme Court decided *Aragon* at the same time as *Bullcoming I* and similarly rejected the admission of a forensic report by a second expert when the analyst who had tested the substance was not the one to testify at trial. In *Aragon*, the Court made a point similar to the one Justice Sotomayor would later make in her *Bullcoming II* concurrence:

> The [s]tate's argument would have merit if Young had expressed his own opinion based upon the underlying data that contributed to the opinion announced in the report. It is proper to admit opinion testimony based, *in part*, upon reports of others which are not in evidence but which the expert customarily relies upon in the practice of his profession.

2010-NMSC-008, ¶ 23 (internal quotation marks and citation omitted). The Court concluded: "Under such circumstances, [the d]efendant would have had the opportunity to effectively cross-examine Young, and his right to confrontation would not have been violated." *Id.*

{15} Thus, the case before us can be distinguished from *Melendez-Diaz*, *Bullcoming II*, the New Mexico Supreme Court's decision in *Aragon*, and our case *Jaramillo*. In those cases, the report itself was admitted into evidence, and the alternate analyst was used as a witness to introduce the findings of the original, unavailable analyst. Here, the forensic report is not being admitted into evidence but might serve as an underlying document to be used by the expert in giving her own opinion. This is an interlocutory appeal; we do not know what will transpire at trial.

{16} But our analysis does not end here, because *Aragon* cautions that a state's witness

does not have carte blanche to give boundless testimony based on hearsay evidence. The controlling question in a case involving an alternative expert witness, our Supreme Court noted, is whether the analyst's testimony "was an expression of his own opinion or whether he was merely parroting" or "merely repeating the contents of [the] report or the opinion of the analyst who is unavailable for cross-examination." 2010-NMSC-008, ¶ 26. *Aragon* pointed to an out-of-state case that held an analyst's testimony was inadmissible even when that testimony was only *partially* based on the non-testifying expert's hearsay opinion. *Id.* ¶ 25 n.4. But, again, our Supreme Court clarified its "concern" about such a situation: "The opposing party has no opportunity to cross-examine the basis for the hearsay opinion because the opinion is not the testifying expert's own opinion. This is especially true when, as is the situation in this case, the testifying expert relies *solely* on the opinion of another expert." *Id.* In other words, the degree to which a substitute analyst parrots the hearsay testimony of another, or in the parlance of *Bullcoming II*, serves as a mere surrogate, controls the analysis.

3. Tenth Circuit Cases

{17} An examination of those boundaries played out in federal court in New Mexico in *United States v. Mirabal*, 2010 WL 3834072 (D.N.M. 2010) (mem. & order), filed in 2010—a year after *Melendez-Diaz*, but a year before *Bullcoming II*. There, the federal government sought to bring in the testimony of a forensic chemist, Eshelman, who was the supervisor of the analyst, Hall, who had tested the substance in question but was unavailable to testify. 2010 WL 3834072, at *2. The federal district court for New Mexico in *Mirabal* distinguished the circumstances from those in *Melendez-Diaz* based on the fact that live testimony was available. *Mirabal*, 2010 WL 3834072, at *4. The court therefore granted the government's motion to allow the supervising analyst to testify based on her own expert opinions. *Id.* In granting the motion, however, the court cautioned the government about the permissible scope of such testimony: "Eshelman's conclusions must be her own, and not a parroting of Hall's opinions." *Id.* The court noted that defense counsel

> will be able to cross-examine Eshelman on the issues of "what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed." *Melendez-Diaz*, [___ U.S. at ___,] 129 S. Ct. at 2537. She would also be able to cross-examine Eshelman on the fact that Eshelman did not, herself, perform[] the tests and inquire about the possibility that Hall had performed the tests incorrectly.

Mirabal, 2010 WL 3834072, at *4. The court took guidance from *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009), which worried about prosecutors making "an end run around *Crawford*" and stated: "As long as [the expert] is applying his training and experience to the sources before him and reaching an independent judgment, there will typically be no *Crawford* problem." *Id.*

{18} In the wake of *Melendez-Diaz*, the Tenth Circuit has embraced the idea of an analyst testifying as an expert based on another's report that qualifies as an out-of-court testimonial statement. *Pablo*, 625 F.3d at 1292. In *Pablo*, the court allowed an analyst, Snider, to give her expert opinion based on DNA reports that she did not help compile but were filed by others, Dick and

Boyd: "Nowhere does Ms. Snider testify that she is simply parroting Ms. Dick's DNA report to the jury. To the contrary, her testimony revealed her own extensive review of the entire test procedure in this case[,] and she expressed her own expert conclusions." *Id.* at 1294. The court upheld the admission of Snider's testimony even though "once or twice" she discussed Dick's conclusions because she did so "in the context of explaining some of the data and information she is relying on in giving her own expert opinion." *Id.* The court did concede the precariousness of such a situation: "The degree to which an expert may merely rely upon, and reference during her in-court expert testimony, the out-of-court testimonial conclusions of another person not called as a witness is a nuanced legal issue without clearly established bright line parameters, even today with the benefit of *Melendez-Diaz*." *Pablo*, 625 F.3d at 1294.

{19} The rationale of the Tenth Circuit applies to the situation in this case. Here, the State told the district court that its testifying pathologist, Dr. Krinsky, would not rely on the conclusions or opinions of Dr. Williams and his original autopsy report, but rather on her own review of photographs of the body and other raw data. If Dr. Krinsky offers her own opinions and conclusions as an expert witness and avoids parroting the testimonial statements of Dr. Williams, her testimony would not run afoul of Defendant's Sixth Amendment right to confrontation. At this point, we do not know, because we have only the proffer, not her actual testimony.

4. Other Jurisdictions

{20} Cases from other state court jurisdictions reveal a variety of approaches to this question. The Supreme Judicial Court of Massachusetts has allowed experts to testify based on autopsy reports when the original analyst was not available to testify.

> [S]ubstitute medical examiner's opinions must be grounded in the evidence presented at trial, but once that condition is met, he or she may offer opinions on such issues, among others, as whether a particular wound was an entry or exit wound, the amount of time that would have elapsed between injury and death, the amount of force required to inflict an injury, the characteristics of the object probably used to inflict the type of injury observed, and the effect that certain types of injuries would have had on the victim.

Commonwealth v. Avila, 912 N.E.2d 1014, 1028 (Mass. 2009). The Illinois Supreme Court has ruled that an expert may testify about data in forensic reports even though the original analyst is not available to testify, to show the basis for the testimony of the expert witness. *See People v. Lovejoy*, 919 N.E.2d 843, 870 (Ill. 2009). In *People v. Williams*, 939 N.E.2d 268, 278 (Ill. 2010), *cert. granted*, *Williams v. Illinois*, ___ U.S. ___, 131 S. Ct. 3090 (U.S. June 28, 2011), the Illinois court stated: "This court has long held that prohibitions against the admission of hearsay do not apply when an expert testifies to underlying facts and data, not admitted into evidence, for the purpose of explaining the basis of his opinion." The Washington Court of Appeals allowed expert testimony of supervisors on an autopsy report not admitted into evidence because the experts "were not acting as mere conduits for the testimonial assertions of their employees." *State v. Lui*, 221 P.3d 948, ¶ 27 (Wash. Ct. App. 2009) ("This is not a case where the [s]tate produced expert witnesses simply to have them recite out-of-court statements made by others as a

way to evade the protections of the [C]onfrontation [C]lause."). Other courts permit such expert testimony but closely guard against allowing the expert to disclose testimonial statements based on the underlying autopsy report when the author of the report is not available as a witness. In *Wood v. State*, 299 S.W.3d 200, 211-13 (Tex. Ct. App. 2009), the expert witness relied on photographs to form his own opinion about the nature and causes of the victim's injury, thus steering clear of violating the Confrontation Clause; however, the court held that the expert did later violate the Confrontation Clause when he testified as to the conclusions of the original medical examiner.

{21} Other courts have found clear violations of defendants' Sixth Amendment rights by expert witnesses. The North Carolina Court of Appeals found a Confrontation Clause violation based on the following testimony of an expert witness, Schell, who had not performed the forensic examination at issue:

> Q. Now have you reviewed the testing procedures that you've described and the results of the examinations of the test yourself?
> A. I have.
> Q. And have you also reviewed Agent Gregory's conclusion?
> A. I have.
> Q. Have you formed an opinion as to the item that was submitted inside the plastic bag that's been marked as State's Exhibit 1B?
> A. I have.
> Q. And what is your opinion based on?
> A. Based upon all the data that she [Agent Gregory] obtained from the analysis of that particular item, State's Exhibit 1B, I would have come to the same conclusion that she did.

State v. Brewington, 693 S.E.2d 182, 185 (N.C. Ct. App. 2010). The court concluded:

> It is clear from the testimony of Special Agent Schell that she had no part in conducting any testing of the substance, nor did she conduct any independent analysis of *the substance*. She merely reviewed the reported findings of Agent Gregory, and testified that if Agent Gregory followed procedures, and if Agent Gregory did not make any mistakes, and if Agent Gregory did not deliberately falsify or alter the findings, then Special Agent Schell "would have come to the same conclusion that she did."

Id. at 190.

{22} Most recently, the Maryland Court of Appeals warned about allowing an alternate analyst to remark on the conclusions of the non-testifying analyst's DNA report. In *Derr v. State*, 29 A.3d 533, 557 (Md. 2011), the court concluded that the expert witness "relied on the serological examiner's conclusion that sperm cells were present" and "conceded that she could not form an independent basis for her conclusions without trusting the report." The court reasoned: "The key distinction in this type of case is whether the testifying expert relies on raw data in forming his or her conclusions, as opposed to relying on the conclusions and opinions of others when testifying." *Id.* at 553.

5. Analysis

{23} Allowing an expert to testify to an

opinion based on the work of a non-testifying, as opposed to an unavailable, witness is a balancing act for courts that must protect the Confrontation Clause rights of the accused while permitting the state to reasonably present expert testimony for the benefit of the factfinder. Courts must walk that fine line between the Confrontation Clause and the rules of evidence with care.

> If the specific conclusions of the report's non[-]testifying author are not disclosed, and if the testifying expert can also be cross-examined on the fact that he did not personally conduct the tests at issue that undergird his conclusions, permitting reliance upon a report that provides sufficient detail for another expert to exercise independent expertise, assess its conclusions and reach his own judgment appeals to numerous judges as reasonable balance between respecting the Confrontation Clause values and continuing to permit experts to reasonably rely on inadmissible materials, as has long been permitted under Rule 703.

David H. Kaye, David E. Bernstein, Jennifer L. Mnookin, *The New Wigmore: A Treatise on Evidence—Expert Evidence*, § 4.10.2, at 202-03 (2d ed. 2011); *see O'Kelly v. State*, 94 N.M. 74, 77, 607 P.2d 612, 615 (1980) (stating that experts may rely on facts and data embodied in a non-admissible report but not the oral or written opinions of the non-testifying compiler of that report). In the case before us, in the absence of a fully formed record, we can say no more at this point other than that allowing an expert to testify based on information in the autopsy report of another analyst, assuming the report itself is not introduced into evidence, is not a *per se* violation of the Confrontation Clause rights of the defendant. Because the autopsy report is not being admitted into evidence, this case does not trigger the Confrontation Clause violations flagged by the United States Supreme Court in *Melendez-Diaz* or *Bullcoming II* and by our own Supreme Court in *Aragon*. An expert's testimony may be based on inadmissible evidence, and until such expert testimony crosses the line from the formation of an independent opinion based on underlying raw data to a reliance on the conclusions and opinions of the author of the autopsy or a mere parroting of the report's findings, then that testimony is admissible subject to the rules of evidence.

{24} We extend this discussion in order to provide words of caution to be observed by the district court upon remand as it takes on the responsibility of ensuring that Dr. Krinsky's testimony does not run afoul of Defendant's Confrontation Clause rights. We do not decide here, for instance, whether under the New Mexico rules of evidence Dr. Krinsky is qualified to serve as an expert witness or whether the underlying facts and data she plans to rely on are a sufficient basis for such expert testimony. In addition, the district court must closely police the testimony of Dr. Krinsky if she relies in any way on the underlying facts and data contained in the autopsy report prepared by Dr. Williams. And Defendant will have the opportunity to object to any and all of Dr. Krinsky's testimony, as well as to cross-examine Dr. Krinsky and inquire about her methods and her lack of personal knowledge about the autopsy that was conducted, all subject to the court's discretion.

{25} Such case-by-case scrutiny by a trial court is essential. The New Mexico Supreme Court recently gave guidance to district courts when they assess testimony that pushes the boundaries of hearsay limitations under the

rules of evidence: "Our courts must once again shoulder the heavy responsibility of sifting through statements, piece-by-piece, making individual decisions on each one." *Mendez*, 2010-NMSC-044, ¶ 46. In *Mendez*, the Supreme Court refused to proclaim that all statements made by any victim to a sexual assault nurse examiner (SANE) must be excluded under the rules of hearsay: "It would make our job far easier simply to exclude all statements made during SANE examinations. We would do so, however, at the substantial risk of excluding statements that are otherwise trustworthy, vital to the prosecution, and fair to the accused." *Id.* In the realm of Confrontation Clause analysis, we, too, refuse to extend the holdings of *Crawford*, *Melendez-Diaz*, and *Bullcoming II* and to toss a blanket ban on the testimony of an expert witness about the circumstances of the death of the victim in those instances when the expert did not perform the autopsy and the autopsy report has not been admitted into evidence.

{26} In summary, the balance between the extent to which its contents constitute the facts and data upon which Dr. Krinsky bases her opinion, and whether those facts are presented before the jury pursuant to Rule 11-703 requires active monitoring and evaluation by the district court—a process that has not played out here and points to the district court's ruling as being premature under the state of the law. After *Cabezuela*, we know that a pathologist who participated in an autopsy can testify to his or her opinion, including opinions utilizing another participating doctor's notes. Until Dr. Krinsky testifies to her opinions and their bases, no confrontation problem exists. Perhaps, no confrontation problem will arise. Until it does, however, exclusion of her testimony is unwarranted and requires reversal.

III. CONCLUSION

{27} For the foregoing reasons, we conclude that Dr. Krinsky should not have been precluded from testifying as an expert as to the circumstances surrounding the victim's death because she did not prepare the autopsy report. The proffer by the State indicates that she will be testifying as an expert in her own right. Nevertheless, her testimony is not automatically admissible. As Dr. Krinksky presents her testimony at trial, Defendant will be able to make objections. The State will be able to counter, and the district court will make its rulings based on the testimony offered and the objections made.

{28} Accordingly, we reverse the order of the district court excluding Dr. Krinsky from being an expert witness and remand this matter to the district court for proceedings consistent with this Opinion.

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

CELIA FOY CASTILLO, Chief Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

RODERICK T. KENNEDY, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-035

Filing Date: February 15, 2012

Docket No. 30,591

VILLAGE OF RUIDOSO,

Plaintiff-Appellee,

v.

DAVID WARNER,

Defendant-Appellant.

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OPINION

SUTIN, Judge.

{1} On behalf of a non-profit foundation that he created after the death of his son, Defendant David Warner stationed himself and his pickup truck in a public street intersection in the Village of Ruidoso, New Mexico. He handed out flyers that solicited funds to support his foundation. Posters in the bed of the truck identified the foundation and asked for donations. Defendant was arrested and convicted in municipal court of soliciting without a permit contrary to Ruidoso, N.M., Code of Ordinances ch. 58, art. III, § 58-84(b) (1998). He appeals from a repeated conviction in a de novo appeal in the district court. He presents constitutional challenges to Section 58-84(b). We reverse Defendant's conviction.

BACKGROUND

The Ordinance at Issue

{2} Section 58-84(b) reads:

> *Solicitation on public property.* The practice by itinerant vendors or solicitors of going onto public property for the purpose of soliciting money or for the sale of goods, wares[,] and merchandise or for the purpose of disposing of goods, wares[,] and merchandise shall be considered a nuisance and punishable under this Code, except as otherwise provided by law or authorized by the council.

Section 58-84 (use of streets, sidewalks, parks, and village-owned public property) is found under Article III (offenses against property) of

Chapter 58 (offenses and miscellaneous provisions) of the Village's Code of Ordinances.

{3} The parties consider three other Village ordinances to be related in the constitutional analyses. These ordinances are found in Division 2 (special licenses) under Article II (business registration and licenses) of Chapter 26 (businesses) of the Village's Code of Ordinances. Ruidoso, N.M., Code of Ordinances ch. 26, art. II, div. 2, § 26-62 (1998) (definitions) defines "solicitation" to include requesting contribution of funds for charitable or other noncommercial purposes. It defines "solicitor" as any person who engages in solicitation along "any streets[.]" Ruidoso, N.M., Code of Ordinances ch. 26, art. II, div. 2, § 26-75 (1998) (amended Jan. 26, 2010) (solicitation) makes it unlawful for any solicitor to engage in solicitation without first obtaining a license from the Village, but it exempts "[p]ersons, organizations[,] and other entities who are not otherwise required by the provisions of this article to obtain business registrations and/or licenses[.]" Section 26-75(b)(2) (1998) (prior to 2010 amendment). And Ruidoso, N.M., Code of Ordinances ch. 26, art. II, div. 2 § 26-77 (1998) (fundraising events by non-profit organizations) sets out criteria under which outdoor fundraising activity by a non-profit organization can be conducted. Criteria applicable to Defendant's activity include "submit[ting] an application supplied by the village clerk[,]" providing documentation of not-for-profit status, and obtaining permission from "the administering agency" (e.g., school, village, county, federal, or state agency) if the activity is held on public property. Section 26-77(2), (4), (5). None of these ordinances refers to Section 58-84(b). We see nothing in the record that indicates that either the municipal court or the district court considered these other ordinances when convicting Defendant for violating Section 58-84(b).

{4} Defendant requests this Court to rule that Section 58-84(b) alone or in combination with Sections 26-62, 26-75, and 26-77 suffers from facial and as-applied constitutional deficiencies, naming the facial culprits overbreadth, prior restraint, and vagueness. It appears from the briefs on appeal that, in pursuit of the issue of the constitutional validity of Defendant's conviction under Section 58-84(b), the parties believe that all of these sections are to be read together as one regulatory scheme.

Applicable General Principles

{5} Our analysis of the facial invalidity of statutes and ordinances[1] prohibiting content-neutral speech in public places essentially considers how substantial, broad, and chilling the prohibition is, sometimes involving concerns about unbridled government official discretion and prior restraint. In a facial challenge to an ordinance, we consider only the text of the ordinance itself, not its application; whereas, in an as-applied challenge, we consider the facts of the case to determine whether application of the ordinance even if facially valid deprived the challenger of a protected right. *Field Day, LLC v. Cnty. of Suffolk*, 463 F.3d 167, 174-75 (2d Cir. 2006).

{6} "According to our First Amendment

[1] Statutes and ordinances are treated the same in cases addressing the constitutionality of laws restricting First Amendment speech. In this Opinion, because this case involves ordinances, unless "statute" appears in quoted material, we use "ordinance" throughout even though several of the cited cases deal with statutes.

overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292 (2008); *State v. Ebert*, 2011-NMCA-098, ¶ 6, 150 N.M. 576, 263 P.3d 918. The concept of overbreadth is applicable to invalidate ordinances that fail to serve "legitimate interests [through] narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980). The overbreadth doctrine is also applied to invalidate ordinances restricting speech that do not include reasonable restrictions based on time, place, and manner of communicating information. *See, e.g.*, *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 59 n.17 (1976) (collecting cases that entertained facial overbreadth claims "where statutes, by their terms, purport to regulate the time, place, and manner of expressive or communicative conduct"); *Grayned v. City of Rockford*, 408 U.S. 104, 114-15 (1972) (stating that an ordinance, even if clear and precise, "may nevertheless be overbroad if in its reach it prohibits constitutionally protected conduct" and "that reasonable, time, place[,] and manner regulations may be necessary to further significant governmental interests, and are permitted" (internal quotation marks omitted)).

{7} In some instances, the concept of void for vagueness is applicable to ordinances that restrict speech. *See, e.g.*, *Grayned*, 408 U.S. at 109 ("[W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms." (alterations omitted) (internal quotation marks and footnotes with citations omitted)); *see also Coates v. City of Cincinnati*, 402 U.S. 611, 611, 614 (1971) (holding an ordinance prohibiting, among other things, "conduct . . . annoying to persons passing by" to be "unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard," to be vague "in the sense that no standard of conduct is specified at all[,]" and also to be "unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct").

{8} In addition, the concept of prior restraint has also been applied in a First Amendment context. *See Young*, 427 U.S. at 59 n.17 (collecting cases that entertained facial overbreadth claims where expressive or communicative "conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights"); *cf. Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940) (involving an invalid prior restraint on the free exercise of religion); *see also Vill. of Schaumburg*, 444 U.S. at 629 (noting that, following the *Cantwell* decision, the Court "understood *Cantwell* to have implied that soliciting funds involves interests protected by the First Amendment's guarantee of freedom of speech").

{9} The ordinances in question are content neutral. *See, e.g.*, *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322 (2002) (discussing the distinction between "subject-matter censorship [and] content-neutral time, place, and manner regulation of the use of a public forum"). Content-neutral regulation of protected speech may survive constitutional attack if the regulation is made subject to reasonable time, place, and manner restrictions. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (stating, in the context of content-neutral park service regulations relating to demonstrations,

that "[e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions"); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) ("[T]he peace, good order, and comfort of the community may imperatively require regulation of the time, place[,] and manner of distribution [of literature]."); *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (indicating that "[i]f a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place[,] and manner in relation to the other proper uses of the streets"); *cf. City of Farmington v. Fawcett*, 114 N.M. 537, 540, 843 P.2d 839, 842 (Ct. App. 1992) (stating, in the context of free speech under the New Mexico Constitution on the issue of prior restraint, related to an ordinance criminalizing dissemination of obscene material, that "our [S]upreme [C]ourt has recognized that the state may constitutionally regulate the place and manner of such speech"). Still, through "unduly broad discretion" enjoyed by officials in the permitting process, "even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression." *Thomas*, 534 U.S. at 323. The regulation must "contain adequate standards to guide the official's decision and render it subject to effective judicial review." *Id.* And, "in order to constitute a legitimate time, place, and manner restriction . . . the restriction on speech must . . . serve a significant governmental interest, and . . . in so doing, . . . must leave open ample alternative channels for communication of the information." *Stuckey's Stores, Inc. v. O'Cheskey*, 93 N.M. 312, 318, 600 P.2d 258, 264 (1979) (internal quotation marks and citation omitted).

{10} We apply an intermediate level of scrutiny to content-neutral ordinances that restrict speech. *Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n*, 512 U.S. 622, 642 (1994) (citing *Clark*, 468 U.S. at 293). Under that scrutiny, the restrictions in the ordinance must be narrowly tailored to serve a significant or substantial governmental interest without unnecessarily interfering with First Amendment freedoms and must "leave open ample alternative channels for communication of the information." *Clark*, 468 U.S. at 293; *Vill. of Schaumburg*, 444 U.S. at 637; *Am. Target Adver., Inc. v. Giani*, 199 F.3d 1241, 1247 (10th Cir. 2000).

Preliminary Preservation Question

{11} In the district court, Defendant broadly asserted that his First Amendment rights were violated and that Section 58-84(b) was void for vagueness. The district court expressed disagreement with Defendant's void-for-vagueness assertion but noted that Defendant raised the issue. The record proper in this Court shows that in the municipal court proceedings Defendant argued that charitable solicitations qualified as protected speech under the First Amendment, that the Village's content-neutral Section 58-84(b) regulation of the solicitations was subject to intermediate scrutiny, and that although government can impose reasonable restrictions of time, place, and manner of protected speech, narrowly tailored to serve a significant governmental interest, the Village "lacked specific instructions or procedures set in place by which a non-profit organization would apply for and obtain a license or permit to request donations." In the municipal court proceedings, Defendant cited several cases that set out the constitutional guidelines related to Defendant's arguments, two of which were *Vill. of Schaumburg*, 444 U.S. at 637 (addressing overbreadth), and *Am. Target Adver.*, 199 F.3d at 1246-53 (addressing

intermediate scrutiny of content-neutral regulation of fundraising activity, facial challenge and narrow-tailoring requirements, prior restraint, and unbridled discretion). Thus, the constitutional issues appear to have been contained in the district court record.

{12} The record does not reflect that the district court addressed First Amendment issues. Because Defendant failed to argue First Amendment issues with any specificity, we cannot fault the district court if it did not specifically address them. Nevertheless, for the following reasons, we will address the First Amendment issues that Defendant has raised on appeal: (1) Defendant raised the issues in municipal court and the issues were part of the district court record; (2) the Village has not argued any lack of preservation and has addressed the constitutional issues in its answer brief on appeal; and (3) colorable First Amendment challenges to content-neutral ordinances that do not contain standards of time, place, and manner of communication restrictions on protected speech should be heard on appeal even though the challenges were not clearly preserved in the district court. *See State v. Laguna*, 1999-NMCA-152, ¶¶ 18-23, 128 N.M. 345, 992 P.2d 896 (reviewing a constitutional void-for-vagueness challenge despite lack of preservation).

DISCUSSION

{13} We review the constitutional issues raised by Defendant de novo. *See Christus St. Vincent Reg'l Med. Ctr. v. Duarte-Afara*, 2011-NMCA-112, ¶ 21, 267 P.3d 70, *cert. quashed*, 2012-NMCERT-005, ___ P.3d ___ (No. 33,166, May 24, 2012). There is a presumption that municipal ordinances are constitutional. *City of Albuquerque v. Jones*, 87 N.M. 486, 488, 535 P.2d 1337, 1339 (1975); *Fawcett*, 114 N.M. at 540, 843 P.2d at 842. The challenger has the burden to establish that an ordinance is unconstitutionally invalid. *See Jones*, 87 N.M. at 488, 535 P.2d at 1339; *see also State v. Ball*, 104 N.M. 176, 178, 718 P.2d 686, 688 (1986) ("It is the duty of [an appellate court] to uphold statutes [and ordinances] unless it is satisfied beyond all reasonable doubt that the [legislative body] went outside the Constitution in enacting the challenged legislation."). We are to uphold the ordinance at issue here unless otherwise satisfied beyond all reasonable doubt that it is outside the Constitution. *Fawcett*, 114 N.M. at 540, 843 P.2d at 842.

Observations Regarding the Ordinances

{14} Section 58-84 is titled "Use of streets, sidewalks, parks[,] and village-owned public property[,]" and Subpart (b) specifically relates to solicitation on public property. Unless otherwise provided by law or authorized by the Village council, Section 58-84(b) by itself unqualifiedly criminalizes as a nuisance a practice by an itinerant solicitor "of going onto public property" to solicit money. As it plainly reads, Section 58-84(b) criminally prohibits a non-profit organization's charitable solicitation of funds orally or by use of leaflets and posters at any time, in any public place, and in any manner. Thus, unless other law or Village council authorization saves this clear First Amendment infringement, Section 58-84(b) cannot pass constitutional scrutiny. *See City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) (collecting "prior decisions [that] voiced particular concern with laws that foreclose an entire medium of expression"); *Martin*, 319 U.S. at 147 ("The dangers of distribution [of literature] can so easily be controlled by traditional legal methods . . . that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.");

Jamison v. Texas, 318 U.S. 413, 416 (1943) ("The right to distribute handbills concerning religious subjects on the streets may not be prohibited at all times, at all places, and under all circumstances."); *Schneider v. New Jersey*, 308 U.S. 147, 163-65 (1939) (holding that regulations embodied in various ordinances abridged the freedom of speech and press); *Lovell v. City of Griffin*, 303 U.S. 444, 450-51 (1938) (holding an ordinance facially unconstitutional because of its "broad sweep" prohibiting "the distribution of literature of any kind at any time, at any place, and in any manner").

{15} As we have indicated earlier in this Opinion, the parties treat Sections 26-62, 26-75, and 26-77 as related to Section 58-84(b). The question is whether these ordinances come within the phrase "except as otherwise provided by law or authorized by the council." Section 58-84(b). Section 26-62 appears intended to define "solicitation" and "solicitor" that appear in Section 58-84(b). We understand the parties to argue that this definitional provision applies in the application of Section 58-84(b). Thus, Section 26-62 includes within the definition of "solicitation," presumably as it is applied in Section 58-84(b), "requesting contribution of funds . . . for political, charitable, religious[,] or other noncommercial purposes." Section 26-62. Section 26-62 also includes within the definition of "solicitor," presumably as it is applied in Section 58-84(b), "any person . . . along any streets within the [V]illage conducting solicitation." Section 26-62. Assuming these definitions apply to Section 58-84(b), that section covers Defendant's charitable fundraising activity and brings that activity within the proscription of Section 58-84(b). Section 26-62 does not relieve Section 58-84(b) of its constitutional defect.

{16} Section 26-75(a) appears intended, at first glance, to place a restriction on "solicitation" and "solicitor" in Sections 58-84(b) and 26-62 by making unlawful any solicitation by a solicitor without first obtaining a license from the Village. Section 26-75(b)(2) (1998) (prior to 2010 amendment) exempts solicitors from the license requirement as long as the solicitors are not required under another section to obtain a business registration or license. Because those who engage in requesting contributions for charitable purposes are not required to obtain a business registration or license, Defendant was presumably exempt from the license requirement. Like Section 26-62, Section 26-75 does not relieve Section 58-84(b) of its constitutional defect.

{17} Section 26-77 appears intended to allow a non-profit organization to engage in outdoor fundraising activity on public property under the specific requirements, called criteria, set out in the section. This section does not mention "solicitation" or "solicitor." Among the criteria for engagement in outdoor fundraising activity are that the organization must "submit an application supplied by the [V]illage clerk[,]" must provide documentation of its non-profit status, and "[i]f the activity is to be held on public property, permission must be granted from the administering agency, such as but not limited to school, village, county, federal[,] or state agencies." Section 26-77(2), (4), (5). Further, under Section 26-77(6), "[d]uration of the fundraiser is limited to five consecutive days." Thus, in the present case, assuming that Section 26-77 is to be considered a law narrowing the proscriptive scope of Section 58-84(b), Section 58-84(b)'s proscription will not be enforced against someone in Defendant's circumstance as long as that person files an application provided by the Village, files documentation showing its non-profit status, and is given permission by the

Village to engage in the fundraising activity, which can be no longer than five consecutive days in duration. The arresting officer testified that he recommended to Defendant that if he got a permit, the citation would probably be dismissed. Notwithstanding this testimony, it is notable that neither the record nor the briefs reflect whether an application form existed for anyone to use to obtain a permit, what information an application required, or what standards were to be considered in granting or withholding permission for a non-profit organization to engage in fundraising. Considering Sections 58-84(b) and 26-77 together as the Village's attempt to regulate the time, place, and manner of solicitation by a non-profit organization for charitable purposes in a public place, the following picture emerges of the coverage of the sections in relation to Defendant's solicitation conduct on behalf of his non-profit organization and of the constitutional status of his conviction.

{18} Section 58-84(b) outright proscribes any solicitation whatsoever of funds for charitable purposes, "except as otherwise provided by law or authorized by the council." Sections 26-62 and 26-75 add nothing to our constitutional analysis. Section 26-77 can arguably be considered a law that the Village intended as limiting the breadth to Section 58-84(b). Read in that manner, the two sections might be interpreted as implying that the solicitation flatly proscribed in Section 58-84(b) would nevertheless be allowed if the criteria set out in Section 26-77 were met. We gather from the Village's arguments on appeal that it intends this interpretation. Based on the interplay of Sections 58-84(b) and 26-77, it is reasonable to conclude that, under that two-ordinance regulatory scheme, Defendant was prohibited from soliciting funds on behalf of his non-profit organization unless he first completed an application supplied by the Village, submitted it to the Village, and then obtained permission from the Village to engage in the fundraising activity.

Constitutional Analysis

{19} The diagnosis is not one of constitutional health but instead of constitutional infirmity. As we indicated earlier in this Opinion, without Section 26-77, Section 58-84(b) is clearly facially unconstitutional, unless a law or authority provides otherwise, because Section 58-84(b) outright prohibits all solicitation of money at any time, at any place, and in any manner.

{20} Even with Section 26-77 at its side, however, Section 58-84(b) is facially unconstitutional. The regulatory scheme comprised of Sections 58-84(b) and 26-77 still broadly prohibits solicitation of money at any time, at any place, and in any manner unless a permit from the Village is obtained. This regulation does not save the infirmity of the ordinances. We understand the Village to argue that solicitation is not prohibited but rather that the ordinances "merely require a permit prior to solicitation and are designed to provide the Village with notice of time, place, and manner of presentation so that public health[,] safety[,] and welfare concerns can be addressed." However, there exists nothing in the record to indicate whether any particular form of application actually exists; nothing to indicate what is required in the application, if it does exist; nothing to indicate who is responsible for granting or denying permission; and nothing to indicate by what standards permission will be granted or denied. Nothing in the ordinances or in the record reflects the existence of any limitation on discretion, or any time, place, or manner of solicitation regulation.

{21} Thus, the scheme facially and

unconstitutionally prohibits activity without obtaining a permit, the issuance of which rests in what appears from the lack of evidence to the contrary to be unbridled discretion of public officials. *See Vill. of Schaumburg*, 444 U.S. at 628-29 (characterizing *Schneider*'s analysis as "holding that the city could not . . . subject . . . communication of views to the discretionary permit requirement"); *Schneider*, 308 U.S. at 164-65 (holding an ordinance void in requiring a permit to disseminate information where the police had discretion to allow some persons to act and not others). Furthermore, the regulatory scheme before us does not "constitute[] a reasonable time, place, and manner restriction on [Defendant's] exercise of protected First Amendment Rights[,]" nor did the Village sustain its "burden . . . to show the validity of [any significant governmental interest] and the absence of less intrusive alternatives." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 656, 658 (1981) (Brennan, J., concurring in part and dissenting in part, citing *Schneider*). The scheme at hand is "demonstrably overbroad" and lacks essential "precision of drafting and clarity[.]" *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216-17 (1975); *see also Young*, 427 U.S. at 59 n.17 (discussing cases involving claims of facial overbreadth, which include entertainment of the claims "where statutes, by their terms, purport to regulate the time, place, and manner of expressive or communicative conduct," and "where such conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights"). The scheme utterly fails to pass the test of intermediate scrutiny, a test that requires the governmental regulator to show where

> [e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. . . . [R]estrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

Clark, 468 U.S. at 293; *see also Turner Broad. Sys.*, 512 U.S. at 642 (stating that "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny," citing *Clark*, 468 U.S. at 293). And the scheme "subject[s] the exercise of First Amendment freedoms to the prior restraint of a [permit]" and has built in no protection of protected speech against "the uncontrolled will of an official—as by requiring a permit . . . which may be granted or withheld in the discretion of such official." *Am. Target Adver.*, 199 F.3d at 1252 (internal quotation marks and citations omitted). Moreover, the Village presented no evidence showing that the solicitation regulations are narrowly tailored to serve a substantial, significant governmental interest, nor any evidence that the restriction leaves open ample alternative channels for communication of the information Defendant sought to give to the public.

{22} Based on our holding that the ordinances in question are facially invalid abridgments of First Amendment speech, we deem it unnecessary to address Defendant's as-applied and void-for-vagueness arguments.

CONCLUSION

{23} We reverse Defendant's conviction.

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

JONATHAN B. SUTIN, Judge

WE CONCUR:

CELIA FOY CASTILLO, Chief Judge

CYNTHIA A. FRY, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-036

Filing Date: January 19, 2012

Docket No. 29,756

RAYMOND L. KYSAR,
PATSY SUE KYSAR, and
THE KYSAR FAMILY TRUST,

Plaintiffs-Appellants,

v.

BP AMERICA PRODUCTION COMPANY, f/k/a AMOCO PRODUCTION COMPANY,

Defendant-Appellee.

and

WILLIAM KARL JOHNSON and MARY M. JOHNSON, his wife, and all of their heirs and successors known and unknown, BP, the heirs and successors of MAUDE KEYS, including, but not limited to OLIE MAE McCOY, LAURA A. TOVEY, CLARENCE RIDDLE, EUGENE RIDDLE, JOYCE (JOY) RIDDLE LEE and TOMMY RALPH RIDDLE, BEN CASE, HENRY and GEORGIA KNOWLTON; ONOFRE R. JAQUEZ and ALVINA JAQUEZ, his wife, and all of their heirs and successors, known and unknown; COLEMAN OIL & GAS, INC.; WILLIAM HOLMBERG and JOYCE HOLMBERG, his wife, SHIRLEY M. HOLMBERG, and UNKNOWN ENTITIES A-Z; JOHN DOES I-X (as yet unidentified agents, employees or contractors of BP America Production Company, BP, or unknown entities A-Z, who have trespassed on the Kysar Ranch); and all other persons unknown, claiming any right, title, estate, lien, easement, or interest in the real property described in the complaint adverse to Plaintiffs' ownership, or any cloud on Plaintiffs' title thereto,

Defendants.

Victor R. Marshall & Associates, P.C.
Victor R. Marshall
Albuquerque, NM

for Appellants

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

for Appellee

OPINION

VIGIL, Judge.

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

BACKGROUND AND PROCEDURAL HISTORY

{2} Plaintiffs own the surface estate of the Kysar Ranch, which consists of some 600 acres of land along the Animas River. The northern portions of the ranch were previously owned by Jessie Maude Keys, and the southern portions of the ranch were previously owned by Onofre and Alvina Jaquez. In 1948, Keys and Mr. and Mrs. Jaquez executed separate oil and gas leases on their respective properties to C.H. Nye. In 1949, Mr. and Mrs. Jaquez conveyed their surface estate, together with half of the underlying oil, gas, and mineral rights to Keys. In 1956, Keys deeded the now unified surface estate to Henry and Georgia Knowlton, reserving the entire mineral estate. By this transaction, all the minerals were severed from the surface estate, and access to the minerals was preserved because Keys also reserved a right of ingress and egress to access the oil, gas, and other minerals. In 1983, Mr. and Mrs. Knowlton sold the entire surface estate to Plaintiffs, subject to all prior reservations of oil, gas, and other minerals. The surface estate is now known as the Kysar Ranch.

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

{4} Since Plaintiffs acquired the surface estate to the Kysar Ranch in 1983, their relationship with BP and Amoco, its immediate predecessor, has been marked by discord. A series of disputes were resolved by a settlement agreement in 2000 (the 2000 Settlement Agreement) between Plaintiffs and Amoco. The 2000 Settlement Agreement resolved claims that Amoco's operations had damaged the Kysar Ranch, constituted an unreasonable use of the surface, or otherwise constituted a trespass. However, the 2000

Settlement Agreement did not resolve one major disagreement: whether Amoco had a right to use the Back Gate Road to access the Sullivan Gas Com E-1 Well (the E-1 Well) located on Bureau of Land Management (BLM) land outside, but adjacent to, the Kysar Ranch.

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

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

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

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

prohibited Plaintiffs from presenting certain evidence at trial.

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

> THIS MATTER came before the Court on May 19, 2009, on the parties' joint request for entry of a stipulated order directing a verdict in favor of BP American [sic] Production Company. The Court having heard the arguments of counsel, having reviewed the applicable law, and being otherwise fully advised in the premises, find that the parties' joint request is well-taken and should be GRANTED, as follows:
>
> 1. On May 18, 2009, a 12-person jury was selected, sworn into service, and empaneled for trial of this matter.
>
> 2. On May 19, 2009, prior to the parties' opening statements, the Court addressed and ruled upon certain evidentiary issues raised by the parties. The Court's decisions on those evidentiary matters are reflected in separate orders in this case.
>
> 3. In light of the Court's decisions and evidentiary rulings to date, the parties stipulated that a reasonable jury would not have a legally sufficient evidentiary basis to find for Plaintiffs on any of the claims raised by Plaintiffs' complaint. In so stipulating, each party reserved the right to challenge the Court's aforementioned decisions and rulings on appeal.
>
> 4. In light of the parties' stipulation, which is well taken, the Court determines that the claims raised by Plaintiffs' complaint, insofar as they pertain to BP America Production Company, should be dismissed and finds that BP America Production Company is entitled to judgment as a matter of law.
>
> 5. The parties further stipulated that, respecting BP America Production Company's counterclaim, because Plaintiffs have not prevented or attempted to prevent BP or its personnel from accessing its wells on Plaintiffs' property, BP America Production Company has incurred no damage as a result of Plaintiffs' revocation or purported revocation of permission relating to such access. The parties further stipulated that no such damage will be incurred for so long as Plaintiffs do not prevent or

attempt to prevent BP America Production Company or its personnel from accessing its wells on Plaintiffs' property.

6. In light of the parties' stipulation, which is well taken, the Court determines that the parties stipulation of dismissal respecting BP America Production Company's counterclaim pursuant to Rule 1-041(A)(2) NMRA is proper.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that, pursuant to Rule 1-050 NMRA, JUDGMENT is hereby entered in favor of BP America Production Company, and against Plaintiffs, on all issues raised by Plaintiffs' complaint, and that all of Plaintiffs' claims against BP America Production Company be and hereby are DISMISSED, *with prejudice*, and without leave to amend.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, pursuant to Rule 1-041(A)(2), BP America Production Company's counterclaim against Plaintiffs is hereby DISMISSED.

IT IS FINALLY ORDERED, ADJUDGED, AND DECREED that each party to this action shall bear its own costs, expenses, and attorney fees incurred to date.

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

APPEAL OF A STIPULATED CONDITIONAL DIRECTED VERDICT

{11} We characterize the order before us as a "stipulated conditional directed verdict." The directed verdict was conditionally stipulated to, with each party expressly reserving the right to challenge rulings of the district court on appeal, with success on appeal resulting in a reversal of the directed verdict. Whether such an order is appealable presents a question of law, which invokes de novo review. *Baca v. Los Lunas Cmty. Programs*, 2011-NMCA-008, ¶ 7, 149 N.M. 198, 246 P.3d 1070 (stating that a question of appellate jurisdiction presents a question of law, which we review de novo).

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

{13} In general, a party cannot appeal from a judgment entered with its consent. E. H. Schopler, Annotation, *Right to Appellate Review of Consent Judgment*, 69 A.L.R.2d 755, § 3 (1960). However, the federal courts and some state courts have carved out exceptions allowing appeals from consent judgments in certain circumstances. Schopler, *supra* § 5. All the federal circuits except the

Fifth Circuit allow an appeal from a consent judgment provided that the party explicitly reserves the right to appeal a contested issue.[1] Some state courts also allow an appeal from a consent judgment if the party has expressly reserved the right in the judgment.[2] Other states reach the same result when the trial court's rulings have effectively precluded the plaintiff from proceeding with the trial.[3] The broad reasons supporting these views are that: (1) it is a waste of judicial resources to require a plaintiff to undertake a trial which will in all

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

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

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

probability be unsuccessful merely to obtain a judgment which is appealable; and (2) allowing an appeal in these circumstances effectuates the intention of the parties. *See Villano v. Waterman Convalescent Hosp., Inc.*, 105 Cal. Rptr. 3d 276, 279 (Ct. App. 2010). On the other hand, some state courts have concluded that parties cannot confer appellate jurisdiction by stipulating to a reservation of appellate rights, and they do not allow appeals from consent judgments. Schopler, *supra* note 6, § 29, at 814-15.

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

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

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

{17} Based on the foregoing, we conclude that an appeal will lie from a stipulated conditional directed verdict when the following conditions are satisfied: (1) rulings are made by the district court, which the parties agree are dispositive; (2) a reservation of the right to challenge those rulings on appeal; (3) a stipulation to entry of judgment; and (4) approval of the stipulation by the district court. Recognizing an exception to the general rule that an appeal will not lie from a

judgment entered by consent when these conditions are satisfied conserves scarce judicial resources and preserves the constitutional right to appeal. Having determined that this case is properly before us, we turn to the pretrial rulings of the district court that Plaintiffs challenge on appeal.

THE DISTRICT COURT RULINGS

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

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

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

{21} Importantly, in this case, no offer of proof was made, and no evidence was ever presented to the jury. Moreover, the district court ruled that during trial, Plaintiffs could seek to introduce the evidence, whereupon it would consider whether to admit the evidence. Reconsideration of the ruling would then be made in the specific context of the case at that point in the trial. However, since there was no trial, we have no basis for determining whether excluding the evidence might constitute error, and even if we could, we have no context for assessing whether excluding the evidence was prejudicial. It is a well-established principle of appellate review that the appellant has the burden of ensuring that the appellate court is provided with a complete record and transcript of proceedings that is sufficient to review the appellant's claims. *State v. Martinez*, 2002-NMSC-008, ¶ 48, 132 N.M. 32, 43 P.3d 1042; *see Vill. of Angel Fire v. Wheeler*, 2003-NMCA-041, ¶ 25, 133 N.M. 421, 63 P.3d 524 (stating that for appellate review to be meaningful, the record must be of sufficient completeness to permit proper consideration of the appellant's claims); *State v. Wilson*, 116 N.M. 793, 797, 867 P.2d 1175, 1179 (1994) ("It was [the] defendant's burden to make a sufficient record for review on appeal."). Furthermore, even if a district court makes an erroneous evidentiary ruling, it does not constitute reversible error unless it results in prejudice. Rule 11-103(A) NMRA ("Error may not be predicated upon a ruling which

admits or excludes evidence unless a substantial right of the party is affected[.]"); *City of Albuquerque v. Ackerman*, 82 N.M. 360, 365, 482 P.2d 63, 68 (1971) ("Harmless error in the exclusion of evidence cannot be the basis for a new trial."); *El Paso Elec. Co. v. Real Estate Mart, Inc.*, 98 N.M. 570, 574, 651 P.2d 105, 109 (Ct. App. 1982) ("A party must show prejudice before reversal is warranted."). Under the circumstances, there is no issue for us to decide, as we have no basis for reviewing whether the order of the district court constituted reversible error. Any attempt to undertake an analysis at this point would result in an advisory opinion, which we decline to give. *See Santa Fe So. Ry., Inc. v. Baucis Ltd. Liab. Co.*, 1998-NMCA-002, ¶24, 124 N.M. 430, 952 P.2d 31 ("Our concern with issuing advisory opinions stems from the waste of judicial resources used to resolve hypothetical situations which may or may not arise.").

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

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

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

Id. (internal quotation marks and citation omitted). Thus, motions in limine are interlocutory orders which are subject to reconsideration by the district court during the trial. "It is often impossible to make definitive evidentiary rulings prior to trial because admissibility will depend on the state of the evidence at the time of the ruling." *State v. Dubois*, 556 A.2d 86, 87-88 (Vt. 1988). As the trial unfolds, and other evidence admitted, the context may demonstrate that excluded evidence is, in fact, relevant and admissible, making it proper for the district court to revisit, and modify or reverse its prior ruling. This is due to the very nature of a motion in limine. "[M]otions in limine seeking advance rulings on the admissibility of evidence are fraught with problems because they are necessarily based upon an alleged set of facts rather than the actual testimony which the trial court would have before it at trial in order to

make its ruling." *State v. Young*, 983 P.2d 831, 833 (Idaho 1999). In addition, "[R]ulings in limine can never be totally accurate in balancing the probative and prejudicial values of a piece of evidence which is best evaluated in the total trial context." Rothblatt & Leroy, *The Motion in Limine in Criminal Trials: A Technique for the Pretrial Exclusion of Prejudicial Evidence*, 60 Ky. L.J. 611, 633 (1972). Thus, the ruling on the motion in limine may subsequently be changed, expanded or modified by the district court in light of the development of the evidence at trial. *See Proper*, 90 N.M. at 715, 568 P.2d at 241.

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

{25} However, we do have an adequate record to assess the district court's in limine rulings 1 and 2. Those issues arose as follows. BP filed a motion in limine seeking to prohibit Plaintiffs from introducing any evidence that the permission Plaintiffs gave to BP to enter the Kysar Ranch was the product of misstatements or misrepresentations by BP. BP contended that the first time Plaintiffs raised either misrepresentation or mistake was when they included these claims in their requested jury instructions; that Plaintiffs never pled mistake or fraud, either specifically or generally; and that Plaintiffs had not attempted to amend their pleadings to include claims of fraud or mistake. BP asserted that because Plaintiffs "have not complied with the pleading rules," and "have not heretofore alleged misrepresentation (fraud) or mistake," that Plaintiffs "cannot now raise these claims." BP therefore contended that Plaintiffs "should be barred from offering testimony or evidence in support of them."

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

> 26. In response to the Kysars' objections, BP continues to falsely represent that it has the right to cross the Kysar Ranch to reach existing and proposed wells. However, no such express written conveyance exists.
>
> 27. Amoco (BP's predecessor in interest) knowingly made false representations about its supposed right to cross the Kysar Ranch which tended to and actually did deceive and mislead the Kysars in connection with BP's production and purchase of coal seam gas from the wells located on the Kysars' land.
>
> . . . .

62. Plaintiffs have asked BP for pertinent information concerning the basis for BP's claimed access rights on the Kysar Ranch, including the documents relating to the unitized or pooled tracts that affect the Kysar Ranch, and for those units contiguous to the Kysar Ranch. BP has refused to provide the information sought. The Kysars do not have ready access to this information, which is not regularly tracked by title companies.

63. BP continues to insist that it has the right to cross the Kysar Ranch where and when it pleases to access existing wells and any new wells that it locates anywhere on the Kysar Ranch. BP insists that it may use the Back Gate Road access for all of its existing wells and any new ones that it drills. BP is using roads located on one "unit" to gain access to wells located on other "units."

64. BP's dilatory, hide-the-ball tactics, when it has superior knowledge of the unitization agreements and oil and gas leases that impact on its location of various new wells, and its refusal to share this information with [P]laintiffs, constitutes a breach of the duty of good faith and fair dealing.

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

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

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

{29} We agree with Plaintiffs that the foregoing allegations are sufficient to raise issues of misrepresentation, fraud, and mistake. Accordingly, it was error for the district court to exclude evidence that the consent given to Amoco/BP, to use the Back Gate Road for access to wells on the Kysar Ranch, was fraudulently or mistakenly induced. Further, the allegations make

evidence of BP's refusal to produce pertinent documents purporting to give it a right to cross the Kysar Ranch to access existing and future wells, relevant to Plaintiffs' claim that BP breached the duty of good faith and fair dealing. *See* Rule 11-401 NMRA ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); Rule 11-402 NMRA (providing that all relevant evidence is admissible).

CONCLUSION

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

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

MICHAEL E. VIGIL, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

TIMOTHY L. GARCIA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-037

Filing Date: February 23, 2012

Docket No. 30,315

Consolidated with

Docket No. 30,445

THE ESTATE OF PETER NAUERT,

Petitioner-Appellant,

v.

MELISSA MORGAN-NAUERT,

Respondent-Appellee.

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OPINION

WECHSLER, Judge.

{1} This appeal raises the issue of whether the Probate Code's creditors' claims classification provision, NMSA 1978, § 45-3-805(A) (1995), applies to lump-sum spousal support and attorney fee awards to a surviving spouse in a divorce proceeding continued after the death of the other spouse under the domestic affairs anti-abatement statute, NMSA 1978, § 40-4-20(B) (1993). The district court in the divorce action (the Divorce Court) ordered that the decedent's estate (the Estate) pay the spousal support and attorney fee awards immediately, as a priority, before the district court in the probate proceedings (the Probate Court) assumed jurisdiction over the assets to address the Estate's creditors' claims. The Estate argues that (1) the Divorce Court did not have jurisdiction to classify the spousal support and attorney fee awards as Class One claims under Section 45-3-805(A); (2) the Divorce Court improperly interpreted Section 40-4-20(B) as providing the Divorce Court with authority to order the immediate payment of the awards before the Probate Court assumed jurisdiction over the assets; (3) the Divorce Court's order violated the Federal Insolvency Act, 31 U.S.C. § 3713(a)(1)(B) (1982); and (4) the Divorce Court's order is barred by res judicata because of the Probate Court's earlier classification of the claims. We also address Appellee's argument that she is entitled to attorney fees because the Estate pursued this litigation in bad faith. We hold that the Divorce Court did not err by ordering the immediate payment of the spousal support and attorney fee awards under Section 40-4-20(B), the Divorce Court's action did not violate the Federal Insolvency Act, and the Estate failed to preserve the res judicata claim which, we nevertheless conclude, fails. We also deny Appellee attorney fees. Accordingly, we affirm.

BACKGROUND

{2} Peter Nauert (Peter) began this case by filing a petition for dissolution of marriage (the divorce action) from Melissa Morgan-Nauert (Melissa) in the Divorce Court in March 2006. Peter died while the divorce action was pending, and the Divorce Court continued the proceeding pursuant to the domestic relations anti-abatement statute, Section 40-4-20(B), with Peter's Estate as a substitute party. On September 4, 2007, Michael Owens Jr., as personal representative of the Estate (the personal representative), initiated an informal probate action in the Probate Court for the administration of the Estate.

{3} On November 14, 2007, Melissa filed a motion for interim spousal support, attorney fees, and costs in the Divorce Court. At a subsequent status conference held before the Divorce Court ruled on the motion, the Estate argued that any spousal support, attorney fees, or costs awarded would be Class Six claims in the probate proceedings under the Probate Code's creditors' claims classification provision, Section 45-3-805(A), and informed the Divorce Court that the Estate was not certain that there would be sufficient assets in the Estate to pay the Class One

through Class Five claims. The Divorce Court set a hearing, and the parties submitted briefs, concerning the amount of spousal support and attorney fees to which Melissa was entitled and the proper classification of the awards under the Probate Code. At the hearing, the Divorce Court orally awarded Melissa monthly spousal support beginning September 1, 2007 and attorney fees, and determined that the attorney fees were a Class One claim under the Probate Code.

{4} Subsequently, on May 21, 2009, the Divorce Court entered an interlocutory order awarding Melissa monthly spousal support and attorney fees beginning September 1, 2007, ordering that both awards shall be treated as Class One claims under the Probate Code, and requiring the Estate to pay the awards immediately. The Estate did not pay the awards immediately and instead filed a petition for extraordinary writ in the New Mexico Supreme Court, arguing that the Divorce Court's classification of the spousal support and attorney fee awards usurped the authority of the Probate Court provided by the Probate Code. Our Supreme Court denied the writ without comment on the merits.

{5} After denial of the petition for extraordinary writ, the Estate filed a petition in the Probate Court for guidance on the classification of the spousal support and attorney fee awards under the Probate Code. The Estate also released funds to Melissa in order to avoid being held in contempt for refusing to pay the spousal support and attorney fee awards immediately as required by the May 21, 2009 order in the Divorce Court. On August 13, 2009, the Probate Court acted on the Estate's petition and entered an order determining that the spousal support and attorney fee awards were not Class One claims but rather Class Six claims under the Probate Code.

{6} Meanwhile, the Divorce Court held the property division hearing in the divorce action on November 30 through December 4, 2009. Melissa continued to argue that the Estate was required to pay the spousal support and attorney fees immediately, and the Estate continued to argue that the awards were Class Six claims. The Divorce Court entered its findings of fact and conclusions of law on February 1, 2010. It required the Estate to pay immediately a lump-sum spousal support award based on a monthly amount for the period of August 19, 2007 through August 19, 2010 and all of Melissa's attorney fees in the divorce action. The Divorce Court reasoned that Section 40-4-20(B) required it to determine all financial issues relating to the divorce action, including spousal support and attorney fees, before the "remaining assets can be treated as the probate estate" and that the Divorce Court must "order distribution and payments *as a priority*" before the remainder of the Estate's assets pass to the jurisdiction of the Probate Court. Therefore, although the Divorce Court's findings of fact stated that the spousal support and attorney fee awards are Class One claims under the Probate Code, the Divorce Court held that the awards are not part of the probate estate and therefore out of the jurisdiction of the Probate Court by operation of Section 40-4-20(B).

{7} The Divorce Court entered a final judgment on March 24, 2010. Melissa subsequently filed a motion detailing the amount of attorney fees in the divorce action. The Divorce Court awarded Melissa attorney fees on May 10, 2010, and the Estate filed a timely appeal on May 12, 2010.

ARGUMENTS AND STANDARD OF REVIEW

{8} On appeal, the Estate argues that (1) the Divorce Court did not have jurisdiction to

classify the spousal support and attorney fee awards as Class One claims under the Probate Code's creditors' claims classification provision, Section 45-3-805(A); (2) the Divorce Court improperly interpreted Section 40-4-20(B) as providing the Divorce Court with authority to order the immediate payment of the awards; (3) the Divorce Court's order violated the Federal Insolvency Act, 31 U.S.C. § 3713(a)(1)(B); and (4) the Divorce Court's order is barred by res judicata. The first three issues require statutory construction, an issue of law that we review de novo. *See N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2007-NMSC-053, ¶ 19, 142 N.M. 533, 168 P.3d 105. The application of res judicata is also an issue of law that we review de novo. *Chaara v. Lander*, 2002-NMCA-053, ¶ 10, 132 N.M. 175, 45 P.3d 895.

DIVORCE COURT'S CLASSIFICATION OF CLAIMS

{9} The Estate first argues that the Divorce Court did not have jurisdiction to classify the spousal support and attorney fee awards as Class One claims under the Probate Code's creditors' claims classification scheme, Section 45-3-805(A). The Estate argues that in enacting Section 45-3-805(A), the Legislature "committed" the jurisdiction to classify claims "solely to district courts sitting in probate."

{10} However, the record reveals that the Divorce Court did not order the immediate payment of the spousal support and attorney fee awards based on classifying the awards as Class One claims under the Probate Code. Initially, in awarding interim support and attorney fees on May 21, 2009, the Divorce Court did classify the awards as Class One claims and ordered the immediate payment of the awards. However, the Estate did not pay either award and instead filed a petition for an extraordinary writ in the New Mexico Supreme Court and, after the Supreme Court denied the writ, the Estate filed a petition in the Probate Court for guidance on the classification of the awards. Ultimately, in the Divorce Court's findings of fact and conclusions of law, the Divorce Court relied exclusively on Section 40-4-20(B) in concluding that it "must determine all financial issues and order . . . payment of [spousal] support and attorney[] fees so that the remaining assets can be treated as the probate estate and the Probate Court can then proceed." In its final judgment, the Divorce Court echoed this conclusion and ordered the immediate payment of the awards "before the assets are returned to the jurisdiction of the Probate Court." The Divorce Court essentially determined that the assets awarded as spousal support and attorney fees are not part of the probate estate by operation of Section 40-4-20(B). The Divorce Court's classification did not contribute to its conclusion requiring the Estate to pay the spousal support and attorney fee awards immediately, and the classification, if error, is not grounds for reversal. *See Downs v. Garay*, 106 N.M. 321, 323, 742 P.2d 533, 535 (Ct. App. 1987) ("[E]rroneous findings of fact not necessary to support the judgment of the court are not grounds for reversal.").

SECTION 40-4-20(B)

{11} We therefore turn to the Estate's argument that the Divorce Court misinterpreted Section 40-4-20(B) as providing it with authority to order the immediate payment of the spousal support and attorney fee awards without forcing Melissa to comply with the Probate Code's creditors' claims classification provision, Section 45-3-805(A), as a priority before the Probate Court assumed jurisdiction over the Estate's assets.

On the other hand, Melissa argues that the Divorce Court did not err because the spousal support and attorney fee awards "were outside the Estate" by operation of Section 40-4-20(B) and, therefore, not subject to Section 45-3-805(A). This issue requires statutory construction of Section 40-4-20(B), Section 45-3-805(A), and related provisions in both the domestic affairs statutes and Probate Code.

{12} When engaging in statutory construction, our guiding principle is to give effect to the intent of the Legislature. *Att'y Gen. v. N.M. Pub. Regulation Comm'n*, 2011-NMSC-034, ¶ 10, 150 N.M. 174, 258 P.3d 453. In determining legislative intent, we first look to the "plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *Id.* (internal quotation marks and citation omitted). Further,

> [w]hen construing statutes related to the same subject matter, the provisions of a statute must be read together with other statutes in pari materia under the presumption that the [L]egislature acted with full knowledge of relevant statutory and common law. Thus, two statutes covering the same subject matter should be harmonized and construed together when possible, in a way that facilitates their operation and the achievement of their goals.

Id. (internal quotation marks and citation omitted).

{13} We begin by examining the scope of the relevant sections of the Probate Code, including Section 45-3-805(A). Chapter eight of the Probate Code, entitled "creditors' claims," provides the procedures for the payment of creditors' claims against an estate. *See generally* NMSA 1978, §§ 45-3-801 to -816 (1975, as amended through 2011). Section 45-3-805(A) provides the priority scheme for payments when the assets in an estate are insufficient to pay all of the estate's creditors' claims. It divides creditors' claims against an estate into six classes and provides the priority for payment of each class. As Melissa points out, Section 45-3-805(A) only applies "[i]f the *applicable assets of the estate* are insufficient to pay all claims in full[.]" (Emphasis added.) She argues that the spousal support and attorney fee awards are not paid from Estate assets and therefore Section 45-3-805(A) does not apply. However, whether the awards are paid from Estate assets depends on whether the Legislature, when enacting Section 40-4-20(B), intended that the awards be "claims" under the Probate Code, or whether the Legislature intended the awards to be paid before the probate proceedings.

{14} The Probate Code defines "claims" as "includ[ing] liabilities of the decedent or protected person, whether arising in contract, in tort or otherwise and liabilities of the estate that arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration." NMSA 1978, § 45-1-201(A)(7) (2011). Generally, a judgment obtained in another court against a personal representative is considered an allowed claim against an estate, and the recipient may not execute on the judgment without complying with the Probate Code's creditors' claims provision. *See* § 45-3-806(D); § 45-3-812. We must therefore determine whether the Legislature intended a judgment for spousal support and attorney fees in a divorce action continued after the death of a party pursuant to Section 40-4-20(B) to follow this general scheme or whether Section 40-4-20(B) requires payment before the subsequent

probate proceedings.

{15} Under the common law rule of abatement, the death of either party during the pendency of a marriage dissolution proceeding before the entry of a final decree divested the court of jurisdiction. *Trinosky v. Johnstone*, 2011-NMCA-045, ¶ 13, 149 N.M. 605, 252 P.3d 829. By enacting Section 40-4-20(B), the Legislature departed from the common law rule of abatement. *Trinosky*, 2011-NMCA-045, ¶ 13. The relevant portions of Section 40-4-20(B) provide that:

> Upon the filing and service of a petition for dissolution of marriage, separation, annulment, division of property or debts, spousal support, child support or determination of paternity . . . if a party to the action dies during the pendency of the action, but prior to the entry of a decree granting dissolution of marriage, separation, annulment or determination of paternity, the proceedings for the determination, division and distribution of marital property rights and debts, distribution of spousal or child support or determination of paternity shall not abate. The court shall conclude the proceedings as if both parties had survived.

{16} We first address Section 40-4-20(B) as applied to the spousal support award and conclude that, by the plain language of Section 40-4-20(B), the Legislature intended spousal support awards against an estate to be paid before the probate proceedings. First, Section 40-4-20(B) expressly provides that upon the filing of a petition for spousal support, the "*distribution* of spousal . . . support . . . shall not abate." (Emphasis added.) "Distribute" is defined as "to divide among several or many: deal out: apportion" or to "dispense, administer." Webster's Third New Int'l Dictionary 660 (Unabridged 1993). Based on this definition, by using the term "distribution," the Legislature intended that a district court in a domestic relations proceeding have more authority than simply awarding a judgment for spousal support. The Legislature intended that the court may issue the judgment and conclude the enforcement, or actual dispensing, of the award.

{17} Second, Section 40-4-20(B) directs the court to "conclude the proceedings as if both parties had survived." Although a final judgment with an award of spousal support may "conclude" a proceeding in some cases, a district court maintains jurisdiction to enforce the final judgment. *See Trinosky*, 2011-NMCA-045, ¶ 17; *Hall v. Hall*, 114 N.M. 378, 388, 838 P.2d 995, 1005 (Ct. App. 1992) (noting that a court has jurisdiction post-judgment to enforce a judgment). By ordering the immediate payment of the spousal support award, the Divorce Court's order can properly be characterized as enforcing the award to ensure that the award be paid, especially considering that the Divorce Court was aware that the Estate's assets may be insufficient to pay all creditors' claims. *See Hall*, 114 N.M. at 388, 838 P.2d at 1005 (defining "[e]nforce" as "to compel obedience to, or to cause the provisions to be executed"). This action to enforce the final judgment is part of the "proceedings" that Section 40-4-20(B) mandates a court to "conclude."

{18} Our reading is consistent with the goals of the statutory provisions governing spousal support. *See Att'y Gen.*, 2011-NMSC-034, ¶ 10 ("[T]wo statutes covering the same subject matter should be harmonized and construed together when possible, in a way that facilitates their operation and the

achievement of their goals." (internal quotation marks and citation omitted)). Spousal support is statutorily authorized by NMSA 1978, Section 40-4-7(B) (1997). It is characterized as "a continuation of the right to support." *Ellsworth v. Ellsworth*, 97 N.M. 133, 135, 637 P.2d 564, 566 (1981). It is "based on need, ability to self-support, and the equities of the particular situation." *Talley v. Talley*, 115 N.M. 89, 92, 847 P.2d 323, 326 (Ct. App. 1993) (internal quotation marks and citation omitted). Considering that spousal support is based on the recipient's need and that, by enacting Section 40-4-20(B), the Legislature clearly intended the recipient to receive spousal support regardless of the death of a spouse, it would frustrate the legislative purpose to require a recipient to wait, in some cases years, while probate proceedings take place in order to receive spousal support. Further, requiring the recipient to comply with the creditors' claims provision may lead to the recipient of the spousal support not receiving any support, if the debts to creditors exceed the estate's assets. These concerns are especially troublesome when considered in light of child support. Section 40-4-20(B) does not differentiate between spousal support and child support, treating them the same under the anti-abatement provision. If we were to hold that a spousal support award is simply a judgment or claim and that a district court in a domestic affairs proceeding cannot enforce the judgment against an estate, a child support award would require the same treatment and a decedent's child would be forced to wait in line with other creditors.

{19} Further, our reading is consistent with our Supreme Court's recent interpretation of Section 40-4-20(B) and case law regarding the nature of lump-sum spousal support awards. In *Oldham v. Oldham*, 2011-NMSC-007, ¶ 31, 149 N.M. 215, 247 P.3d 736, our Supreme Court "clarif[ied] the procedural sequence that must be followed in cases where one party to a pending divorce action dies before the entry of a final divorce decree." The Court held that "distributing the decedent's estate under the decedent's estate plan and the [Probate Code] without first establishing the decedent's share of the marital property and debts would be unworkable and contrary to legislative intent." *Id.* It additionally stated that the decedent's "estate must be defined through the entry of a Section 40-4-20(B) marital property judgment before that estate can be distributed in probate." *Oldham*, 2011-NMSC-007, ¶ 31. Underlying this holding is that "the domestic relations court must determine the extent of the decedent's separate property and share of the community property in order to determine what property will pass by intestacy." *Id.* ¶ 34. In other words, once the surviving spouse receives property in the domestic relations proceeding from a property division, the property immediately becomes the property of the recipient spouse and therefore defines the assets in the estate. This holding applies to a spousal support award to the extent that a spousal support award creates an immediate property right in the assets of the estate that are awarded as spousal support.

{20} The spousal support award in this case was a lump-sum spousal support award even though the district court based the award on accrued monthly sums over a specific period of time. *See Deeds v. Deeds*, 115 N.M. 192, 194, 848 P.2d 1119, 1121 (Ct. App. 1993) ("Lump-sum alimony has been defined as the award of a definite sum of money[.]" (internal quotation marks and citation omitted)); *see also Michaluk v. Burke*, 105 N.M. 670, 675, 735 P.2d 1176, 1181 (Ct. App. 1987) ("[L]ump sum alimony [is] akin to accrued periodic alimony."). This Court has held that "[l]ump-sum alimony becomes a vested property right from the day of

judgment." *Deeds*, 115 N.M. at 194, 848 P.2d at 1121; *see also* NMSA 1978, § 40-4-12 (1973) ("[T]he court may make an allowance to either spouse of the other spouse's separate property as alimony and the decree making the allowance shall have the force and effect of vesting the title of the property so allowed in the recipient."). Because it becomes a vested property right, the "sum must be paid in full, regardless of future events." *Deeds*, 115 N.M. at 194, 848 P.2d at 1121. Applying these principles to this case, the spousal support award became a vested property interest in Melissa when the Divorce Court issued its final order, and, therefore, the sum needed to pay the award was no longer part of the property of the Estate subject to the creditors' claims provision. *See Oldham*, 2011-NMSC-007, ¶ 34. Therefore, the spousal support award was not a claim under the Probate Code to which the creditors' claims provision would apply. The Divorce Court did not err by ordering that the Estate pay the spousal support award immediately before the probate proceedings.

{21} Regarding the attorney fee award, we first note that Section 40-4-20(B) does not specifically mention attorney fees. Further, some of the rationale we relied upon in determining that the Legislature did not intend spousal support awards to be considered "claims" under the Probate Code do not readily apply to the attorney fee award, including the plain language meaning of "distribution" and the immediate vesting of lump-sum spousal support awards as a property interest in the recipient.

{22} However, Section 40-4-20(B) states that "the *proceedings* . . . shall not abate" and that the "court shall conclude the *proceedings* as if both parties had survived." (Emphasis added.) Attorney fees in domestic relations cases are authorized by Section 40-4-7(A), which states that "[i]n any *proceeding* for the dissolution of marriage, division of property, disposition of children or spousal support . . . [t]he court may make an order, relative to the expenses of the proceeding, as will ensure either party an efficient preparation and presentation of his case." (Emphasis added.) Construing Section 40-4-7(A) and Section 40-4-20(B) together, the Divorce Court awarded the attorney fees as part of the "proceedings" covered by Section 40-4-20(B) that the Divorce Court is mandated to "conclude . . . as if both parties had survived." As we have determined, a district court maintains jurisdiction to enforce the final judgment. *See Hall*, 114 N.M. at 388, 838 P.2d at 1005 (noting that a court has jurisdiction post-judgment to enforce a judgment). We construe the Divorce Court's order that the Estate pay the attorney fee award immediately to Melissa as enforcing the judgment. *See id.* (defining "[e]nforce" as "to compel obedience to, or to cause the provisions to be executed"). The Divorce Court therefore did not err in ordering the immediate payment of the attorney fee award in concluding the divorce proceedings.

{23} The Estate argues that Section 40-4-20(B) is simply a "survivorship statute" and that a judgment in an action continued pursuant to Section 40-4-20(B) should be treated the same as a judgment pursuant to other survivorship statutes, which is that the judgment is an allowed claim under the Probate Code. For support, the Estate cites NMSA 1978, Section 37-2-1 (1941), the survivorship statute for wrongful death and personal injury cases. However, the statutes are distinguishable. Section 37-2-1 only provides that "[t]he cause of action for wrongful death and the cause of action for personal injuries, shall survive the death of the party responsible therefor." Section 40-4-20(B) is more specific and states that the court

must conclude the proceedings as if both parties survived as opposed to simply providing that the cause of action survives the responsible party's death.

{24} The Estate also makes several other arguments: (1) that when the Legislature intended that a payment for a claim be made against other creditors of an estate, it has expressly done so, (2) that the Divorce Court ordering the immediate payment injures other claimants and deprives them of due process, and (3) that by ordering the immediate payment of the awards, the Divorce Court potentially subjects the personal representative to personal liability or conflicting obligations. However, these arguments presume that the spousal support and attorney fee awards are claims against the Estate that will be paid from Estate assets. As we have determined, the awards are not claims against the Estate.

FEDERAL INSOLVENCY ACT

{25} The Estate next argues that the Divorce Court's order requiring the Estate immediately pay the spousal support and attorney fee awards to Melissa violates the Federal Insolvency Act, particularly 31 U.S.C. § 3713(a)(1)(B). Further, the Estate argues that immediate payment of the awards subjects the personal representative to personal liability under 31 U.S.C. § 3713(b). These arguments require statutory construction of 31 U.S.C. § 3713(a)(1)(B), and (b).

{26} 31 U.S.C. § 3713(a)(1)(B) provides that "[a] *claim* of the United States Government shall be paid first when . . . *the estate* of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor." (Emphasis added.) 31 U.S.C. § 3713(b) provides that "representative of . . . an estate . . . paying any part of a debt of the . . . estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government." Again, the Estate premises its argument on the assumption that the spousal support and attorney fee awards is an allowed claim and therefore payable from Estate assets. As we have determined, the awards are not claims against the Estate, and, therefore, the Federal Insolvency Act does not apply.

RES JUDICATA

{27} The Estate also argues that the Probate Court's August 13, 2009 order declaring that the spousal support and attorney fee awards are Class Six claims under the Probate Code was a final order for purposes of appeal, and, therefore, the Divorce Court erred by failing to give res judicata effect to the order. However, the Estate failed to show that it preserved the issue in the Divorce Court.

{28} "To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked[.]" Rule 12-216(A) NMRA. In order "[t]o preserve error for review, a party must fairly invoke a ruling of the district court on the same grounds argued in this Court." *Crutchfield v. N.M. Dep't of Taxation & Revenue*, 2005-NMCA-022, ¶ 14, 137 N.M. 26, 106 P.3d 1273. The primary purposes of the preservation requirements are (1) to specifically alert the district court to a claim of error so that the error may be corrected at that time, (2) to allow the opposing party adequate opportunity to respond to a claim of error, and (3) to create a sufficient record to allow this Court to make an informed decision regarding the contested issue. *Gerke v. Romero*, 2010-NMCA-060, ¶ 18, 148 N.M. 367, 237 P.3d 111, *cert. denied*, 2010-NMCERT-006, 148 N.M. 583, 241 P.3d 181.

{29} The Estate argues that it preserved

the issue (1) by "inform[ing]" the Divorce Court of the Probate Court's order at a hearing on August 17, 2009, (2) in its response to Melissa's motion to release separate funds and request for expedited treatment, and (3) in its proposed findings of fact and conclusions of law. Yet, in none of these instances did the Estate argue that res judicata applied to the August 13, 2009 order, and the Divorce Court did not make a determination regarding the issue. In the cited proposed conclusion of law, the Estate states only that the August 13, 2009 order "was a final [o]rder and the time for appealing that [o]rder has run." At the August 17, 2009 hearing and in the response to Melissa's motion to release separate funds and request for expedited treatment, the Estate mentioned the Probate Court's August 13, 2009 order as a reason for not complying with the earlier order of the Divorce Court ordering the Estate to pay the interim spousal support and attorney fee awards immediately. The Estate did not "fairly invoke" a ruling as to the August 13, 2009 order's preclusive effect in the Divorce Court.

{30} Even if we were to address the merits of the issue, however, principles of res judicata do not apply. Res judicata requires that (1) the parties are the same; (2) the cause of action is the same; (3) there has been a final decision in the first suit; and (4) the first decision was on the merits. *Kirby v. Guardian Life Ins. Co. of Am.*, 2010-NMSC-014, ¶ 61, 148 N.M. 106, 231 P.3d 87. As we have discussed, the spousal support award was not a claim under the Probate Code to which the creditors' claims provision would apply. Further, we have construed the Divorce Court's order that the Estate pay the attorney fee award as enforcing the judgment. Thus, although the parties in these cases were the same, the cause of action in the Probate Court and the Divorce Court were not. Principles of claim preclusion do not apply.

ATTORNEY FEES ON APPEAL

{31} Melissa argues that she is entitled to attorney fees and costs for this appeal because the Estate's "quest in this litigation was not in good faith." In arguing bad faith, Melissa relies on findings from the district court that the Estate "undertook an over-vigorous attack" during the district court proceedings. Further, Melissa appears to argue that she is entitled to attorney fees because the Estate's position in this case is unsupported by law.

{32} New Mexico recognizes "a bad-faith exception to the American [r]ule under which parties typically pay their own fees." *ERICA, Inc. v. N.M. Regulation & Licensing Dep't*, 2008-NMCA-065, ¶ 54, 144 N.M. 132, 184 P.3d 444 (internal quotation marks and citation omitted). "[A] court may award attorney fees to vindicate its judicial authority and compensate the prevailing party for expenses incurred as a result of frivolous or vexatious litigation." *Id.* (internal quotation marks and citation omitted). However, this Court does not have the inherent authority to award attorney fees on appeal for proceedings in the district court. *Id.* Further, we do not determine that the Estate engaged in bad faith during this appeal. We therefore deny Melissa's request for attorney fees.

CONCLUSION

{33} In a divorce proceeding continued after the death of a party pursuant to Section 40-4-20(B) in which the court awards lump-sum spousal support and attorney fees, the final judgment is not a "claim" against an estate for purposes of the Probate Code's creditors' claims provision. Therefore, in this case, the Divorce Court did not err in ordering that the Estate pay the spousal support and attorney fee awards immediately, before the probate proceedings. As a result, we affirm.

{34} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

LINDA M. VANZI, Judge

Certiorari Denied, March 7, 2012, No. 33,449

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-038

Filing Date: January 12, 2012

Docket No. 30,286

RABO AGRIFINANCE, INC., Successor in Interest to Farm Credit Bank of Texas,

Plaintiff-Appellant/Cross-Appellee,

v.

TERRA XXI, LTD., a Texas limited partnership, composed of VEIGEL CATTLE CO., as general partner; ROBERT WAYNE VEIGEL, a/k/a BOB W. VEIGEL; ELLA MARIE WILLIAMS VOGEL, a/k/a ELLA MARIE VEIGEL; VEIGEL CATTLE CO., a Texas corporation; VEIGEL FARM PARTNERS, a Texas general partnership, d/b/a VEIGEL PARTNERS; BOB VIEGEL, INC., a Texas corporation, STEVE VEIGEL, INC., a Texas corporation; VEIGEL-KIRK, INC., a Texas corporation; VICKI VEIGEL, INC., a Texas corporation; VEIGEL FARMS, INC., a Texas corporation; TERRA PARTNERS, a Texas general partnership; BURNETT & VEIGEL, INC., a Texas corporation, as general partner of Terra Partnership, a Texas general partnership; and ALL UNKNOWN CLAIMANTS OF INTEREST IN THE PREMISES ADVERSE TO THE PLAINTIFF,

Defendants-Appellees/Cross-Appellants.

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for Appellant

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OPINION

SUTIN, Judge.

{1} In its foreclosure action, a mortgagee sought to enlarge its mortgage lien from a 50% interest to a 100% interest based on the doctrine of after-acquired title. The district court held against the mortgagee. The court also dismissed counterclaims. We hold that the court erred in granting summary judgment, and we remand for further proceedings on the issue of the applicability of the after-acquired title doctrine in circumstances in which a mortgage contains mortgage covenants. And we hold that the counterclaimants failed to preserve their cross-appeal issues.

BACKGROUND

{2} Plaintiff Rabo Agrifinance, Inc. (Rabo) held two 1994 promissory notes (the notes) secured by a 1994 first mortgage (the mortgage) covering property located in Quay and Guadalupe Counties, New Mexico (the property).[1] The mortgage was recorded in both Quay and Guadalupe Counties. When it granted the mortgage, Defendant Terra XXI, Ltd. (Terra), a Texas limited partnership, owned an undivided 50% interest in the property. In 1999 Terra received a warranty deed to the property that effectively placed in Terra a 100% ownership interest in the property.

{3} In December 2005, Rabo sued in the United States District Court in Texas to collect amounts due on the notes (the Texas suit). The federal district court entered summary judgment in October 2006 in favor of Rabo for a total amount prior to interest, costs, and attorney fees, of $3,958,577.97, and the judgment was affirmed by the Fifth Circuit Court of Appeals in December 2007. *See Rabo Agrifinance, Inc. v. Terra XXI Ltd.*, 2006 WL 2828748 (N.D. Tex. 2006), *aff'd* 257 Fed. Appx. 732, 2007 WL 4305378 (5th Cir. 2007) (per curiam). Rabo domesticated the Texas suit judgment in New Mexico in December 2006, and in January 2007, Rabo recorded transcripts of the judgment in Quay and Guadalupe Counties.

{4} Before us now is Rabo's suit against Terra and others (Defendants) filed in August 2007 in New Mexico district court asking that the $3,958,577.97 judgment awarded in the Texas suit on the 1994 notes (less a $200,000 credit) be confirmed and seeking foreclosure of the mortgage covering the property. Defendants filed counterclaims in five counts: Count I (failure to act in good faith), Count II (prima facie tort), Count III (mortgages extinguished), Count IV (civil conspiracy), and Count V (quiet title and foreclosure). Summary judgment proceedings concluded with the district court confirming the judgment amount and, after determining that Rabo "ha[d] a first mortgage lien on an undivided 50% interest" and that "[a]s a matter of law, the doctrine of after-acquired title is inapplicable to this matter, and [Rabo] does not have a 100% mortgage lien interest[,]" the district court entered summary judgment in favor of Rabo on its first mortgage lien interest as to an undivided 50% interest in the property. With respect to Defendants' counterclaims, the court held that "[r]es judicata and collateral estoppel bar the counterclaims of . . . Defendants[] and, as such, no genuine issues of material fact exist as to Defendants' counterclaims[,]" granted Rabo's motion for summary judgment regarding the counterclaims, and dismissed the same.

[1] Rabo was successor-in-interest to a number of entities, starting with Farm Credit Bank of Texas (Farm Credit), the mortgagee in the 1994 loan transactions.

{5} Rabo asserts on appeal that the district court erred in granting it judgment consisting of only a 50% mortgage lien interest in the property. We discuss Defendants' cross-appeal later in this Opinion. No party seeks reversal on the ground that a genuine issue of material fact existed precluding summary judgment.

DISCUSSION

Rabo's Appeal

{6} Rabo asserts that, under the doctrine of after-acquired title with its estoppel element, the mortgage should have been foreclosed based on a 100% lien interest in the property. Based on the nature of the district court's ruling and undisputed facts, the issues before us are legal ones that we review de novo. *Barreras v. State Corr. Dep't*, 2003-NMCA-027, ¶ 5, 133 N.M. 313, 62 P.3d 770.

{7} Rabo acknowledges that, at the time the mortgage was granted in 1994, Terra had title to only 50% of the property. But Rabo points out that in 1999 Terra obtained a warranty deed to the remaining 50% of the property from the Stephen Samuel Williams Testamentary Trust (the Williams Testamentary Trust)[2] and that this remaining 50% enured to Rabo's benefit under the doctrines of after-acquired title and estoppel. Rabo's claim to entitlement to a 100% mortgage lien interest is rooted in the language in the mortgage stating that Terra granted, mortgaged, and conveyed its interest in and to the property "with mortgage covenants."

{8} Rabo explains that the meaning of "warranty covenants" in NMSA 1978, Section 47-1-37 (1947), titled "[e]ffect of warranty covenants in conveyances[,]" is that the grantor of real estate represents and agrees "'that he is lawfully seized in fee simple of the granted premises[,]'" that the premises are free of all encumbrances, and that he "'shall warrant and defend the [premises] to the grantee . . . forever against the lawful claims and demands of all persons.'" Rabo then points to NMSA 1978, Section 47-1-40 (1947), titled "[c]onstruction of 'mortgage covenants[,]'" which reads:

> In a mortgage or deed of trust by way of mortgage of real estate "mortgage covenants" shall have the full force and meaning and effect of the following words and shall be applied and construed accordingly: "the mortgagor for himself, his heirs, executors, administrators[,] and successors, covenants with the mortgagee and his heirs, successors[,] and assigns that he is lawfully seized in fee simple of the granted premises; that they are free from all encumbrances; that the mortgagor has good right to sell and convey the same; and that he will, and his heirs, executors, administrators[,] and successors shall, warrant and defend the same to the mortgagee and his heirs, successors[,] and assigns forever against the lawful claims and demands of all persons."

[2] On May 13, 1999, the Estate of Stephen Samuel Williams (the Estate of Williams) conveyed its 50% ownership interest in the property to the Williams Testamentary Trust. On June 8, 1999, the Williams Testamentary Trust conveyed that same 50% interest to Terra. On November 1, 2006, effective September 12, 2006, Terra conveyed that same interest to Terra Partners, a Texas general partnership (Terra Partners).

Rabo asserts, based on Section 47-1-40[3] and the similar language in Section 47-1-37, that "with mortgage covenants" Terra represented and agreed that it was lawfully seized in fee simple of the granted, mortgaged, and conveyed premises and that the property was free from all encumbrances. Rabo further asserts that Terra warranted and agreed to defend against the lawful claims and demands of all persons.

{9} Based on these circumstances, Rabo argues that Terra is estopped from asserting its after-acquired 50% ownership interest in defense of Rabo's pursuit of foreclosure on 100% of the property. In support of its position, Rabo cites New Mexico's mainstay after-acquired title case, *Hays v. King*, 109 N.M. 202, 784 P.2d 21 (1989), which states: "The common law doctrine of after-acquired title is one under which title to land subsequently acquired by a grantor who previously attempted to convey title to the same land, which he then did not own, completely and automatically inures to the benefit of his prior grantee." *Id.* at 204, 784 P.2d at 23. Recognizing, however, that no New Mexico case has directly addressed the issue whether mortgage covenants in a mortgage covers an ownership interest in the property "described in the mortgage that is acquired by the mortgagor after the execution of the mortgage[,]" Rabo goes beyond *Hays* to out-of-state cases that Rabo contends support its position. *Cf. C & L Lumber & Supply, Inc. v. Tex. Am. Bank/Galeria*, 110 N.M. 291, 298, 795 P.2d 502, 509 (1990) ("[A]lthough other jurisdictions have applied the doctrine of after-acquired title to cure defects in mortgages, the application of the doctrine to documents void at the time of execution for failure to join both spouses has been rejected in New Mexico.").

{10} Language in some of the cases cited by Rabo tends to support its position. For example, the court in *Tompkins State Bank v. Niles*, 537 N.E.2d 274, 278 (Ill. 1989), stated: "The after-acquired-title doctrine can be applied to mortgages as well as to conveyances by warranty deed, when the mortgage instrument contains covenants of title. A mortgage which contains the words "and warrants" has been held to be equivalent to a mortgage containing all covenants of title." (Citations omitted.) Also, in *Alabama Home Mortg. Co. v. Harris*, 582 So. 2d 1080, 1083 (Ala. 1991), the court stated: "[I]n their mortgage [the mortgagors] warranted the title to the property that was conveyed by the mortgage. Because of these warranties, any after-acquired interest of the [mortgagors] would pass to the [mortgagees], as the [mortgagors] are estopped to deny the title of the [mortgagees]."

{11} Terra points out that the after-acquired-title doctrine has not been applied in New Mexico to mortgage interests and that New Mexico has not enacted an after-acquired-interest statute as other states have

[3] Although not discussed by Rabo, we note two other pertinent sections, namely, NMSA 1978, Sections 47-1-39 (1947) and 47-1-44 (1975). Section 47-1-44 establishes "[c]onveyancing forms[,]" including forms for a mortgage and a deed of trust. The form for mortgages states that the grantor grants the real estate "with mortgage covenants." Section 47-1-44(6). After setting out the effect of warranty and special warranty covenants in conveyances of real estate in Section 47-1-37 and NMSA 1978, Section 47-1-38 (1947), Section 47-1-39 discusses the effect of a "deed in substance" following the forms entitled "mortgage" or "deed of trust[.]" Section 47-1-40 then sets out the meaning of "mortgage covenants" in "a mortgage or deed of trust by way of mortgage of real estate."

done. Terra argues that the after-acquired-title doctrine set out in *Hays* "is nothing more than an enforcement of the grantor's obligation to deliver a good title" and shows that Colorado's after-acquired-interest statute was held inapplicable because a deed of trust did not involve a transfer of title and "did not purport to convey an estate in fee simple absolute." *Premier Bank v. Bd. of Cnty. Comm'rs*, 214 P.3d 574, 577 (Colo. App. 2009) (internal quotation marks omitted). Terra also argues that, different from a conveyance of title, a mortgage is personal property and is merely a lien, and it does not pass title to the mortgaged property. In addition, Terra argues that the controlling language in the mortgage is "all its interest in and to" the property, which at the time of the grant was only 50%, and that Terra could not encumber a property interest that was not its own. *See Texas Am. Bank/Levelland v. Morgan*, 105 N.M. 416, 417, 733 P.2d 864, 865 (1987) (stating that "jurisdictions [that] have decided this question . . . have uniformly agreed that one cotenant may not encumber the other cotenant's interest without consent" and that "a grantor can only give that which he owns"). Finally, Terra argues that Rabo's January 2007 transcribed Texas suit judgment attached to the property only after Terra's after-acquired 50% interest had been conveyed by Terra to Terra Partners in November 2006. Thus, according to Terra, Rabo's judgment lien could have been effective only as to the interest still owned by Terra in January 2007 and was not effective as to Terra Partner's ownership interest acquired from Terra in November 2006. For the reasons that follow, we are not persuaded by Terra's arguments.

{12} First, Terra's judgment lien priority theory holds no water. Rabo's lien priority in this case was based on foreclosure of its first mortgage, not a foreclosure of its judgment lien. Second, we see no reason why, as a general rule, the after-acquired-title or -interest doctrine cannot be applied when mortgage interests are involved and a mortgagor grants a mortgage with "mortgage covenants" on property to which the mortgagor has a defect in its title at the time of the grant of the mortgage but later acquires good title to the mortgaged property. It appears that this general rule is well-established at common law. *See, e.g.*, *Orr v. Stewart*, 7 P. 693, 694 (Cal. 1885) ("It is . . . well settled that when a mortgage of land is made, purporting to convey the land in fee, any title afterwards acquired by the mortgagor will feed the mortgage and inure to the benefit of the mortgagee[.]"); *Roderick v. McMeekin*, 68 N.E. 473, 477 (Ill. 1903) ("It is well settled that, when one gives a mortgage upon land to secure a debt, he is estopped by the recitals in his contract creating the lien from denying his title to the mortgaged premises." (internal quotation marks and citation omitted)); *Decker v. Caskey*, 3 N.J. Eq. 446, 1836 WL 2149, *3 (N.J. Ch. 1836) ("If a mortgage be made of an estate to which the mortgagor has not a good title, and then he who has the real title conveys to the mortgagor . . . with a good title, the mortgagee will be entitled in equity to the benefit of it[.]"); *Weber v. Laidler*, 66 P. 400, 401 (Wash. 1901) ("The principle is too well established to call for discussion that, ordinarily, if one conveys or mortgages land to which he has then no title, his after-acquired title will inure to the benefit of his grantee or mortgagee."); 4 Tiffany, *Law of Real Property*, ch. 29, § 1231, p. 1107-08 (3d ed. 1975) ("The doctrine of . . . after-acquired title has been applied in the case of a mortgage as well as in that of an absolute conveyance, more particularly when the mortgage instrument contains a covenant of warranty or other covenant. . . . There appears to be no difference, as regards the doctrine of estoppel, between the principles applicable to a

mortgage and to an absolute conveyance[.]"). *See generally* Annot., *Nature of Conveyance or Covenants Which Will Create Estoppel to Assert After-Acquired Title or Interest in Real Property*, 58 A.L.R. 345, 354-58, 360-98, 422-28 (1929) (indicating that a mortgage with covenants of general warranty and not intended as a quitclaim of an interest affords a basis for estoppel against assertion of an after-acquired title or interest). Third, we reject Terra's unsupported argument that an after-acquired title theory cannot apply in jurisdictions, such as New Mexico, in which a mortgage is considered a lien and as such does not pass title. Not only is Terra's argument unsupported by any authority, Terra fails to distinguish the cases cited by Rabo in support of its argument to the contrary. The issue is not the character of a mortgage but instead is the enforcement of a mortgagor's covenant of ownership of the property described in the mortgage and the equitable notion that, in certain circumstances, breach of that covenant can and ought to be cured through an after-acquired title theory.

{13} Terra also argues that the after-acquired title doctrine is inapplicable in this case because the original mortgagee, Farm Credit, was on notice through a 1994 title opinion that the Estate of Williams held a 50% ownership interest in the property. *Cf. Morgan*, 105 N.M. at 418, 733 P.2d at 866 ("Our decision is buttressed by the evidence that at the time [one of the defendants] executed the mortgage, the [plaintiff] was on constructive notice, by reason of recordation, that [the defendant] was merely a joint tenant."). At first glance, Terra's position would appear to have merit. But a study of the parties' positions during the proceedings take us down a different path. In that regard, we note the following. In its summary judgment argument in the district court, Rabo acknowledged that when the mortgage was executed Terra had title to only 50% of the property. In response, Terra stated that Farm Credit knew that Terra owned only a 50% interest and knew that the Williams Testamentary Trust owned the other 50% interest in the property, citing the 1994 title opinion obtained by Farm Credit through its attorneys. In reply, Rabo stated that whether Farm Credit was aware of the Williams Testamentary Trust "is not relevant to the after-acquired title issue[,]" because Terra gave the mortgage to Farm Credit with "mortgage covenants." Yet Rabo argued that even were knowledge relevant, "it is clear that Rabo did, in fact, believe that Terra . . . owned the complete interest in the property at the time the mortgage was executed." Rabo's authority for this representation was that the title opinion was a preliminary opinion, that after it was prepared an affidavit of heirship was executed on the mortgage date that, according to a supplemental title opinion, indicated that the only surviving heir of Williams executed the deeds into Terra in her individual capacity, as well as in her capacity as co-trustee under the Williams Testamentary Trust, and that "it was the opinion of the examining attorneys that title to the entire surface estate of the captioned lands is vested in Terra[.]" (Alteration omitted.) (Emphasis omitted.) (Internal quotation marks and citations omitted.) Rabo concluded that "while not pertinent to the after-acquired title issue, it is evident that Rabo believed that Terra . . . owned the 100% interest in the property at the time the 1994 mortgage was executed."

{14} Terra addressed Rabo's discussion of the examining attorney's opinion in the supplemental title opinion and pointed out that Rabo failed to mention that the opinion also stated "[s]ubject to those matters discussed in this opinion[.]" (Emphasis omitted.) And Terra asserted that the supplemental opinion

clearly stated: "REQUIREMENT A: Unsatisfied. This requirement dealt with title to an undivided one-half interest in Tracts 2 and 3 of the captioned lands, credited in our original opinion to the heirs or devisees of . . . Williams, deceased." (Emphasis omitted.) Terra then argued in its sur-reply that this showed that "the requirement of the 1994 title opinion had not been satisfied with the recording of the [a]ffidavit of [h]eirship on November 9, 1994."

{15} In the summary judgment proceeding, Terra submitted an affidavit of Steve Veigel. The affidavit indicates that for over nine years Veigel had "been owner of Burnett & Veigel, Inc., one of four general partners of Terra Partners, both parties to this action." He stated that in 1994 Terra "believed it was the only owner of the subject property until receipt of the [title opinion]" which he attached as an exhibit to the affidavit. In the district court, Terra also submitted requested findings of fact and conclusions of law. A requested finding set out the existence of the title opinion it had referred to in its briefing and explained that the 1994 title opinion stated that the Williams Testamentary Trust was the owner of 50% interest in the property.

{16} In its amended decision letter, based on which the court entered summary judgment favoring Terra on the mortgage interest issue, the court set out numerous facts, which we presume the court considered to be the undisputed facts that supported its decision and ultimate summary judgment. In the letter, the court determined, as a matter of law, that "the after-acquired title doctrine [was] not . . . applicable in this matter" without giving any indication on what ground or rationale it did so. One of the court's facts stated that the mortgage provided by Terra to Farm Credit mortgaged "all its interest in and to [the] property . . . with mortgage covenants." (Omission in original.) It is unclear whether the district court's reference to "all its interest" only applies to Terra's 50% ownership interest at the time of the mortgage due to the 1994 title opinion recognizing a 50% interest in the Williams Testamentary Trust. None of the facts nor anything else in the court's decision mentions anything about the 1994 title opinion or anything about any notice, knowledge, or intent on Farm Credit's part of any ownership interest of the Williams Testamentary Trust. As a result, it is impossible for this Court to determine whether the district court's grant of summary judgment was at all based on a notice, knowledge, or intent, rationale or issue relating to the 1994 title opinion and of the Williams Testamentary Trust ownership interest.

{17} The absence in the court's decision letter of any factual bases or legal rationale whatsoever for its legal conclusion and determination that "the after-acquired title doctrine [was] . . . not applicable in this matter" leads us to conclude that, in the court's view, the after-acquired title doctrine would not be applicable even were the court to view all of the facts in a light most favorable to Rabo, such as, for example, if the 1994 title opinion documents were ignored and the only material facts before the court were simply (1) the mortgage, (2) Rabo's later acknowledgment that Terra owned only 50% of the property at the time of the mortgage transaction, and (3) Terra's after-acquired ownership of the remaining 50% of the property. We cannot accept that limited view of the doctrine's applicability.

{18} We hold that, as a general matter, the after-acquired title doctrine can be applied in New Mexico in favor of a mortgagee of property based on mortgage covenants unless particular circumstances warrant non-

application. We therefore reverse the district court's summary judgment favoring Terra and remand the case to the district court for further proceedings on the issue of application of the after-acquired title doctrine. To the extent the factual circumstances that are material to the analysis are disputed, summary judgment will be inappropriate.

The Cross-Appeal

{19} Defendants assert on cross-appeal that the district court erred in dismissing its counterclaims through which they sought (1) to establish the priority of Terra Partners' assigned judgment lien acquired based on judgments obtained by Diversified Financial Services, Inc. (Diversified) and to quiet title to the property and foreclose the Diversified judgment lien; and (2) to establish the leasehold estate of Terra Partners on the basis of collateral estoppel arising from certain Texas judgments.

{20} Rabo argues that Defendants failed to preserve these points because Defendants did not raise them in the district court. We agree. Defendants state that these points were preserved in their response to Rabo's motion for summary judgment and during oral argument in the district court. We have reviewed the record at the record cites supplied by Defendants. The record does not support preservation. We will not consider points and arguments that are not made to the district court and raised for the first time on appeal. *See Agua Fria Save The Open Space Ass'n v. Rowe*, 2011-NMCA-054, ¶ 27, 149 N.M. 812, 255 P.3d 390 ("To preserve a question for review, it must appear that a ruling or decision by the district court was fairly invoked." (alterations omitted) (internal quotation marks and citation omitted)); *see also Chrysler Credit Corp. v. Beagles Chrysler-Plymouth*, 83 N.M. 272, 273, 491 P.2d 160, 161 (1971) ("[A] matter not brought to the attention of the trial court cannot be raised for the first time on appeal.").

CONCLUSION

{21} We reverse the district court's determination that Rabo was entitled to foreclose its mortgage lien only as to a 50% interest in the property, and we remand for further proceedings related to the applicability of the after-acquired title doctrine in accordance with this Opinion. Additionally, we hold that lack of preservation precludes consideration of Defendants' cross-appeal points, and we affirm the district court's dismissal of Defendants' counterclaims.

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

JONATHAN B. SUTIN, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

TIMOTHY L. GARCIA, Judge

Certiorari Denied, March 8, 2012, No. 33,448

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-039

Filing Date: January 26, 2012

Docket No. 29,817

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

SHEILA BAHNEY,

Defendant-Appellant.

Gary K. King, Attorney General
Ann M. Harvey, Assistant Attorney General
Santa Fe, NM

for Appellee

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for Appellant

OPINION

HANISEE, Judge.

{1} Defendant Sheila Bahney appeals from six counts of criminal conviction that are the result of her participation in the kidnapping, killing, and incineration of Barbara Lumsey, as well as the attempted cover-up of those crimes. We reject the bulk of Defendant's arguments and affirm all but one of her convictions, the lone exception being conspiracy to commit aggravated arson. Supported by recent New Mexico case law, we hold that Defendant's separate conspiracy convictions, based on one overarching agreement, violate double jeopardy. Based also on our precedent, we reject Defendant's remaining double jeopardy contentions and hold that the evidence presented at trial was sufficient to support the jury's verdict. We also determine that the trial court did not abuse its discretion by admitting photographs which included images of Lumsey, her injuries, and the crime scene, and conclude Defendant has failed to establish ineffective assistance of trial counsel. We therefore affirm in part, reverse in part, and remand with instructions to vacate Defendant's conviction for conspiracy to commit aggravated arson and re-sentence accordingly.

I. BACKGROUND

{2} On November 4, 2005, at approximately 7:00 p.m., Barbara Lumsey was found dead in the trunk of a still-burning vehicle adjacent to a public elementary school in Belen, New Mexico. Forensic investigators determined that although she was severely beaten—her

hyoid bone and the thyroid structure in her throat having been fractured, and a molar dislodged—it was the fire that caused her death. The circumstances of Lumsey's homicide are the subject of Defendant's underlying convictions and this appeal.

{3} The State's evidence showed that at the time of the murder, Defendant lived in her Belen mobile home with three other individuals: her husband, Tom Bahney; her five-year-old grandson, Bobby; and her godson, Angel Esquibel. Esquibel's girlfriend, Jessica Cavasos, frequently stayed at the Bahney residence and was a participant in the crimes against Lumsey. Also involved were Anthony Sanchez and Patricia Sipes, neighbors and friends of Esquibel.

{4} In the early morning hours of November 4, 2005, Defendant and her husband left for work, leaving Esquibel to prepare Bobby for school and ensure that he boarded the school bus at 7:30 a.m. Following Bobby's departure for school, events leading to Lumsey's death began to rapidly unfold: (1) Lumsey drove her car to the Bahney residence and spoke with Esquibel, (2) Esquibel viciously beat Lumsey after an argument, covering her head and upper torso, his hands, and parts of the living room with blood, (3) Esquibel enlisted the assistance of Cavasos and Sanchez following the initial assault and kept Lumsey quiet by threatening her with a knife retrieved by Sanchez, (4) Esquibel force-fed Lumsey a handful of prescription pills located by Cavasos within the Bahney residence, and (5) Esquibel washed Lumsey's blood from his body, dressed, and contacted Defendant, who said she would be home "within five to ten minutes."

{5} Upon her return at 10:30 a.m., Defendant walked through the front door and encountered a bloodied, beaten, and drugged Lumsey lying and moaning in the hallway, with Esquibel, Cavasos, and Sanchez watching over her. Defendant and Esquibel had a brief, private conversation, and Esquibel helped Defendant carry groceries into the mobile home. Afterward, Defendant sat at a computer in the living room, within close proximity to Lumsey, who was positioned in the hallway immediately adjacent to the living room. Defendant remained seated and silent when Esquibel forced Lumsey to rise and walk into his bedroom, where he duct-taped her hands and tied her to his bed frame with rope.

{6} Esquibel then telephoned Sanchez, who had returned to his own mobile home, and instructed him to come back to the Bahney residence because Defendant wanted to speak with him. When Sanchez returned, Defendant—who remained seated at the living room desk playing computer games—"looked at [Sanchez] and kind of giggled and said, 'You don't look too good.'" Sanchez replied, "No, this is bullshit. I don't belong here." Defendant then asked Sanchez if he needed "to smoke a bowl." Sanchez agreed and smoked marijuana with Defendant before again returning to his home across the street.

{7} Tom Bahney arrived home from work at 11:15 a.m. and also spoke privately with Esquibel before entering the front door. Once inside, he sat on the living room couch directly across from Defendant—who remained at the computer —and began to watch television. Esquibel paced back and forth in the hallway between his bedroom where Lumsey lay bound and tied and the living room where the Bahneys sat. He repeatedly muttered "bitch" in Spanish, and expressed agitation regarding an impending civil court hearing in Albuquerque that he was required to attend at 1:30 p.m. that day. At approximately noon, Esquibel declared his intention to take Lumsey "to the state police

office and kill her there and turn himself in." Defendant abruptly spoke in opposition to Esquibel's plan, saying "don't do it, just go to court." Esquibel agreed, acquired the car keys from Tom Bahney, and he and Cavasos walked to the door to depart for court. On the way out, Esquibel instructed the Bahneys to "watch [Lumsey]" and "make sure she [did not] make any noise." No conversation ensued, yet when Esquibel and Cavasos returned three hours later the Bahneys remained posted at the house—Defendant at the computer and Tom Bahney stationed in the hallway. Neither had notified the police and, consistent with Esquibel's wishes, Lumsey remained affixed to the bed, helpless and unassisted during Esquibel's lengthy absence.

{8} Once home, Esquibel immediately checked on Lumsey and demanded that Cavasos help her go to the bathroom. When Cavasos refused, Esquibel grabbed her by the throat and asked her whether she wanted to end up like Lumsey. Cavasos broke loose from Esquibel's grip in the hallway and walked toward the living room, but Esquibel again grabbed her violently, this time by the hair. Defendant and Tom Bahney quickly reacted in defense of Cavasos, telling Esquibel, "Don't do it." Esquibel promptly released Cavasos, who tearfully retreated to the living room sofa.

{9} Shortly following her intervention on behalf of Cavasos, Defendant instructed Esquibel in a demanding tone to "do something or figure something out because Bobby [is] going to be home soon." Esquibel quickly enlisted the aid of Patricia Sipes, who lived with Sanchez across the street. Sipes followed Esquibel's requests and "wiped . . . down" Lumsey's car, which had been parked outside the Bahney residence since her arrival that morning. As well, Esquibel instructed Cavasos to help Sipes gather Lumsey's effects and bring them into the Bahney home.

{10} At approximately 4:00 p.m., Bobby arrived home from school and the Bahneys met him at the front door with toys and instructions to play outside. Even then, Lumsey remained duct-taped and tied to Esquibel's bed. Esquibel resumed pacing the hallway between the bedroom and the living room, checking on Lumsey periodically, until he announced to everyone in the living room, "I'm going to just torch the car." Shortly thereafter, Defendant stated that she was "going to take Bobby to Walmart." Esquibel instructed Cavasos to accompany Defendant and Bobby.

{11} Esquibel and Tom Bahney remained at the Bahney home with Lumsey, while the two women and Bobby proceeded to Walmart. There, they walked around for nearly forty-five minutes, including an extended stop to watch lobsters in the store tank, without placing a single item in their shopping cart. At some point, Esquibel called Cavasos's mobile phone to request lighter fluid and asked to speak with Defendant. After Defendant's short conversation with Esquibel, she turned the cart and proceeded directly to the aisle containing charcoal lighter fluid. Cavasos accompanied her, and the women acquired the last two remaining bottles of lighter fluid in the store. They stopped briefly to get Bobby some food for dinner before checking out at the register. Defendant paid for each item purchased, including the lighter fluid. The trial record confirms that Defendant had no typical household need for charcoal lighter fluid, as there existed only a propane-fueled barbeque grill at the Bahney residence.

{12} Shortly after 6:00 p.m., Defendant, Cavasos, and Bobby arrived home. Defendant placed a box containing both bottles of lighter

fluid on the kitchen counter and told Esquibel, "It's in the box. It's over there." Thereafter, Defendant, joined by Bobby, retreated to a bedroom separate from that occupied by Lumsey. By all accounts, Defendant had no further contact with any of the other adults until after Lumsey's car, with Lumsey imprisoned within it, had been successfully set ablaze and abandoned.

{13} Esquibel, Cavasos, Sipes, and Tom Bahney undertook the process of removing Lumsey from the house in order to depart the Bahney residence. Sipes positioned Lumsey's vehicle on the opposing side of a five-foot-tall fence immediately behind the mobile home. Esquibel doused the car with the lighter fluid purchased and supplied by Defendant, and used wire cutters retrieved by Cavasos to disable the release cable normally accessible within the interior trunk. Esquibel and Tom Bahney led Lumsey outside—with her hands still bound—before lifting and dropping her over the fence, head first, into her own open trunk. Sipes then drove Lumsey's lighter-fluid-soaked car, with Lumsey trapped in the trunk, to the nearby elementary school located several miles from the Bahney residence. Esquibel and Tom Bahney followed Lumsey's vehicle in a separate car, while Cavasos remained at the Bahney residence to clean away evidence of Lumsey's beating. On the roadside adjacent to the school, Lumsey's car was lit on fire. The trio immediately returned to the Bahney residence in the remaining vehicle, having been alarmed by a school custodian who observed them, and who following their departure notified police. Lumsey's vehicle burned, with her imprisoned in the trunk, for nearly ten minutes before emergency services arrived. Due to the volume of accelerant poured into and upon Lumsey's vehicle, firefighters were unable to completely extinguish the flames for approximately twenty additional minutes. The fire resulted in Lumsey's death and the consumption of much of the vehicle's interior, as well as both rear tires.

{14} After the series of crimes against Lumsey was completed and she was dead, the Bahney household directed their attention to the ongoing clean-up effort. Cavasos continued to scrub Esquibel's room where Lumsey had been tied to the bed, as well as the living room wall, a chair, and a portion of flooring that was spattered with Lumsey's blood. The next day, Defendant washed the blood-stained living room blinds and reported her accomplishment to Esquibel. In the ensuing days, the Bahney residence returned to normalcy. Defendant transported Cavasos to and from work, and Defendant and Tom Bahney even attended a concert at the Route 66 Casino the evening after Lumsey's murder. Shortly thereafter, all participants were identified by law enforcement and arrested.

{15} In district court, each case was independently resolved. Cavasos and Sanchez pleaded guilty to lesser crimes and were called as witnesses by the State during Defendant's trial. Tom Bahney pleaded guilty to first-degree murder. Following the commencement of his own trial, Esquibel entered into a plea agreement where he too pleaded guilty to first-degree murder, as well as related crimes. Sipes and Defendant were tried separately and each was convicted by a jury of second-degree murder, in addition to a handful of ancillary charges, including for Defendant: kidnapping, aggravated arson, conspiracies to commit each, and tampering with evidence. Defendant presents each of the following arguments on appeal: (1) her convictions are unsupported by sufficient evidence, (2) the multitude of convictions based on the same conduct violates double jeopardy, (3) the district court abused its discretion in admitting photographs of Lumsey's charred body and

vehicle, and (4) her trial counsel was ineffective by failing to inform her of her right to testify, failing to call an alibi witness, and failing to object to certain testimony. We examine each claim in detail below.

II. DISCUSSION

A. Double Jeopardy

{16} We begin our legal analysis by reviewing Defendant's contentions that many of her convictions violate the double jeopardy clauses of the United States and New Mexico Constitutions. Double jeopardy affords a criminal defendant three layers of protection: (1) "protects against a second prosecution for the same offense after acquittal"; (2) "protects against a second prosecution for the same offense after conviction"; and (3) "protects against multiple punishments for the same offense." *Swafford v. State*, 112 N.M. 3, 7, 810 P.2d 1223, 1227 (1991). This appeal relates to the third level of protection identified by *Swafford*, which has been further divided into two categories: "unit of prosecution" cases—"in which a defendant has been charged with multiple violations of a single statute based on a single course of conduct," and "double-description" cases—"in which a defendant is charged with violations of multiple statutes for a single conduct[.]" *State v. DeGraff*, 2006-NMSC-011, ¶ 25, 139 N.M. 211, 131 P.3d 61. In this case, Defendant maintains that double jeopardy bars (1) her conviction of two conspiracy counts based on facts that amount to a single overarching agreement under our "unit of prosecution" analysis; and (2) her remaining five convictions, with the exception of tampering with evidence, under our "double-description" analysis. While our precedent within New Mexico case law defeats the latter contention, we do agree that under these facts Defendant's double jeopardy rights were violated by her separate conspiracy convictions.

{17} Recently, the New Mexico Supreme Court addressed double jeopardy in the context of multiple conspiracy convictions in a strikingly similar case, *State v. Gallegos*, 2011-NMSC-027, 149 N.M. 704, 254 P.3d 655. In *Gallegos*, the Court applied our "unit of prosecution" analysis to the crime of conspiracy. *Id.* ¶¶ 31, 50 (describing our "unit of prosecution" analysis as asking first whether "the statutory language spells out the unit of prosecution," and second, if no legislative guidance is apparent, determining whether a defendant's acts are separated by sufficient "indicia of distinctness" to justify multiple punishments under the same statute (internal quotation marks and citation omitted)). Based on its detailed analysis of NMSA 1978, Section 30-28-2 (1979) (Conspiracy), the Court determined that "the Legislature established what we will call a rebuttable presumption that multiple crimes are the object of only one, overarching, conspiratorial agreement subject to one, severe punishment set at the highest crime conspired to be committed." *Gallegos*, 2011-NMSC-027, ¶ 55. The Court adopted "[t]he totality of the circumstances test utilized by the federal circuits" in announcing the nature of evidence required to overcome the presumption. The test asks whether:

> (a) the [location] of the two alleged conspiracies is the same; (b) there is a significant degree of temporal overlap between the two conspiracies charged; (c) there is an overlap of personnel between the two conspiracies (including unindicted as well as indicted co-conspirators); and (d) the overt acts charged and the role played by the defendant . . . [in the alleged conspiracies are] similar.

Id. ¶¶ 56, 42 (alterations in original).

{18} Applying the framework adopted in *Gallegos* to Defendant's convictions for conspiracy to commit kidnapping *and* aggravated arson, we hold that Defendant "entered into only one agreement and took part in only one conspiracy." *Id.* ¶¶ 57, 62 (holding that conspiracies of first-degree murder, kidnapping, and aggravated arson must merge in light of the fact that "the conspiracy to commit kidnapping should be understood as one aspect of a larger continuous combination that eventually embraced murder as its central objective"). As in *Gallegos*, the conspiracies of which Defendant was convicted involved a single victim and each embraced a collective intent by co-conspirators to inflict an interrelated series of harms upon her. *See* NMSA 1978, § 30-4-1 (2003) (stating that conspiracy to commit kidnapping requires a finding that Defendant intended to hold Lumsey "against [her] will [and] to inflict death [or] physical injury."); *see also* NMSA 1978, § 30-17-6 (1963) (stating that conspiracy to commit aggravated arson requires a finding that Defendant "willful[ly] or malicious[ly] . . . set[] fire to . . . [Lumsey's] vehicle . . . causing [Lumsey] great bodily harm"). Both conspiracies served to inflict personal injury on Lumsey and eliminate her ability to freely depart her surroundings. Additionally, the series of events occurred over a relatively short time frame, and the same individuals participated in and were implicated by both charged conspiracies.

{19} We therefore agree with Defendant that she and her co-conspirators formed one overarching agreement, rather than two distinct agreements separated by time and space. Furthermore, even were we to credit her "argument that [she] was unaware of the plot to [commit arson and] murder while taking part in the initial kidnapping, it does not follow that Defendant entered a new combination when [she] later joined [her] confederates in their efforts" to commit additional offenses. *Gallegos*, 2011-NMSC-027, ¶ 62.

{20} Defendant's second double jeopardy argument, which challenges five counts of conviction based on our aforementioned double description analysis, has already been defeated in *State v. Carrasco*, 1997-NMSC-047, 124 N.M. 64, 946 P.2d 1075. In *Carrasco*, a getaway driver was convicted of five separate offenses: conspiracy to commit robbery and accessory to attempted robbery, aggravated battery, aggravated assault, and false imprisonment. *Id.* ¶ 1. The getaway driver's only obvious role within the trial record was drinking with his co-conspirators earlier in the evening and later driving them away from a convenience store directly following a robbery attempt. *Id.* ¶¶ 3-4. Thus, he was not physically present during the commission of any offenses committed within the convenience store. The Court applied *Swafford*, in the requisite two-part query: (1) "whether the conduct underlying the offenses is unitary," and (2) "whether the Legislature intended to impose multiple punishments for the unitary conduct." *Carrasco*, 1997-NMSC-047, ¶ 22. "Only if the first part of the test is answered in the affirmative, and the second in the negative, will the double jeopardy clause prohibit multiple punishment in the same trial." *Swafford*, 112 N.M. at 13, 810 P.2d at 1233.

{21} Assuming without concluding that the collective criminal conduct of Defendant and her co-conspirators was unitary under the first prong of the *Carrasco* test, we elect to address the latter, Legislative-intent prong. We note that although we follow the *Carrasco* approach here and presume unitary conduct

under the first prong, our case law separately makes it clear that analysis pursuant to either prong can be dispositive of a *Swafford*-governed double jeopardy challenge. *See, e.g.*, *State v. Urioste*, 2011-NMCA-121, ¶¶ 16-29, 267 P.3d 820, *cert. quashed*, 2012-NMCERT-008,___ P.3d ___ (No. 33,287, August 17, 2012) (rejecting double jeopardy challenge to convictions of voluntary manslaughter, kidnapping, and aggravated battery based upon the conclusion that the underlying conduct was *not* unitary). Accordingly, we must ascertain whether the underlying crimes "require[] proof of at least one element that the other does not." *Carrasco*, 1997-NMSC-047, ¶ 28 (internal quotation marks and citation omitted). Where elements are distinct within the crimes being compared, "a presumption exists that the Legislature intended to separately punish the . . . offenses." *Id.* ¶¶ 23, 28.

{22} We conclude that second-degree murder, kidnapping, and aggravated arson each requires a unique element the others do not. Thus, guided by *Carrasco*, we too conclude that "[the d]efendant has not brought forth indicia of legislative intent to overcome the presumption that the Legislature intended to punish" second-degree murder, aggravated arson, and kidnapping separately. *Id.* ¶ 29.

{23} Defendant's contention that her conspiracy convictions should merge with the substantive crimes that underlie them similarly fails. This is so whether she was convicted as an accessory or as a principal. "The crimes of conspiracy and accessory to a crime are separate offenses based on separate acts for which the Legislature has intended multiple punishments." *Id.* ¶ 36; *see State v. Armijo*, 90 N.M. 12, 15, 558 P.2d 1151, 1154 (Ct. App. 1976) ("[C]onspiracy and the completed offenses are separate offenses and conviction of both does not amount to double jeopardy.").

{24} In sum, while we find no merit in Defendant's second double jeopardy claim, we must reverse as to her conviction for conspiracy to commit aggravated arson. "[T]he appropriate remedy is to vacate . . . [the] redundant [conspiracy conviction] with punishment imposed on the single remaining conspiracy at the level of the 'highest crime conspired to be committed,' [which in this circumstance] is a conspiracy to commit" kidnapping. *Gallegos*, 2011-NMSC-027, ¶ 64 (internal quotation marks and citation omitted); *compare* § 30-4-1(B) ("[C]ommit[ing] kidnapping [that results in physical injury] is . . . a first degree felony."), *with* § 30-17-6 ("[C]ommit[ing] aggravated arson is . . . a second degree felony."); *see also* NMSA 1978, § 30-28-1 (1963) (punishing conspiracy to commit first-degree felonies as second-degree felonies and conspiracy to commit second-degree felonies as third-degree felonies). Accordingly, we remand to the district court to vacate Defendant's conviction for conspiracy to commit aggravated arson and adjust Defendant's sentence in a manner consistent with this Opinion.

B. Sufficiency of the Evidence

{25} Defendant next maintains that there is insufficient evidence to support any of the six counts of which she was convicted. As to each such claim, our review of the trial record must defer to "the jury's fundamental role as factfinder" yet satisfy our autonomous responsibility "to ensure that . . . jury decisions are supportable by evidence in the record, rather than mere guess or conjecture." *State v. Flores*, 2010-NMSC-002, ¶ 2, 147 N.M. 542, 226 P.3d 641. We "view the evidence in the light most favorable" to the

jury's guilty verdicts, which must be based upon proof "beyond a reasonable doubt with respect to every element essential" to the convictions. *State v. Duran*, 2006-NMSC-035, ¶ 5, 140 N.M. 94, 140 P.3d 515 (internal quotation marks and citation omitted); *see State v. Garcia*, 114 N.M. 269, 274, 837 P.2d 862, 867 (1992) (forbidding the substitution of appellate judgment for that of a jury).

{26} We divide the six crimes of conviction into categories of review for ease of analysis: (1) accessory liability, (2) conspiracy, and (3) principal liability. The verdict sheets returned by the jury did not specify whether its determinations of Defendant's guilt for second-degree murder, aggravated arson, and kidnapping were based on principal or accessory liability, though both theories were presented to the jury. Because we need only find sufficient evidence under one of the theories presented to uphold Defendant's convictions, we choose to address each of the three crimes under the State's theory of accessory liability. *See State v. Salazar*, 1997-NMSC-044, ¶ 43, 123 N.M. 778, 945 P.2d 996 ("[D]ue process does not require a general verdict of guilt to be set aside so long as *one of the two* alternative bases for conviction is supported by sufficient evidence."). We separately address the sufficiency of Defendant's remaining conviction for conspiracy and her conviction for tampering with evidence as a principal.

1. Accessory Liability Convictions

{27} In New Mexico, a person may be "convicted of [a] crime as an accessory if he procures, counsels, aids or abets in its commission[,] although he did not directly commit the crime." NMSA 1978, § 30-1-13 (1972). Likewise, "[a] person who aids or abets in the commission of a crime is equally culpable" and faces "the same punishment as a principal." *Carrasco*, 1997-NMSC-047, ¶ 6. Under New Mexico's Uniform Jury Instructions, a defendant may be found guilty of a substantive offense as an accessory, if the jury finds beyond a reasonable doubt that:

1. Defendant intended that the crime be committed;
2. The crime was committed;
3. Defendant helped, encouraged or caused the crime to be committed.

UJI 14-2822 NMRA.

{28} Unlike other states that employ the "natural and probable consequences" test for accessory liability, *see, e.g., People v. Beeman*, 674 P.2d 1318, 1326 (Cal. 1984) (in bank) (stating that accomplice liability extends to the natural and reasonable consequences of the acts that the accessory knowingly and intentionally aids and encourages), New Mexico law requires that a jury "find a community of purpose for *each* crime of the principal." *Carrasco*, 1997-NMSC-047, ¶ 9. In other words, "a jury must find that a defendant *intended* that the acts necessary for *each* crime be committed." *Id.*

{29} Under our approach to accessory liability, Defendant elects to challenge the sufficiency of only some of the elements essential to her convictions for second-degree murder and aggravated arson, conceding the others. As to each offense, she challenges the initial element—that she intended those crimes to be committed. She agrees with the jury that the crimes were in fact committed, and even that her actions "helped, encouraged or caused" their commission. Regarding the crime of kidnapping, Defendant asserts that both the elements of intent and that she acted to help, encourage, or cause the crime's occurrence are unmet.

{30} Defendant's challenge to the evidence that underpins the jury's determination of her guilt for second-degree murder and aggravated arson rests on three specific assertions of insufficiency: (1) no evidence was presented that Defendant was aware the lighter fluid would be used to kill Lumsey or burn her car, (2) the evidence presented merely proved Defendant knew Lumsey was being held by Esquibel, not that her life was at stake, and (3) although Defendant heard Esquibel say he was going to "torch the car," she was not an active participant to the conversation and was later "sealed off" from the actual killing of Lumsey. We disagree with Defendant's arguments and hold that the evidence was sufficient to establish the requisite *mentes reae* of second-degree murder and aggravated arson.

{31} Notably, there is no legal requirement within our jurisprudence that an accessory know in advance the exact method by which a crime is to be carried out, or even that the accessory be physically present when the crime is committed. Again, *Carrasco* is instructive. There, despite evidence that the defendant remained in the getaway car from which he was unable to observe his criminal companions attack the lone clerk on duty at Allsup's convenience store, our New Mexico Supreme Court upheld his convictions as an accessory to each of the crimes—false imprisonment, assault, and aggravated battery. *Carrasco*, 1997-NMSC-047, ¶ 19. Based on evidence that the defendant had been "cruising and drinking" with his companions earlier that evening, had personal knowledge of Allsup's shifts and hours having himself worked at an Allsup's for nearly six months, and finally that he drove his fleeing companions quickly from the store following the attempted robbery, the Court held "a rational jury *could* have inferred . . . that [the d]efendant intended the false imprisonment, assault with intent to commit a violent felony, and aggravated battery on the store clerk be committed to accomplish the robbery." *Id.* ¶¶ 12, 14.

{32} Likewise here, a rational jury could infer that Defendant intended both the burning of Lumsey's car and her death, based upon Defendant's personal communication with Esquibel and its consistency with her actions. Those communications, which occurred throughout the day, demonstrated the existence of a joint criminal enterprise. And Defendant's presence during Esquibel's verbal brainstorming, during which he considered both murdering Lumsey and torching her car, placed Defendant on notice of the potential ends of that enterprise. Finally, individual actions that supported the jury's verdict include: (1) Defendant's calloused response and provision of marijuana as a gesture meant to soothe Sanchez's discomfort at being recruited by Esquibel as an assistant following the beating of Lumsey, (2) her lack of intervention on Lumsey's behalf when contrasted with her quick defense of Cavasos against Esquibel's briefly redirected violence, (3) her and her husband's de-facto compliance with Esquibel's request to ensure Lumsey did not escape or make noise during his three-hour absence, (4) her demand that Esquibel "figure something out" before Bobby returned from school, followed by her absence of spoken objection to Esquibel's idea of "torch[ing] the car" when contrasted with her vocal and successful protests of his previous idea to kill Lumsey at the state police office and turn himself in, (5) her retreat with Bobby to a separate bedroom while others led Lumsey out of the house to her death, and most tellingly, (6) the physical purchase and provision of charcoal lighter fluid for Esquibel. Of the many tangible activities undertaken by Defendant in furtherance of the crimes against Lumsey, it is this latter action which singularly appended a match tip to the bare stick that was

Esquibel's idea to burn Lumsey's car, a plan that provided no unrelated fate for Lumsey herself.

{33} Based on the evidence listed above, it is within the purview of a rational jury to have concluded Defendant acted in concert with Esquibel and played a supporting role in the murder and arson. We disagree with Defendant's assertions that there is no direct evidence of her own intention to kill or cause great bodily injury to Lumsey, or to burn her car. Indeed, it is inadequate to conclude that her actions merely enabled the homicide when in fact she provided the one missing ingredient needed to transform an object designed by automotive engineers to be incombustible into a mobile pyre. Even absent such an extraordinarily inculpatory fact, however, the "[c]ircumstantial evidence alone can amount to substantial evidence." *Flores*, 2010-NMSC-002, ¶ 19; *see Duran*, 2006-NMSC-035, ¶¶ 7-8 ("Intent is subjective and is almost always inferred from other facts in the case[.]" (internal quotation marks and citation omitted)). Further, the jury was aware that the Bahney household had no need for charcoal lighter fluid from the standpoint of outdoor food preparation, based upon the presence of only a propane grill at the residence. We conclude that facts within the trial record are sufficient to convict Defendant of each of the elements of second-degree murder and aggravated arson, as an accessory, beyond a reasonable doubt.

{34} Defendant similarly challenges the sufficiency of the evidence supporting her kidnapping conviction. She argues that there was inadequate proof of her intent to kidnap Lumsey, and that she helped, encouraged or caused the kidnapping. Defendant insists that the record is devoid of indicia that she agreed to watch Lumsey while Esquibel went to court and asserts that the kidnapping had already been perpetrated by Esquibel before Defendant arrived home. She also maintains her fear of Esquibel wholly dictated her actions during the entire Lumsey episode. Again, we are unpersuaded.

{35} In reviewing the sufficiency of the evidence, an appellate court "does not evaluate the evidence to determine whether some hypothesis could be designed which is consistent with a finding of innocence." *State v. Sutphin*, 107 N.M. 126, 130-31, 753 P.2d 1314, 1318-19 (1988). Rather "we must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. Here again, there was substantial evidence presented for the jury to infer that following Defendant's arrival home, she became an important participant in the ongoing forcible restraint of Lumsey. She not only sat idly at the computer while Lumsey remained constrained in the bedroom, she and her husband did nothing to free Lumsey and instead continued Lumsey's imprisonment for a three-hour period after Esquibel requested they do so. It is well settled in New Mexico that kidnapping is a continuing crime, and it is immaterial that Esquibel had already initiated the kidnapping before Defendant arrived. *See State v. Hutchinson*, 99 N.M. 616, 624, 661 P.2d 1315, 1323 (1983) ("Kidnapping which involves the detention of another[] is a continuous offense."). Finally, Defendant herself confirmed to police detectives that at no time was Lumsey free to leave, even during the three-hour period in which she and Tom Bahney were alone with Lumsey. Based on the trial record of facts and the reasonable inferences that can be derived from them by a considered jury, a finding that Defendant shared Esquibel's intent that Lumsey's

kidnapping continue unabated, and that she "helped, encouraged or caused" its continuance by her own activities over a period of many hours, is demonstrably supported by sufficient evidence.

2. Conspiracy Convictions

{36} As discussed previously, Defendant's conviction on conspiracy to commit aggravated arson is vacated on double jeopardy grounds. Thus, we need only review the sufficiency of the evidence for conspiracy to commit kidnapping. Once more, Defendant primarily contends that because the State's evidence did not prove she was present when Lumsey was initially beaten and because there was no direct communicated acceptance to Esquibel's command to watch and listen to Lumsey while he was absent, her conviction for conspiracy to commit kidnapping is legally deficient.

{37} We disagree with Defendant's characterization of our law. In the context of conspiracy liability, New Mexico has long held it unnecessary "to prove [the existence of] a formal agreement to accomplish the illegal act." *State v. Deaton*, 74 N.M. 87, 89-90, 390 P.2d 966, 967-68 (1964); *see also Territory v. Leslie*, 15 N.M. 240, 245, 106 P. 378, 379 (1910). In fact, the crime of conspiracy is rarely proven by direct evidence. *Deaton*, 74 N.M. at 90, 390 P.2d at 968 ("[A]greement is generally a matter of inference deduced from the facts and circumstances, and from the acts of the person accused done in pursuance of an apparent criminal purpose."). When Defendant arrived home, it was apparent that Lumsey was being held against her will and had been severely beaten. For many of the same reasons a jury could properly find Defendant guilty of the substantive crime of kidnapping, it could as well reasonably infer that Defendant agreed, together with Esquibel, Tom Bahney, and others with whom the kidnapping was perpetrated, to collectively foreclose any possibility that Lumsey's freedom would be regained.

{38} The body of interaction by the team of participants to the crimes against Lumsey—each perpetrated while Lumsey was in some manner restrained—invited the jury's reasonable inference that Defendant not only joined the conspiracy, but that when expressly called upon to do so by her co-conspirator, she assumed responsibility for the ongoing kidnapping. The evidence presented of a shared agreement to commit and perpetuate the crime of kidnapping meets the substantial evidence test required by our jurisprudence.

3. Principal Liability Conviction—Tampering with Evidence

{39} As a final sufficiency point of appeal, Defendant challenges the trial record's support of the jury's conclusion that she tampered with evidence. She maintains the State failed to prove both that she intended to prevent her own apprehension, prosecution, or conviction when she washed blood spatter from her living room blinds the day following the Lumsey homicide, and that she was not "acting under threats and a reasonable fear of her safety" at the time. As discussed above, there was sufficient evidence for the jury to conclude that Defendant joined a criminal enterprise united in purpose as to each of the crimes that led to the death of Lumsey. The previous day's events in furtherance of that enterprise provide decisive context to Defendant's effort to later clean the deceased victim's blood from the blinds. That final action, we conclude, was wholly enmeshed with the prior undertakings of Defendant and her co-conspirators. Each concerted criminal activity served to build the evidentiary inference that

when Defendant was wiping away human blood she was concerned with more than the cleanliness of her home. The jury was well within its fact-finding prerogative to conclude that Defendant's removal of blood evidence that would undoubtedly have been usable by the State against her was intended to prevent her own apprehension, prosecution, and conviction.

{40} Finally, the jury was presented with substantial evidence showing that Defendant's actions were not dictated by her fear of Esquibel, a conclusion we cannot second guess. *See* UJI 14-5130 NMRA ("[When e]vidence has been presented that the defendant was forced to [commit the crime] under threat[s], . . . [t]he burden is on the state to prove beyond a reasonable doubt that the defendant did not act under such reasonable fear."). Her contrary contention is primarily repudiated by her failure to extract herself from the criminal events when twice having opportunities to do so, first during Esquibel's lengthy absence and then during her trip to Walmart. Further repudiating her claim that she too feared physical harm at the hand of Esquibel are her ably asserted demands that he abandon his plan to turn himself over to state police, cease separately battering Cavasos, and resolve the obvious incongruence between the immediate presence of a captive and the pending arrival of a child. Finally, her professed fear of Esquibel is poorly demonstrated by her placation of Sanchez's discomfort and her later voluntary provision of far more than just double the volume of lighter fluid required for normal use. We conclude that the trial record of Defendant's statements and actions belies the notion that she was subservient as a product of self-preservation.

C. The Trial Court Did Not Abuse Its Discretion by Admitting the Crime Scene Photographs

{41} At trial, Defendant objected to the admission of over forty of the State's photographs taken during the crime scene investigation. The defense stipulated to the admissibility of merely two photographs in the set: one of Lumsey's charred body lying in the trunk of the burned car with police investigators standing by, and the other of Lumsey's body lying on a sheet after being removed from the car. The district court considered each of the challenged photographs in light of Rule 11-403 NMRA, and excluded the three for which it felt "the prejudice outweigh[ed] any possible probative value." Thus, forty of the initial forty-five photographs were admitted into evidence over Defendant's objections.

{42} We review a trial court's determination that items of evidence are admissible for abuse of discretion, *Flores*, 2010-NMSC-002, ¶ 25, which "occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case." *State v. Simonson*, 100 N.M. 297, 301, 669 P.2d 1092, 1096 (1983). "[R]elevant[] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Rule 11-403. Nevertheless, "[t]he trial court ought to exclude photographs which are calculated to arouse the prejudices and passions of the jury and which are not reasonably relevant to the issues of the case." *State v. Boeglin*, 105 N.M. 247, 253, 731 P.2d 943, 949 (1987).

{43} Graphic photographs of the injuries suffered by deceased victims of crime are by their nature significantly prejudicial, but that fact alone does not establish that they are impermissibly so. District courts are afforded "great discretion in balancing the prejudicial impact of [evidence] against its probative value." *State v. Garcia*, 2005-NMCA-042, ¶ 50, 137 N.M. 315, 110 P.3d 531 (internal

quotation marks and citation omitted). Indeed, photographs may be admitted for proper purposes, "even if they are gruesome." *Id.* Such purposes include depicting the nature of an injury, clarifying and illustrating testimony, and explaining the basis of a forensic pathologist's expert opinion. *Id.* "Photographs are the pictured expressions of data observed by a witness. They are often more accurate than any description by words, and give a clearer comprehension of the physical facts than can be obtained from the testimony of witnesses." *State v. Pettigrew*, 116 N.M. 135, 139, 860 P.2d 777, 781 (Ct. App. 1993) (internal quotation marks and citation omitted).

{44} Of the forty photographs challenged by Defendant, six showed Lumsey's body after being burned to death. The six were close-ups of her body and head, which collectively showed that the fire had burned the left side of her body to the point of charring, but had spared some of her right side. The pictures were a graphic depiction of the results of the arson and murder with which Defendant was charged, and thereby relevant to the elemental requirement that the State show the crimes contained within the indictment were in fact undertaken and completed.

{45} The remainder depicted the burning car, fire damage to its interior and exterior, firefighters as they extinguished the flames, and the location where the vehicle was burned. All were relevant, in that each made the existence of essential elements of the crimes of murder and arson more probable within the burden of proof assigned to the State. None were more prejudicial than probative—they simply showed the scene as it was investigated, with no undue emphasis on the burned body or anything that would unfairly prejudice Defendant. We cannot say the admission of illustratively neutral photographs defied logic to a degree necessary to conclude that the trial court abused its discretion in its determinations of admissibility.

{46} As to each image, the record is clear that the district court weighed the probative and prejudicial impact outside the jury's presence and excluded the three that it felt were excessively prejudicial. Based on the trial court's consideration of Defendant's arguments and analysis of the photographs, we see nothing to indicate that it did not employ its discretion appropriately. Nor can we conclude that even if there was error, it was not harmless in nature. *Pettigrew*, 116 N.M. at 139, 860 P.2d at 781 ("[W]e are unaware of any case that has reversed a conviction due to allegedly inflammatory photographs.").

{47} In fact, we see nothing to distinguish this case from the many cases in which district courts from around the State have properly used their discretion to admit graphic photographs of victims. *See, e.g.*, *State v. Saiz*, 2008-NMSC-048, ¶ 54, 144 N.M. 663, 191 P.3d 521 (holding that the district court did not abuse its discretion by admitting five gruesome photographs of the victim's decomposed body, when those photographs aided the pathologist's testimony), *abrogated on other grounds by State v. Belanger*, 2009-NMSC-025, ¶ 36 n.1, 146 N.M. 357, 210 P.3d 783; *State v. Mora*, 1997-NMSC-060, ¶¶ 54-55, 124 N.M. 346, 950 P.2d 789 (upholding the admission of multiple autopsy photos of child victim on grounds that they were illustrative), *abrogated on other grounds by State v. Frazier*, 2007-NMSC-032, ¶ 1, 142 N.M. 120, 164 P.3d 1; *State v. Perea*, 2001-NMCA-002, ¶ 22, 130 N.M. 46, 16 P.3d 1105 (holding that a potentially inflammatory photograph of a victim's slashed face was relevant and that its admission was within the discretion of the district court), *aff'd in part,*

vacated in part, 2001-NMSC-026, 130 N.M. 732, 31 P.3d 1006; *Boeglin*, 105 N.M. at 253, 731 P.2d at 949 (holding that the admission of a close-up photograph depicting gruesome neck wounds suffered by the victim was proper to "illustrate, clarify, and corroborate the testimony of witnesses"); *Pettigrew*, 116 N.M. at 139, 860 P.2d at 781 (holding that photos of battered victim were relevant to depict the extent of the victim's injuries and to illustrate a physician's testimony, and their admission was not an abuse of discretion); *State v. Blakley*, 90 N.M. 744, 748, 568 P.2d 270, 274 (Ct. App. 1977) (holding that admission of photograph of the victim's body was proper because it "illustrated, clarified, and corroborated the testimony of various witnesses"). We will not disturb the trial court's judgment on these facts.

D. There is No Prima Facie Evidence of Ineffective Assistance of Counsel

{48} Defendant last argues she received ineffective assistance of counsel based on three purported inactions by her trial attorney: (1) failure to locate a known alibi witness, (2) failure to inform Defendant of her right to testify, and (3) failure to object to second-hand statements originating from Esquibel. We review claims of ineffective assistance of counsel de novo. *Duncan v. Kerby*, 115 N.M. 344, 347-48, 851 P.2d 466, 469-70 (1993). In order to establish a prima facie case of ineffective assistance of counsel on direct appeal, a defendant must demonstrate that: (1) counsel's performance fell below that of a reasonably competent attorney; (2) no plausible, rational strategy or tactic explains counsel's conduct; and (3) counsel's apparent failings were prejudicial to the defense. *See State v. Herrera*, 2001-NMCA-073, ¶ 36, 131 N.M. 22, 33 P.3d 22. As Defendant acknowledges, "[a] record on appeal that provides a basis for remanding to the [district] court for an evidentiary hearing on ineffective assistance of counsel is rare. Ordinarily, such claims are heard on petition for writ of habeas corpus." *State v. Baca*, 1997-NMSC-059, ¶ 25, 124 N.M. 333, 950 P.2d 776.

{49} Defendant's first two claims of ineffective assistance concern matters not in the appellate record. Defendant argues that she identified an alibi witness to defense counsel, but he failed to locate the witness during trial. She also argues that defense counsel did not inform her of her right to testify and effectively prevented her from testifying in her own defense. We have no basis to be aware of the occurrence or nonoccurrence of these conversations other than Defendant's assertions on appeal. While we are willing to review matters of record for prima facie evidence of ineffective assistance of counsel, we will not afford the same benefit to arguments based on matters outside the trial record. *State v. Telles*, 1999-NMCA-013, ¶ 25, 126 N.M. 593, 973 P.2d 845 (holding that without a record, we cannot consider claims of ineffective assistance of counsel on direct appeal). Such claims are best reserved for habeas corpus, in which a subject-specific record can be developed before the trial court. *State v. Stenz*, 109 N.M. 536, 538-39, 787 P.2d 455, 457-58 (Ct. App. 1990) ("[Habeas corpus] provides a method for the defendant to present in a post-conviction proceeding a record establishing ineffective assistance of counsel . . . .").

{50} Defendant's final claim of ineffective assistance is reviewable based upon the trial record, but we disagree that it establishes a prima facie claim. Defendant argues that counsel was deficient in failing to object to Cavasos's testimony when she recounted statements made by Esquibel to Defendant. Cavasos testified that Esquibel requested Defendant and Tom Bahney watch and ensure

the silence of Lumsey while he was gone, and separately stated in Defendant's presence that he was "just going to torch the car." We disagree that the statements were inadmissible hearsay and that her right of confrontation was violated by their admission.

{51} Regarding Esquibel's request that Defendant and Tom Bahney watch Lumsey and ensure her ongoing silence while Esquibel attended his court hearing, we hold that the statement was not offered at trial to prove the truth of the matter asserted, and therefore is not hearsay at all. *See* Rule 11-801(C) NMRA ("'Hearsay' is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence *to prove the truth of the matter asserted.*" (emphasis added)). Here, the challenged statements are best described as directions or commands, rather than assertions from which truth or falsity can be discerned. They are thus not hearsay. *See State v. Toney*, 2002-NMSC-003, ¶ 3, 131 N.M. 558, 40 P.3d 1002 (holding that an out-of-court statement was not hearsay where the statement "was a directive or a command and was offered not for its truth but for the fact that it was made.").

{52} Similarly, Esquibel's assertion that he was "just going to torch the car," was not offered to prove the veracity of Esquibel's intent to commit arson, but to demonstrate Defendant's knowledge that Esquibel contemplated burning Lumsey's car. Esquibel's statement, which communicated his then-existing state of mind, was offered by the State to establish Defendant's motive when she later purchased lighter fluid for him. "Evidence is not hearsay if admitted as circumstantial evidence of the motive of the listener." *State v. Rosales*, 2004-NMSC-022, ¶ 17, 136 N.M. 25, 94 P.3d 768 (citing 2 Kenneth S. Broun et al., *McCormick on Evidence* § 249, at 102 & n.12 (John W. Strong ed., 5th ed. 1999)). Furthermore, even if we could characterize Esquibel's out-of-court statements as meeting the definition of hearsay under Rule 11-801(C) , they would fall under the category of utterances identified as "statements which are not hearsay," under Rule 11-801(D)(2)(e) (including "statement[s] by a co-conspirator of a party during the course and in furtherance of the conspiracy"). *State v. Farris*, 81 N.M. 589, 590, 470 P.2d 561, 562 (Ct. App. 1970) ("[T]he acts and declarations of one conspirator during the existence of a conspiracy are competent evidence against his co-conspirators." (internal quotation marks and citation omitted)); *see State v. Zinn*, 106 N.M. 544, 552, 746 P.2d 650, 658 (1987) ("[T]here is no requirement under the Confrontation Clause for the prosecution to show that a nontestifying co-conspirator is unavailable to testify when his out-of-court statement is offered into evidence against the defendant/co-conspirator."). Defendant's claim of ineffective assistance thus fails because "trial counsel is not incompetent for failing to make a motion when the record does not support the motion." *Stenz*, 109 N.M. at 538, 787 P.2d at 457.

{53} Our conclusion that Defendant has failed to meet her burden of demonstrating a prima facie case of ineffective assistance of counsel in no way impairs Defendant's ability to later bring such a claim in a habeas proceeding if she considers there to be a factual basis for such a motion. *See Saiz*, 2008-NMSC-048, ¶ 65, (noting that a defendant "may pursue habeas corpus proceedings on [the ineffective assistance of counsel] issue . . . if he is ever able to provide evidence to support his claims").

III. CONCLUSION

{54} In summary, we affirm all but one of

Defendant's convictions, striking only her conviction for conspiracy to commit aggravated arson. We reject Defendant's remaining challenges regarding the sufficiency of the evidence, the trial court's admission of crime scene photographs, and the effectiveness of her trial counsel. Therefore, we remand this case to the district court to vacate the identified conviction and re-sentence Defendant accordingly.

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

J. MILES HANISEE, Judge

WE CONCUR:

CELIA FOY CASTILLO, Chief Judge

MICHAEL D. BUSTAMANTE, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMSC-008

Filing Date: March 29, 2012

Docket No. 31,241

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

STEVE TOLLARDO,

Defendant-Appellant.

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OPINION

SERNA, Justice.

{1} Defendant Steve Tollardo was convicted by a jury of first-degree murder (accessory), kidnapping (accessory), conspiracy to commit murder, and conspiracy to commit kidnapping. He was acquitted of aggravated arson (accessory) and conspiracy to commit aggravated arson. This Court has jurisdiction over Defendant's direct appeal pursuant to Article VI, Section 2 of the New Mexico Constitution and Rule 12-102(A)(1) NMRA.

{2} We address only one of the issues Defendant raises on appeal: whether the district court erred in advising the jury that two other individuals were convicted of conspiracy to commit second-degree murder in connection with the same homicide underlying the charges against Defendant. We conclude that the district court did err in mentioning the co-conspirators' convictions, and that the error was not harmless. Accordingly, we reverse Defendant's convictions and remand to the district court for a new trial. In reaching this holding, we reexamine our harmless error analysis and clarify that a review of the particular circumstances in each case, rather than mechanical application of a multi-factor test, must guide the inquiry into whether a given trial error requires reversal.

I. BACKGROUND

{3} This appeal arises out of the gruesome killing of Juan Alcantar (Victim) in Taos on September 6-7, 2003. The underlying facts of the crime are detailed in the Court's prior opinion in *State v. Gallegos*, 2011-NMSC-027, ¶¶ 5-14, 149 N.M. 704, 254 P.3d 655, which resolved an appeal filed by Lawrence Gallegos, one of Defendant's co-conspirators. Additional facts are set forth below to provide context for the resolution of the present appeal.

{4} Testimony at Defendant's trial established the following sequence of events. On the night of September 6, 2003, Defendant and Victim visited a sports bar in Taos, where they were denied entry. Ivan Romero, a friend of Defendant, exited the sports bar, approached Defendant and Victim in the bar's parking lot, and punched Victim. Defendant and Victim then left the parking lot together, and Ivan Romero left separately.

{5} Later that night, Defendant and Victim were "kicking back" at Richard Anaya's house with Anaya himself, Gallegos, Luis Trujillo, and Racquel Gonzales, later joined by Ivan Lujan. Apparently without warning, Trujillo and Gallegos began kicking and hitting Victim. Defendant and Trujillo then drove to the house of Elias Romero, the father of Ivan Romero. Elias Romero was in the house along with his girlfriend Michelle Martinez, who would be the State's main witness, and his nephew Jaime Romero. Defendant, who appeared "hyped up," told the occupants of the house about the altercation between Ivan Romero and Victim and added that Victim was tied up at Anaya's house. Defendant explained that after the incident at the sports bar he had gone to see Ivan Romero, who disliked Victim and suggested that Elias Romero "would know what to do" with Victim. Defendant also told Elias Romero that Victim had a gun and had threatened to kill Ivan Romero. Jaime Romero mentioned that he had "some soldiers" who could "take care of it." Defendant replied that it was not his "viaje," meaning not his problem. Elias Romero gave a syringe containing a lethal dose of heroin to Martinez and instructed her to "inject [Victim] and make it look like he overdosed."

{6} Martinez then traveled with Defendant and Trujillo to Anaya's house. When they arrived, Victim was lying on the kitchen floor with his hands tied and a black eye. Gallegos was standing over Victim with a kitchen knife. Martinez sat on Victim's hand and injected him with the lethal dose of heroin. Victim cried out to Defendant for help and said, "Steve, please help me." Defendant told Victim that "he shouldn't have fucked with Diablo," a nickname for Ivan Romero.

{7} After Victim stopped moving and Martinez believed him to be dead, Defendant, Gallegos, and Trujillo moved Victim onto a tablecloth. The other individuals, Anaya, Lujan, and Gonzales, were elsewhere in the house during this time. When Victim was moved onto the tablecloth, he began moaning. Martinez was afraid that Victim might regain consciousness, so she instructed Defendant, Gallegos, and Trujillo to leave Victim alone. A short time later, Defendant and Gallegos carried Victim to Victim's car and placed him on the passenger's seat.

{8} Martinez testified that "the plan" laid out by Elias Romero was for her to drive Victim's car and leave Victim in a secluded place to make it appear as though Victim died of a drug overdose. Martinez drove Victim's car with Gallegos and Victim inside, attempting to follow Defendant and Trujillo who were driving in a separate car. Martinez was unable to follow Defendant and Trujillo, so she drove to a nearby church parking lot. Eventually, Defendant and Trujillo arrived at the parking lot, at which point Martinez and Gallegos got into the car with Defendant and Trujillo, leaving the unconscious Victim in his car.

{9} During the drive back to Elias Romero's house, Gallegos and Defendant discussed burning Victim's car to destroy Gallegos' fingerprints and other evidence that might show that Victim did not die of a drug overdose. At Elias Romero's house, Gallegos obtained lantern fuel and left with Defendant and Trujillo. Some time later, Defendant, Gallegos, and Trujillo returned once again to Elias Romero's house. Defendant told Martinez that he, Gallegos, and Trujillo used the lantern fuel and a cherry bomb to set fire to Victim's car with Victim inside.

{10} Seven individuals were prosecuted in connection with Victim's death: Defendant, Lawrence Gallegos, Luis Trujillo, Elias Romero, Michelle Martinez, Jaime Romero, and Ivan Romero. Gallegos was convicted by a jury of first-degree murder, aggravated arson, kidnapping, and three counts of conspiracy. *Id.* ¶ 2. Trujillo was convicted by a jury of first-degree murder, aggravated arson, conspiracy to commit first-degree murder, conspiracy to commit kidnapping, and conspiracy to commit aggravated arson. *Trujillo*, No. 31,500, slip op. at 2 (N.M. Sup. Ct. June 27, 2011). Elias Romero was acquitted of first-degree murder and conspiracy to commit first-degree murder. Martinez pleaded guilty to conspiracy to commit first-degree murder. Jaime Romero and Ivan Romero also resolved the charges against them through pleas, with the former apparently pleading guilty to conspiracy to commit second-degree murder, and the latter pleading no contest to the same charge.[1] This Opinion will refer to these latter two pleas as "the Romeros' pleas" or "the Romeros' convictions."

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[1] The record is not conclusive as to whether Jaime Romero and Ivan Romero entered pleas of guilty or no contest to conspiracy to commit second-degree murder, although the district court and counsel consistently referred to Ivan Romero as having pleaded no contest to the charge.

{11} At Defendant's trial, defense counsel acknowledged during his opening statement that Defendant was present at the home of Richard Anaya on September 6-7, 2003, where Victim was forcibly held before being killed. Defense counsel asked the jury to "look closely" at Defendant's "real involvement" in Victim's death, explaining that "it's not enough that [Defendant] was there. . . . There has to be something more by the State to show that [Defendant] actually helped, encouraged or caused this crime to be committed." Amplifying this point, defense counsel stated that three other individuals who were also present at Anaya's home that night–Anaya himself, Racquel Gonzales, and Ivan Lujan–were not charged in connection with Victim's death. Defense counsel clarified that while Anaya was charged initially, the State dropped charges after further investigation.

{12} Later on in the trial, during direct examination of John Wentz, a detective with the Taos Police Department who investigated Victim's death, the prosecutor asked if Detective Wentz had personal knowledge as to whether Ivan Romero and Jaime Romero had been convicted in connection with Victim's death. Defense counsel objected that the question was irrelevant. Outside the presence of the jury, the State responded that the disposition of the charges against Ivan Romero and Jaime Romero was relevant because

> [w]ithout asking that question, we would be left with the jury wondering what happened, if Ivan and Jaime were ever convicted. . . .
>
> For the jury not to have any information as to the particular people who this detective's investigation revealed, their not having been charged and convicted would leave a hole in the evidence for the jury that we believe we could fill this way.

{13} The district court acknowledged that defense counsel's objection "[wa]s somewhat well taken in that this testimony [wa]s being offered to prove the truth of the matter asserted." Nevertheless, the district court decided that the fact that Ivan Romero and Jaime Romero were convicted through pleas in connection with Victim's death would be presented to the jury, and that the "best route" to doing so would be for the court to take judicial notice of the Romeros' pleas rather than allowing Detective Wentz to testify on that matter.

{14} After the State rested its case (the defense did not call any witnesses), and before closing arguments, the district court informed the jury that

> there are certain facts that you must accept as true. You can give them whatever weight you want to give it [sic]. But there was a question asked of Detective Wentz while he was testifying as to whether or not certain people have been convicted. I am going to instruct you, without requiring testimony or otherwise, that the court has taken notice that Jaime and Ivan Romero were convicted of conspiracy to commit second degree murder. Ivan Romero was convicted pursuant to a no contest plea. A no contest plea means that a defendant does not admit or deny guilt, but will accept a conviction.
>
> You may, but are not required to accept this as a fact. And you may

> give this evidence whatever weight you believe it deserves.

The jury convicted Defendant on the charges listed above, including first-degree murder. This appeal followed.

II. DISCUSSION

A. Admitting the Romeros' Convictions Violated Defendant's Sixth Amendment Right to Confrontation

{15} Defendant argues that introducing the Romeros' convictions to the jury violated his right, under the Sixth Amendment to the United States Constitution, to confront the witnesses against him. Claimed violations of the Sixth Amendment right to confrontation are reviewed de novo. *State v. Cabezuela*, 2011-NMSC-041, ¶ 49, 150 N.M. 654, 265 P.3d 705. Under the Sixth Amendment, every criminal defendant "shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "[T]his bedrock procedural guarantee applies to both federal and state prosecutions." *Crawford v. Washington*, 541 U.S. 36, 42 (2004). The Confrontation Clause "applies to witnesses against the accused–in other words, those who bear testimony. Testimony, in turn, is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 51 (internal quotation marks and citation omitted).

{16} The United States Supreme Court, however, to date has avoided establishing a firm definition of what constitutes a "testimonial statement." *Id.* Instead, the Supreme Court has identified a "core class" of testimonial statements:

> [*E*]*x parte* in-court testimony or its functional equivalent–that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. at 51-52 (internal quotation marks and citations omitted). These formulations "all share a common nucleus." *Id.* at 52. "[A]t a minimum," the Supreme Court explained, the term "testimonial" covers "testimony at a preliminary hearing, before a grand jury, or at a formal trial." *Id.* at 68. Considering the types of statements deemed to be testimonial by the United States Supreme Court, this Court recently noted that "[w]hat these examples have in common is that they lend themselves to an analysis that focuses largely on surrounding circumstances to separate testimonial from non-testimonial statements." *State v. Mendez*, 2010-NMSC-044, ¶ 29, 148 N.M. 761, 242 P.3d 328. We therefore look at the circumstances surrounding how pleas of guilty and no contest are entered in New Mexico to determine whether such pleas are testimonial or non-testimonial statements.

{17} Before a court accepts a defendant's plea of guilty or no contest, the court must first personally address the defendant in open court, "informing the defendant of and determining that the defendant understands" certain rights and consequences surrounding the plea offer. Rule 5-303(F) NMRA. Once

the court has so informed the defendant and determined that the defendant understands those rights and consequences, the court must then determine that the defendant is entering a plea of guilty or no contest voluntarily. Rule 5-303(G); *see also State v. Garcia*, 1996-NMSC-013, 121 N.M. 544, 546-47, 915 P.2d 300, 302-03 (describing the procedures New Mexico courts follow to ensure that a defendant's guilty plea is knowing and voluntary).

{18} The procedures a court must follow in accepting a defendant's plea ensure that the defendant knows and understands the gravity of the statement he or she is about to make, and that the defendant is making the statement voluntarily, to a judge in open court, with a full understanding of his or her rights and the consequences of making such a statement. Under these circumstances, a plea is more akin to "a formal statement to government officers" than "a casual remark." *Crawford*, 541 U.S. at 51. It is reasonable to conclude that such a knowing and voluntary statement "would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 52. We hold, therefore, that a plea of guilty or no contest constitutes a "testimonial statement" under *Crawford*. *See United States v. McClain*, 377 F.3d 219, 221 (2d Cir. 2004) ("[I]t is clear that a plea allocution constitutes testimony, as it is formally given in court, under oath, and in response to questions by the court or the prosecutor."); *State v. Fields*, 168 P.3d 955, 965 (Haw. 2007) (listing "plea allocutions" as "undeniably testimonial under the sixth amendment"); *People v. Duff*, 872 N.E.2d 46, 50 (Ill. App. Ct. 2007) (concluding that a co-defendant's guilty plea is "testimonial" under *Crawford*); *see also United States v. Massino*, 319 F. Supp. 2d 295, 298 (E.D.N.Y. 2004); *Morten v. State*, 856 A.2d 595, 600 (D.C. 2004). As a testimonial statement, a co-defendant's plea of guilty or no contest is inadmissible against a defendant to prove the truth of the matter asserted unless the demands of the Confrontation Clause have been met, in other words that the defendant has an opportunity to cross-examine the co-defendant concerning the plea agreement. *See Crawford*, 541 U.S. at 53-54 (holding that a prior opportunity to cross-examine the witness satisfies the Confrontation Clause).

{19} In *Kirby v. United States*, the United States Supreme Court held that it was a violation of the Confrontation Clause to admit the convictions of co-defendants to prove a "vital fact involved in the charge against" a defendant. 174 U.S. 47, 61 (1899). This Court adopted that holding in *State v. Martino*, ruling that the guilty plea of a gambler could not be admitted against the defendant, who was standing trial for permitting the gambling to take place on his premises. 25 N.M. 47, 47, 176 P. 815, 815-16 (1918) (citing *Kirby*, 174 U.S. 47). We reiterated this principle in *State v. Jackson*, where we reversed a defendant's convictions and noted that a co-defendant's guilty plea was "particularly not admissible as to elements of the offense as against a person not a party to the proceeding." 47 N.M. 415, 415, 143 P.2d 875, 877 (1943). Similarly, in *State v. Urioste*, the Court of Appeals addressed a situation where a defendant was charged with conspiracy to commit murder. 94 N.M. 767, 768, 617 P.2d 156, 157 (Ct. App. 1980). The theory of the State's case was that the defendant conspired with another person to kill the victim. *Id.* The State asked the court to take judicial notice that the co-defendant pleaded guilty to conspiracy to commit murder, arguing that the conviction was relevant "to prove that this man was part of the conspiracy, admitted that he was, in fact, a member of that conspiracy, and that he did, in fact, conspire with [the defendant]." *Id.* at

768-69, 617 P.2d at 157-58 (internal quotation marks omitted). The Court of Appeals held that it was error to admit the co-defendant's convictions "[b]ecause it deprived [the defendant] of the right to confront witnesses against her." *Id.* at 769, 617 P.2d at 158; *see also Bisaccia v. Att'y Gen. of the State of N.J.*, 623 F.2d 307, 314 (3d Cir. 1980) (Seitz, J., concurring) (reasoning that admitting the guilty plea of another person violated the defendant's confrontation rights, not with respect to the person who tendered the plea but with respect to "the witnesses that the government would have presented in a trial of the third person").

{20} Defendant argues that the conviction of a co-defendant is entirely inadmissible at trial. A co-defendant's conviction, however, may be admissible when it is introduced to impeach that co-defendant if he or she testifies, rather than as substantive evidence of the defendant's guilt. *See State v. Gilbert*, 98 N.M. 77, 83, 644 P.2d 1066, 1072-73 (Ct. App. 1982) (distinguishing *Jackson* and *Urioste* and allowing the admission of the co-defendants' convictions because "the purpose of questioning [the co-defendants] regarding their guilty pleas clearly was not solely to prove existence of a conspiracy in which [the] defendant participated," but was also used to attack the credibility of those co-defendants); *see also United States v. Baez*, 703 F.2d 453, 455 (10th Cir. 1983) ("[E]ither the government or the defense may elicit evidence of a guilty plea for the jury to consider in assessing the codefendant's credibility as a witness.").

{21} Indeed, here defense counsel elicited testimony from Martinez about her guilty plea in connection with Victim's death in an effort to impeach her credibility. In contrast to Martinez, neither Jaime Romero nor Ivan Romero testified at Defendant's trial, and thus their credibility was never at issue. Their convictions, therefore, could not be admissible for impeachment purposes under the above rationale.

{22} We reject the State's claim that the otherwise inadmissible convictions were properly placed before the jury to remedy the assertedly "unfair" reference by defense counsel to the fact that other named individuals (Anaya, Gonzales, and Lujan) had not been charged in connection with Victim's death. When a defendant makes a claim that "opens the door" to inadmissible evidence, the doctrine of curative admissibility in some circumstances may permit the State to rebut that claim with otherwise inadmissible evidence. *See State v. Ruiz*, 2001-NMCA-097, ¶ 47, 131 N.M. 241, 34 P.3d 630 (citing *State v. Baca*, 120 N.M. 383, 390 n.2, 902 P.2d 65, 72 n.2 (1995)). The State, however, does not explain the supposed equivalence between the convictions of the Romeros (who *were not* present at Anaya's house where Victim was held against his will prior to being killed), and defense counsel's statement that no charges were filed against Anaya, Gonzales, and Lujan (who *were* present at Anaya's house).[2] Furthermore, the prosecutor

[2] The prosecutor obtained testimony that easily could have been used to dispel any concern that the jury would be confused about the role of different individuals in the events leading up to Victim's death. For instance, Detective Wentz testifiedthat in his interview with Martinez, she implicated some individuals as being involved in Victim's death and others as merely being present at Anaya's house. Martinez herself testified on direct examination that she never saw Anaya, Gonzales, or Lujan "do anything" to Victim. And Detective Wentz testified that another individual, Elias Romero, was charged in connection with Victim's death.

sought testimony about and the district court took judicial notice of the Romeros' convictions, not just the charges filed against them. We need not decide here whether the doctrine of curative admissibility may be used to admit testimonial statements in violation of the Confrontation Clause, because curative admissibility is inapplicable to this case.

{23} The district court's effective admission of the Romeros' testimonial plea agreements, therefore, violated Defendant's Sixth Amendment right to confront the witnesses against him. *See, e.g.*, *State v. Lopez*, 2007-NMSC-037, ¶ 21, 142 N.M. 138, 164 P.3d 19 (finding a "per se" Sixth Amendment violation in admitting testimonial statements of co-defendants who did not testify at the defendant's trial where the defendant did not have an opportunity to cross-examine the co-defendants).

{24} Although not necessary for the resolution of this appeal, we note that the introduction of the Romeros' convictions also presents a serious due process problem. Every criminal defendant has a right "to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else." *United States v. Toner*, 173 F.2d 140, 142 (3d Cir. 1949); *see also Bisaccia*, 623 F.2d at 312-13 (relying in part on *Toner*, holding that admission of a co-conspirator's guilty plea violated the defendant's due process rights, and remanding to the district court for harmless error review). Just as it would be improper to allow the introduction of a co-conspirator's acquittal to show that the defendant himself should be acquitted, it would be similarly improper to admit evidence of a non-testifying co-conspirator's conviction to establish that the defendant himself is guilty. *See United States v. Sanders*, 95 F.3d 449, 454 (6th Cir. 1996) ("[U]nder a parallel treatment for guilty pleas and acquittals, [a co-conspirator's] acquittal may not be admitted" (citing *United States v. Fernandez-Roque*, 703 F.2d 808, 813 (5th Cir. 1983))). Here, even though the district court recognized the danger in allowing testimony about Ivan and Jaime Romero's involvement in Victim's murder, it nonetheless informed the jury about the Romeros' convictions. By instructing the jury that the convictions were facts that it "must accept as true," the district court created the risk that Defendant's guilt or innocence would in some part be determined by "what . . . happened with regard to a criminal prosecution against someone else." *Toner*, 173 F.2d at 142.

B. Applicable Standard for Harmless Error Review

{25} Improperly admitted evidence is not grounds for a new trial unless the error is determined to be harmful. *State v. Macias*, 2009-NMSC-028, ¶ 37, 146 N.M. 378, 210 P.3d 804; *State v. Barr*, 2009-NMSC-024, ¶ 47, 146 N.M. 301, 210 P.3d 198. A "very limited class of errors," not at issue here, is deemed structural and is not reviewed for harmless error but instead "require automatic reversal." *State v. Alvarez-Lopez*, 2004-NMSC-030, ¶ 51, 136 N.M. 309, 98 P.3d 699.

Where, as here, a constitutional error has been established, the State bears the burden of proving that the error is harmless. *See, e.g.*, *State v. Gutierrez*, 2007-NMSC-033, ¶ 18, 142 N.M. 1, 162 P.3d 156 ("The State has the burden of establishing that [a] constitutional error was harmless beyond a reasonable doubt." (internal quotation marks and citation omitted)).

{26} The concept of harmless error arose "as a reaction to an era marked by automatic reversal of cases for any procedural error."

Barr, 2009-NMSC-024, ¶ 47 (citing 7 Wayne R. LaFave et al., *Criminal Procedure* § 27.6(a), at 99-100 (3d ed. 2007)). The harmless error rule originally developed outside the context of constitutional review, simply to "require appellate courts to affirm lower courts notwithstanding technical errors, defects, or exceptions which did not affect the substantial rights of the parties." *Barr*, 2009-NMSC-024, ¶ 48 (quoting 7 LaFave, *supra*, § 27.6(a) at 101 internal quotation marks and brackets omitted)).

{27} Although not always employing the term "harmless error," New Mexico courts historically evaluated claims of error by inquiring into how severely the defendant was affected thereby. In *State v. Coyle*, for example, this Court considered whether or not a trial error worked a "prejudice" against the defendant, concluding that the error was harmless because "[n]one of the evidence here in question could have influenced the jury." 39 N.M. 151, 155, 42 P.2d 770, 772 (1935); *see also State v. Pruett*, 22 N.M. 223, 235, 160 P. 362, 366 (1916) (A trial error was not harmless because improperly admitted testimony was "highly prejudicial" to the defendant.); *State v. Varos*, 69 N.M. 19, 23, 363 P.2d 629, 631 (1961) (improperly admitted testimony about a lie-detector test was reversible error because its "net effect . . . was to cast doubt upon the truth and veracity of the defendant in a manner not countenanced by the courts," thereby "taint[ing]" the jury's verdict.); *State v. Rowell*, 77 N.M. 124, 128, 419 P.2d 966, 969 (1966) (The prosecution's inquiry into the defendant's prior conviction "was fraught with such harm to defendant as to be irremediable." (internal quotation marks and citation omitted)).

{28} In the 1960s, "with the unprecedented expansion of federal constitutional protections into the criminal process, harmless error analysis was imported into the constitutional context." *Barr*, 2009-NMSC-024, ¶ 49 (citing 7 LaFave, *supra*, § 27.6(a) at 101). In *Fahy v. Connecticut*, the United States Supreme Court held that the erroneous admission of unconstitutionally obtained evidence required reversal, noting that the Supreme Court was "not concerned . . . with whether there was sufficient evidence on which the [defendant] could have been convicted" absent the erroneously admitted evidence, but rather whether there was a "reasonable possibility that the evidence complained of might have contributed to the conviction." 375 U.S. 85, 86-87 (1963). The Supreme Court refined this principle in *Chapman v. California*, holding that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt," 386 U.S. 18, 24 (1967), which tracked the prosecution's burden of proof for establishing guilt in the first instance. The Supreme Court made clear that constitutional errors meeting this standard would be found "so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Id.* at 18, 22. Within a few years, appellate courts in New Mexico were applying this emerging federal constitutional standard to their harmless error review.[3] *See,*

[3] Our Rules of Criminal Procedure also explicitly recognize the concept of harmless error and instruct courts that trial errors are not grounds for "granting a new trial or for setting aside a verdict, for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take any such action appears to the court inconsistent with substantial justice." Rule 5-113(A) NMRA; Rule 6-704(A) NMRA; Rule 7-704(A) NMRA; Rule 8-704(A) NMRA.

e.g., *State v. Jones*, 80 N.M. 753, 753-54, 461 P.2d 235, 235-36 (Ct. App. 1969) (State failed to show beyond a reasonable doubt that a prosecutor's comment to the jury about the defendants' failure to testify was harmless.); *State v. Spearman*, 84 N.M. 366, 369, 503 P.2d 649, 652 (Ct. App. 1972) (State did not meet its burden to show beyond a reasonable doubt that the trial court's failure to give a jury instruction was harmless.).

{29} In 1980, this Court departed significantly from the harmless error standard developed in *Fahy* and *Chapman*, and announced a new three-part test for reviewing courts to apply in their harmless error analysis:

> For an error by the trial court to be considered as harmless, there must be: (1) substantial evidence to support the conviction without reference to the improperly admitted evidence, (2) such a disproportionate volume of permissible evidence that, in comparison, the amount of improper evidence will appear so minuscule that it could not have contributed to the conviction, and (3) no substantial conflicting evidence to discredit the State's testimony.

State v. Moore, 94 N.M. 503, 504, 612 P. 2d 1314, 1315 (1980).

{30} In *Moore*, the defendant was convicted of criminal sexual penetration, among other crimes. *Id.* He appealed his convictions to the Court of Appeals on the ground that the trial court erred in permitting the prosecution to admit testimony of the victim concerning her mental state following the rape. *Id.* "The Court of Appeals reversed on the basis of possible prejudice from the admission into evidence of improper testimony." *Id.* On review, this Court agreed with the Court of Appeals' conclusion that the victim's testimony was improperly admitted. *Id.* The Court went on, however, to apply the three-part test quoted above to conclude that the erroneous admission of the victim's testimony was harmless. *Id.*

{31} *Moore* announced the three-part test without analysis or persuasive precedent. The two cases cited in support, *State v. Day*, 91 N.M. 570, 577 P.2d 878 (Ct. App. 1978), and *State v. Self*, 88 N.M. 37, 536 P.2d 1093 (Ct. App. 1975), neither adopted the three-part test nor provided a logical foundation for its use. Rather, *Day* held that an error is only harmless if the reviewing court concludes "that the evidence of guilt was so overwhelming that there is no reasonable probability that the misconduct contributed to the conviction." 91 N.M. at 573-74, 577 P.2d 878, 881-82.[4] *Self* cited two prior Court of Appeals opinions, neither of which anticipates the three-part test created by *Moore*. One of those opinions, *State v. Thurman*, explained that an error would be treated as harmless if there was "no reasonable possibility that evidence improperly admitted, and then stricken by the trial court, contributed to the conviction." 84 N.M. 5, 9, 498 P.2d 697, 701 (Ct. App. 1972) (citing *Schneble v. Florida*, 405 U.S. 427 (1972)). The other opinion, *State v. Lopez*, determined that a trial error was harmless because "'[t]he evidence, exclusive of the improperly admitted exhibits, points so

[4] This holding echoed the standard set forth in *Fahy*, 375 U.S. at 86-87, although modified from "reasonable possibility" to "reasonable probability" for reasons the Court of Appeals did not articulate, but perhaps owing to the non-constitutional nature of the error at issue. *See Barr*, 2009-NMSC-024, ¶ 53.

overwhelmingly[5] to the guilt of defendant of the crime of which he was convicted, that there is no reasonable possibility that the admission into evidence of these improperly received exhibits contributed to his conviction.'" 80 N.M. 599, 458 P.2d 851 (Ct. App. 1969) (quoting *State v. Gray*, 79 N.M. 424, 428, 444 P.2d 609, 613 (Ct. App. 1968)), *abrogated on other grounds by State v. Holly*, 2009-NMSC-004, 145 N.M. 513, 201 P.3d 844.

{32} These opinions from the dozen or so years preceding *Moore* all provide slightly different phrasings of the same concept–that a trial error should be held harmless if there is "no reasonable possibility" (if the claimed error is constitutional in nature) or "no reasonable probability" (if the claimed error is evidentiary or procedural but does not implicate the defendant's constitutional rights) that the error contributed to the defendant's conviction, which might be determined in part by the overall strength of the evidence that the State marshaled against the defendant.

{33} No opinion of this Court prior to *Moore*, including the cases *Moore* relied upon that are discussed above, employed a three-part test for evaluating harmless error, and none appears to have made any reference to the third *Moore* factor–the presence or absence of "substantial conflicting evidence" from the defendant. 94 N.M. at 505, 612 P.2d at 1316. *Moore*, then, shifted the harmless error inquiry away from an assessment of an error's impact on the verdict, and toward a more mechanical approach that requires appellate courts to weigh an error against properly admitted evidence in favor of conviction as well as any contrary evidence discrediting the prosecution's case. *Id.*

{34} In addition to lacking a reasoned foundation in New Mexico law for its existence, the *Moore* test has never been fully adopted by this Court, casting further doubt on its legitimacy and utility. While numerous cases have relied on *Moore*, many other opinions have avoided discussion of the three-part test altogether and instead followed the well-established principle of federal harmless error review that whether a given error requires reversal depends upon the "reasonable possibility" or "reasonable probability" that the error contributed to the conviction. *See, e.g.*, *State v. Gonzales*, 2000-NMSC-028, ¶ 42, 129 N.M. 556, 11 P.3d 131 (applying the "reasonable probability" standard to a non-constitutional error); *Alvarez-Lopez*, 2004-NMSC-030, ¶ 25 (applying the "reasonable possibility" standard to a constitutional error); *State v. Zamarripa*, 2009-NMSC-001, ¶ 52, 145 N.M. 402, 199 P.3d 846 (applying both the "reasonable possibility" standard and the requirement that the error be proven harmless beyond a "reasonable doubt"). Other opinions, without specifically invoking the "reasonable possibility" or "reasonable probability" standard, have remained focused on the likelihood that the error contributed to the underlying verdict. *See, e.g.*, *State v. Paiz*, 2011-NMSC-008, ¶ 19, 149 N.M. 412, 249 P.3d 1235 (analyzing whether error in misjoinder resulted in "prejudice" through a "substantial and injurious effect or influence" on the verdict (internal quotation marks and

[5] The United States Supreme Court's decision in *Schneble* is the source of the principle that "overwhelming" evidence of guilt may help establish harmless error, although *Schneble* retained *Chapman's* requirement that harmlessness be "clear beyond a reasonable doubt." 405 U.S. at 430. *Chapman* itself expressed hesitation at the "emphasis, and perhaps overemphasis" of "overwhelming evidence" in harmless error review. 386 U.S. at 23.

citation omitted)); *Fuson v. State*, 105 N.M. 632, 634, 735 P.2d 1138, 1140 (1987) (determining that impairment of a petitioner's right to a peremptory challenge "prejudice[d]" the petitioner, requiring a new trial).

{35} The present appeal is not this Court's first effort to address *Moore's* divergence from established standards of harmless error review. In *Barr*, we examined how New Mexico courts had up to that point applied the *Moore* test, noting that the test had in some cases replaced the "reasonable possibility" (or "reasonable probability") standard in determining whether an error is harmless. *Barr*, 2009-NMSC-024, ¶ 52; *see also State v. Williams*, 117 N.M. 551, 562, 874 P.2d 12, 23 (1994) (Montgomery, C.J., specially concurring) (suggesting that *Moore* provides a measure of "harmless error" that is different from the "reasonable possibility" standard).

{36} In *Barr*, the defendant was tried for the murder of a former roommate. Another former roommate testified on behalf of the State, and defense counsel attempted to impeach that witness by citing inconsistencies between his in-court testimony and a videotaped statement that he had made to police. 2009-NMSC-024, ¶ 17. The State then introduced, and the district court admitted, the videotaped statement, in which the witness detailed the defendant's killing of the victim and reflected on the defendant's bad character. *Id.* ¶¶ 13-16. After being convicted, the defendant appealed on the basis that the admission of the videotaped statement was improper. *Id.* ¶ 22. The State responded that even if the admission of the statement was error, that error was harmless. *Id.* ¶ 46. We agreed that the error was harmless, and went on to clarify the standard that appellate courts must apply in making such determinations. We "re-fortif[ied] the boundary between non-constitutional and constitutional error for the purpose of harmless error analysis," *id.* ¶ 53, explaining that "it is appropriate to review non-constitutional error with a lower standard than that reserved for our most closely held rights," *id.* ¶ 51, and therefore reviewing courts "should only conclude that [a constitutional] error is harmless when there is no reasonable *possibility* it affected the verdict." *Id.* ¶ 53. By comparison, a non-constitutional error is harmless "when there is no reasonable *probability* the error affected the verdict." *Id.* ¶ 53. Recognizing the federal constitutional underpinnings for such a distinction, *id.* ¶¶ 49-51, we observed that "the reasonable possibility standard continues to resemble the reasonable doubt standard while the reasonable probability standard requires a greater degree of likelihood that a particular error affected a verdict." *Id.* ¶ 54. We reaffirm that holding here.

{37} *Barr* then discussed the "long-standing three-part test" from *Moore*, which we noted "makes no mention of the 'reasonable possibility' standard." *Barr*, 2009-NMSC-024, ¶ 52. We proceeded to sanction the three *Moore* factors, not as a mandatory test as they had been utilized to date, but rather as a "useful framework" which would "provide . . . a reliable basis for determining whether an error is harmless." *Id.* ¶ 55. Since *Barr*, however, courts have continued to employ the *Moore* factors as an inflexible test when assessing the harmfulness of erroneously admitted evidence. *See, e.g.*, *State v. Wilson*, 2011-NMSC-001, ¶¶ 40-42, 149 N.M. 273, 248 P.3d 315; *State v. Tom*, 2010-NMCA-062, ¶ 20, 148 N.M. 348, 236 P.3d 660. Because this Court has a responsibility to "correct a judicial misinterpretation of our caselaw that may otherwise remain on the books as an erroneous precedent," *Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶ 41, 150 N.M. 398, 259 P.3d 803, we overrule *Moore* to the extent

that it mandated the three-part test as the proper analytical framework for reviewing harmless error. For the reasons discussed below, we also overrule that portion of *Barr* that recognized the legitimacy of *Moore*, even when its factors are used more flexibly, as well as all other cases to the extent that they applied *Moore* to resolve a claim of harmless error.[6]

{38} In sum, we no longer recognize the *Moore* three-part test or any of the factors thereof as accurate statements of law. To explain our renunciation of *Moore*, we examine the factors individually, beginning with the first factor: whether there is "substantial evidence to support the conviction without reference to the improperly admitted evidence." *Barr*, 2009-NMSC-024, ¶ 56. This factor, through its use of the phrase "substantial evidence," runs the risk of allowing the more deferential "sufficiency of the evidence" standard of appellate review to seep into a court's harmless error analysis. *See, e.g.*, *State v. Aragon*, 2010-NMSC-008, ¶ 36, 147 N.M. 474, 225 P.3d 1280 (focusing on the sufficiency of the evidence that supports a conviction to conclude an error was harmless); *Tom*, 2010-NMCA-062, ¶ 19 (relying on the "sufficiency of the evidence" standard when applying the first *Moore* factor).

{39} Where a defendant appeals from a conviction on the ground that it was not supported by sufficient evidence, the appellate

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[6] Our review has located the following cases where our appellate courts analyzed harmless error under the *Moore* test. Any other opinions that similarly applied the *Moore* test are also overruled to the extent they did the same: *State v. Wilson*, 2011-NMSC-001, ¶¶ 39-42, 149 N.M. 273, 248 P.3d 315; *State v. Branch*, 2010-NMSC-042, ¶¶ 15-17, 148 N.M. 601, 241 P.3d 602; *State v. Aragon*, 2010-NMSC-008, ¶¶ 35-36, 147 N.M. 474, 225 P.3d 1280; *State v. Marquez*, 2009-NMSC-055, ¶¶ 21-25, 147 N.M. 386, 223 P.3d 931; *State v. Macias*, 2009-NMSC-028, ¶¶ 39-44, 146 N.M. 378, 210 P.3d 804; *State v. McClaugherty*, 2003-NMSC-006, ¶¶ 32-34, 133 N.M. 459, 64 P.3d 486; *State v. Gonzales*, 2000-NMSC-028, ¶ 42, 129 N.M. 556, 11 P.3d 131; *State v. Duffy*, 1998-NMSC-014, ¶¶ 38-41, 126 N.M. 132, 967 P.2d 807; *State v. Ross*, 1996-NMSC-031, 122 N.M. 15, 27, 919 P.2d 1080, 1092; *State v. Williams*, 117 N.M. 551, 559, 874 P.2d 12, 20 (1994); *State v. Compton*, 104 N.M. 683, 687, 726 P.2d 837, 841 (1986); *Sanchez v. State*, 103 N.M. 25, 27-28, 702 P.2d 345, 347-48 (1985); *State v. Skinner*, 2011-NMCA-070, ¶¶ 22-26, 150 N.M. 26, 256 P.3d 969; *State v. Tom*, 2010-NMCA-062, ¶¶ 17-20, 148 N.M. 348, 236 P.3d 660; *State v. McClennen*, 2008-NMCA-130, ¶¶ 13-15, 144 N.M. 878, 192 P.3d 1255; *State v. Morales*, 2002-NMCA-052, ¶¶ 24-25, 132 N.M. 146, 45 P.3d 406; *State v. Barragan*, 2001-NMCA-086, ¶¶ 19-20, 131 N.M. 281, 34 P.3d 1157; *State v. Glasgow*, 2000-NMCA-076, ¶ 20, 129 N.M. 480, 10 P.3d 159; *State v. Gutierrez*, 1998-NMCA-172, ¶¶ 11, 13-14, 126 N.M. 366, 969 P.2d 970; *State v. Elinski*, 1997-NMCA-117, ¶¶ 25-27, 124 N.M. 261, 948 P.2d 1209; *State v. Tave*, 1996-NMCA-056, ¶¶ 17-18, 122 N.M. 29, 919 P.2d 1094; *State v. Aragon*, 116 N.M. 291, 295-96, 861 P.2d 972, 976-77 (Ct. App. 1993); *State v. Sansom*, 112 N.M. 679, 683, 818 P.2d 880, 884 (Ct. App. 1991); *State v. Pacheco*, 110 N.M. 599, 603, 798 P.2d 200, 204 (Ct. App. 1990); *State v. Lara*, 109 N.M. 294, 298, 784 P.2d 1037, 1041 (Ct. App. 1989); *State v. Roybal*, 107 N.M. 309, 312-13, 756 P.2d 1204, 1207-08 (Ct. App. 1988); *State v. Gonzales*, 105 N.M. 238, 242, 731 P.2d 381, 385 (Ct. App. 1986); *State v. Dobbs*, 100 N.M. 60, 68, 665 P.2d 1151, 1159 (Ct. App. 1983).

court must determine "whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Alvarez-Lopez*, 2004-NMSC-030, ¶ 30 (internal quotation marks and citation omitted). In conducting such a review, the court "indulg[es] all reasonable inferences and resolv[es] all conflicts in the evidence in favor of the verdict." *State v. Duran*, 2006-NMSC-035, ¶ 5, 140 N.M. 94, 140 P.3d 515 (internal quotation marks and citation omitted). By contrast, "[t]he jury verdict should not automatically be afforded deference when a constitutional error has infected the trial," and so in harmless error review the verdict is entitled to deference "*only* when the State has established beyond a reasonable doubt that the jury verdict was not tainted by the constitutional error." *Alvarez-Lopez*, 2004-NMSC-030, ¶ 30.

{40} The second *Moore* factor directs courts to consider whether the prosecution presented "such a disproportionate volume of permissible evidence that, in comparison, the amount of improper evidence will appear so minuscule that it could not have contributed to the conviction." *Barr*, 2009-NMSC-024, ¶ 52 (quoting *Moore*, 94 N.M. at 504, 612 P.2d at 1315). The first two factors are closely linked and invite the same type of potential misuse: that an error may be deemed harmless simply because of the sheer volume of other evidence supporting conviction. There are "some circumstances where . . . the evidence of a defendant's guilt is sufficient even in the absence of the trial court's error," that still require the reviewing court "to reverse the conviction if the jury's verdict appears to have been tainted by error." *Macias*, 2009-NMSC-028, ¶ 38; *see also State v. Johnson*, 2004-NMSC-029, ¶ 11, 136 N.M. 348, 98 P.3d 998 ("[C]onstitutional error must not be deemed harmless solely based on overwhelming evidence of the defendant's guilt."). There are several reasons why it is improper for "overwhelming evidence" of a defendant's guilt to serve as the main determinant of whether an error was harmless. First, such an approach moves the inquiry away from its appropriate "central focus," which is "whether there is a reasonable possibility" or probability, depending on whether the error offends the defendant's constitutional rights, that "the erroneous evidence might have affected the jury's verdict." *Id.* In addition, excessive reliance on "overwhelming evidence" of guilt also ignores the principle that "even if conviction *appears* inevitable, there is a point at which an error becomes too great to condone as a matter of constitutional integrity and prosecutorial deterrence." *Alvarez-Lopez*, 2004-NMSC-030, ¶ 31 (internal quotation marks and citation omitted); *see also Moore*, 94 N.M. at 505, 612 P.2d at 1316 (Sosa, C.J., dissenting) ("Though evidence of guilt was great in this case, I believe that prosecutors should nonetheless conform to legal standards in obtaining convictions. . . . Convictions should not be obtained at any cost, but should be obtained in accordance with the rules of evidence."). In addition, when an appellate court gives too much consideration to "overwhelming evidence," it risks simply weighing the evidence in favor of and against guilt, which "would usurp the role of the jury." *State v. Stephen F.*, 2008-NMSC-037, ¶ 41, 144 N.M. 360, 188 P.3d 84; *see also Macias*, 2009-NMSC-028, ¶ 38 ("[I]t is not the role of the appellate court to re-weigh the evidence to decide a defendant's guilt or innocence.").

{41} The third *Moore* factor queries whether there is "substantial conflicting evidence to discredit the State's testimony." *Barr*, 2009-NMSC-024, ¶ 56. In addition to the same potential for confusion posed by the

term "substantial" evidence, discussed above, the third factor runs the risk of inappropriately shifting the burden of proof from the state to the defendant. *See, e.g.*, *State v. Ross*, 122 N.M. 15, 27, 919 P.2d 1080, 1092 (1996) (holding error to be harmless in part because defendant "failed to offer substantial conflicting evidence to discredit the State's testimony" (internal quotation marks and citation omitted)); *State v. McClennen*, 2008-NMCA-130, ¶ 15, 144 N.M. 878, 192 P.3d 1255 (holding error to be harmless in part because the defendant did not testify and "[t]hus, there is not substantial evidence in the record to discredit the State's evidence"). The burden of proof in the underlying criminal proceeding will always rest with the State. *See* UJI 14-5060 NMRA ("The burden is always on the state to prove guilt beyond a reasonable doubt."); *see also Moeller v. Weber*, 689 N.W.2d 1, 16 (S.D. 2004) (the defense "cannot be required to present any evidence whatever."). Similarly, once a constitutional error has been established it is the State's burden to demonstrate that the error is harmless. *See Gutierrez*, 2007-NMSC-033, ¶ 18. Because the third *Moore* factor appears to reduce that burden, it cannot be a proper component of our harmless error analysis. 94 N.M. at 504, 612 P.2d at 1315.

{42} Considering the *Moore* test as a whole, perhaps most significant and most problematic is what it omits: the central inquiry of whether an error was likely to have affected the jury's verdict. By limiting their harmless error review to the weight or volume of evidence in favor of guilt, courts avoid inquiring into the nature and likely impact of the very error at issue. *See United States v. Coughlin*, 821 F. Supp. 2d 8, 2011 WL 5301602 at *5 (D.D.C. 2011) ("The inquiry is 'whether the error itself had substantial influence." (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946))). In sum, even if applied more flexibly as a "useful framework" rather than as a rigid test, *Barr*, 2009-NMSC-024, ¶ 55, the *Moore* factors misstate the law and distort the proper focus of harmless error review from "whether the verdict was impacted by the error" to "whether, in spite of the error, the right result was reached." *Barr*, 2009-NMSC-024, ¶ 57.

{43} We now turn to what relevant considerations reviewing courts may use in place of the *Moore* factors when assessing the reasonable possibility (or reasonable probability) that impermissible evidence contributed to a defendant's conviction. To be sure, there are "no scientific answers to the ultimate question of whether the trier of fact was influenced by an error," as the reviewing court cannot conclusively determine "what went on in the mind of another or of twelve others." Roger J. Traynor, *The Riddle of Harmless Error* 23 (Ohio State Univ. Press 1970). But in reaching a judgment as to the likely effect of the error, courts should evaluate all of the circumstances surrounding the error. This requires an examination of the error itself, which depending upon the facts of the particular case could include an examination of the source of the error and the emphasis placed upon the error. Of course, evidence of a defendant's guilt separate from the error may often be relevant, even necessary, for a court to consider, since it will provide context for understanding how the error arose and what role it may have played in the trial proceedings; but such evidence, as discussed above, can never be the singular focus of the harmless error analysis as it was under *Moore*. As we have previously explained, when reviewing an error's role in the trial, courts may, depending upon the circumstances of the cases before them, examine "the importance of the [erroneously admitted evidence] in the prosecution's case," as well as "whether the [error] was

cumulative" or instead introduced new facts. *Johnson*, 2004-NMSC-029, ¶ 11 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). These considerations, we are careful to note, are not a substitute "test" provided in place of *Moore*; for instance, "improperly admitted evidence that is cumulative[7] is not *ipso facto* harmless beyond a reasonable doubt." *Johnson*, 2004-NMSC-029, ¶ 37.

{44} Reviewing courts must keep in mind that harmless error review necessarily requires a case-by-case analysis. *See Sullivan v. Louisiana*, 508 U.S.275, 279 (1993) ("The inquiry . . . [is] whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error."); *see also Macias*, 2009-NMSC-028, ¶ 37 ("[H]armless error analysis requires an appellate court to review the effect of an error in the unique context of the specific evidence presented at a given trial."). When assessing two cases that are factually analogous, with similar errors, the reviewing court thus may find the impact of the error harmful in one case and harmless in the other. In addition, because an error may be prejudicial with respect to one conviction, but harmless with respect to another, courts must separately assess the effect the error may have had on each of the defendant's convictions. *See Johnson*, 2004-NMSC-029, ¶ 31.

C. Admission of the Romeros' Convictions Was Not Harmless

{45} Having clarified how courts are to analyze harmless error, we return to a consideration of whether the erroneous admission of the Romeros' convictions at Defendant's trial was harmless. As we have discussed, the district court effectively admitted evidence of the convictions in violation of Defendant's right of confrontation under the Sixth Amendment. The error, therefore, was a constitutional error, which is harmless only if we conclude that there is no reasonable possibility the error contributed to the jury's decision to convict Defendant. *See Barr*, 2009-NMSC-024, ¶ 53; *see also Zamarripa*, 2009-NMSC-001, ¶ 52 ("When a statement is admitted in violation of the Confrontation Clause, we next inquire into whether the error was harmless," and "[t]o preclude reversal, the error must be harmless beyond a reasonable doubt.").

{46} Here, the State fails to meet its burden to show that there was no reasonable possibility that admission of the Romeros' convictions affected the jury's verdict. First, we note that the State introduced considerable evidence in support of Defendant's conviction for first-degree murder, kidnapping, and the conspiracy charges, although most of the evidence directly linking Defendant to those crimes came from a single witness, Michelle Martinez. According to her testimony, Defendant conferred with Ivan Romero about "what to do" with Victim, and later initiated a similar discussion with Elias Romero, Jaime Romero, and Martinez herself, after telling the others that he had Victim tied up at Richard Anaya's house. During that later discussion at Elias Romero's house, Defendant warned the others against letting Victim go free. Defendant traveled with Martinez and Luis Trujillo to Anaya's house where Victim was being held, and once there assisted Trujillo and Lawrence Gallegos in moving Victim after he was injected with heroin. Defendant helped carry the then-unconscious Victim to

[7] We explained in *Johnson* that "[c]orroborative evidence tends to corroborate or to confirm, whereas cumulative evidence merely augments or tends to establish a point *already proved* by other evidence." 2004-NMSC-029, ¶ 39 (internal quotation marks and citation omitted).

his own car, drove to the church parking lot where Victim's car would be left, discussed with Gallegos the plan to burn Victim's car with Victim inside, and proceeded to enact that plan by using a cherry bomb to set Victim's car ablaze.

{47} Martinez's testimony strongly implicated Defendant in the kidnapping and murder of Victim, as well as in the conspiracy to commit those acts. Martinez, however, was herself an active co-conspirator in the crimes committed against Victim, and therefore was subject to extensive cross-examination on her credibility and motives. In response to defense counsel's questioning, Martinez testified that she initially told Detective Wentz that Defendant had injected Victim with heroin, later changed her story to indicate that Elias Romero had done so, and only after four interviews with investigators admitted her own involvement in Victim's killing. Martinez admitted lying about other material facts, including the whereabouts of the syringe used to inject Victim with heroin. Defense counsel further attempted to impeach Martinez's credibility by asking her if she "cut a deal with the State" in exchange for her testimony, and by getting Martinez to acknowledge that she faced a sentence of 108 years for various charges, including the murder of Victim, but as a result of her plea agreement was sentenced to a maximum of only fifteen years. In addition, defense counsel elicited testimony from Martinez that she faced additional charges for unrelated criminal acts, including forgery, larceny and credit card fraud.

{48} In contrast to Martinez, whom defense counsel characterized in his closing argument as telling "lie, after lie, after lie," as being a long-time resident of the "drug world," and as being driven by a desire to reduce her own sentence by cooperating with the prosecution, Jaime Romero and Ivan Romero could not be questioned about their credibility or motives because they did not testify. Martinez's plea deal, criminal history, and prior false statements to law enforcement all could have provided the jury with legitimate reasons to doubt her testimony. *See State v. Martinez*, 1996-NMCA-109, ¶ 17, 122 N.M. 476, 927 P.2d 31 ("A jury, when judging a witness's credibility, should be able to take into consideration whether a witness hoped to curry favor by cooperating with the prosecution." (emphasis omitted)). In this light, the Romeros' convictions provided a potentially important and unimpeachable piece of evidence that a criminal conspiracy to kill Victim had occurred, and that such conspiracy included two men who were linked with Defendant through the testimony of Martinez and several other witnesses.

{49} Although the error here–the district court's instruction to the jurors that they "must accept as true" the fact that "Jaime and Ivan Romero had been convicted of conspiracy to commit second-degree murder"–was only uttered once, it cannot be characterized as a stray remark. Trial testimony associated Ivan Romero with Defendant in myriad ways. He sold drugs to Victim, a close friend of Defendant; was reported to have disliked Victim; approached Defendant and Victim in the sports bar parking lot and attacked Victim in the evening before Victim's death; and spoke with Defendant about "what to do" with Victim. In addition, on the night of Victim's death several phone calls were made between Ivan Romero's cell phone and Anaya's home phone, a fact that the prosecutor referenced in his closing argument. Ivan Romero also was explicitly identified as having been "involved" in Victim's death. Perhaps most vividly, Defendant invoked Ivan Romero as the reason why Victim was being injected with an apparently lethal dose of heroin when Defendant told Victim that "he shouldn't have

fucked with Diablo," a nickname for Ivan Romero.

{50} Much less trial evidence connected Jaime Romero to Defendant, although Martinez testified that Jaime Romero told Defendant and others that his (Jaime Romero's) "soldiers" could "take care of" Victim, and in his closing argument the prosecutor suggested that Defendant had entered into a conspiracy with Jaime Romero. The fact that the Romeros were not only charged but convicted of conspiracy to murder Victim strengthened the State's case that a conspiracy existed and that Defendant was a part of that conspiracy. *See Urioste*, 94 N.M. at 768-69, 617 P.2d at 157-58 (quoting the State's argument that a co-defendant's conviction for conspiracy was relevant to prove that a conspiracy existed and that the defendant was part of the conspiracy).

{51} Here, the Romeros' convictions were brought to the jury's attention by the district court rather than by the prosecutor or witness testimony. No curative instruction could be given, and the improperly admitted evidence bore the imprimatur of judicial authority. *See generally State v. Caputo*, 94 N.M. 190, 192, 608 P.2d 166, 168 (1980) ("[B]ecause of the judge's position and the respect and confidence reposed in him (or her) and in his learning and assumed impartiality, a jury is likely to attach undue weight to any participation by the judge in the conduct of the trial."). Although the district court's instruction to the jury was somewhat contradictory and reflected its attempt to reach a compromise between the State's and Defendant's positions regarding admission of the convictions, the district court invited the jury to utilize the convictions to bolster the State's case if they chose to do so.

{52} In addition, the district court's statement about the Romeros' convictions was the last piece of information that the jury received before formal instructions and closing arguments, magnifying the risk that the error would factor into the jury's assessment of Defendant's guilt. *See generally State v. Sosa*, 2009-NMSC-056, ¶ 24, 147 N.M. 351, 223 P.3d 348 (discussing questionable comments made during closing arguments and warning of the increased potential for prejudice due to the proximity to the end of trial); *Caputo*, 94 N.M. at 192, 608 P.2d at 168 ("[T]he information elicited [by the trial court] was the last evidence of the trial heard by the jury and its significance in all probability was pondered during the jury's deliberations.").

{53} Finally, although Jaime Romero and Ivan Romero were convicted only of conspiracy to commit murder, while Defendant was convicted of the additional crimes of first-degree murder and kidnapping, there is at least a reasonable possibility that admission of the Romeros' convictions affected the verdict in its entirety. The dissent is correct that first-degree murder and kidnapping are separate offenses from conspiracy–and therefore require proof of different elements for conviction. The evidence concerning the conspiracy and the substantive crimes, however, was significantly intertwined. The jury heard testimony about the altercation between Ivan Romero and Victim that apparently set the entire criminal venture in motion, Defendant's statement implying that Victim would die because he had crossed Ivan Romero, and suggestions that both Ivan Romero and Jaime Romero made to Defendant about "what to do" with Victim. Any possible ambiguity about what Ivan Romero or Jaime Romero may have meant when they discussed "what to do" with Victim would have been dispelled by Martinez's testimony that Elias Romero then

told her "to go and do it," which as she elaborated meant to "inject [Victim] and make it look like he overdosed" in order to kill him. The jury also heard testimony that while Victim was tied up at Anaya's house, someone (whom the prosecutor implied, and the jury certainly could have inferred, was Defendant) placed multiple calls from Anaya's home phone to Ivan Romero's cell phone. According to Martinez, after setting Victim's car on fire Defendant went to Ivan Romero's home and watched smoke rising from the burning car. Defendant's main concern, after watching Victim's car burn, was that he had "disrespected Ivan by taking [Victim] to the bar in the first place."

{54} All of the substantive crimes charged against Defendant were based on an accessory theory of liability. A defendant may be convicted of a crime as an accessory if that defendant "procures, counsels, aids or abets in its commission and although he did not directly commit the crime and although the principal who directly committed such crime has not been prosecuted or convicted." NMSA 1978, § 30-1-13 (1972); *see also State v. Carrasco*, 1997-NMSC-047, ¶ 6, 124 N.M. 64, 946 P.2d 1075 ("A person who aids or abets in the commission of a crime is equally culpable as the principal."). Here, the prosecutor emphasized this point in his closing argument, reminding the jury that "the law says that if you help, encourage or cause a crime to be committed, you can be just as guilty as the one who did the crime. Just as guilty. Why? I think it's obvious. Because if it weren't for those acts of encouragement, of help, of assistance some of those crimes wouldn't even be committed." The district court then gave the jury the following instruction regarding accessory liability:

> The defendant may be found guilty of a crime even though he himself did not do the acts constituting the crime, if the state proves to your satisfaction beyond a reasonable doubt that:
>
> 1. The defendant intended that the crime be committed;
> 2. The crime was committed;
> 3. The accused helped, encouraged or caused the crime to be committed.

Regarding conspiracy, the district court instructed the jury that to find Defendant guilty of the conspiracy crimes, the State must prove beyond a reasonable doubt that "[t]he defendant and another person by words or acts agreed to commit [the specified crime]," and that "[t]he defendant and the other person intended to commit [the specified crime]."

{55} Accessory liability and conspiracy "are distinct and separate concepts," *State v. Baca*, 1997-NMSC-059, ¶ 46, 124 N.M. 333, 950 P.2d 776 (citation omitted), with the "gist" of conspiracy being "an agreement between two or more persons to commit a felony." *Gallegos*, 2011-NMSC-027, ¶ 25 (quoting *State v. Deaton*, 74 N.M. 87, 89, 390 P.2d 966, 967 (1964)). It is apparent, however, that much of Martinez's trial testimony could be used to support both the conspiracy and the substantive charges against Defendant. For example, Martinez's statement that Ivan Romero and Defendant discussed "what to do" with Victim could provide evidence both that Defendant "helped" or "encouraged" the kidnapping and murder of Victim (accessory liability), as well as that Defendant "by words or acts agreed to commit" and "intended to commit" those crimes (conspiracy liability). The prosecutor acknowledged this substantial evidentiary overlap during his closing argument, asking the jury to apply the "same analysis" from the substantive crimes to the parallel conspiracy

charges and even noting that the conspiracy charges involve the "same elements" as their substantive counterparts. Under these circumstances, it would be unreasonable to simply assume that the jurors separated the concepts of conspiracy and accessory liability, and considered the Romeros' convictions when deliberating on the conspiracy charges but not when deliberating on the charges of carrying out the object of that same conspiracy.

{56} In the dissent's view, Defendant's convictions for first-degree murder and kidnapping should be affirmed because "direct" evidence in the form of Martinez's testimony "convinced the jury of Defendant's guilt, wholly apart from the misbegotten evidence of the conspiracy pleas of others." But the fact that other evidence apart from the error supports conviction, even if that evidence is overwhelming, cannot be the determinant of whether the error is harmless. *See Johnson*, 2004-NMSC-029, ¶ 11 ("[C]onstitutional error must not be deemed harmless solely based on overwhelming evidence of the defendant's guilt."). Furthermore, the jury here had at least some serious doubts about Martinez's credibility, because it acquitted Defendant of the aggravated arson and conspiracy to commit aggravated arson charges, which like the first-degree murder and kidnapping charges (and their conspiracy counterparts) were supported almost exclusively by Martinez's testimony.

{57} Evaluating harmless error, as our discussion indicates, can be a complex and difficult process. In the final analysis, determining whether an error was harmless requires reviewing the error itself and its role in the trial proceedings, and in light of those facts, making an educated inference about how that error was received by the jury. This process comes down to a judgment call based on experience and analysis, and as with many human judgments, reasonable minds may often differ. Our review and consideration of the evidence in this case persuades us that there is a reasonable possibility that admitting the Romeros' convictions contributed to Defendant's convictions. The district court's error, therefore, was not harmless.

III. CONCLUSION

{58} We vacate Defendant's convictions and remand the case to the district court for proceedings consistent with this Opinion.

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

PATRICIO M. SERNA, Justice

WE CONCUR:

CHARLES W. DANIELS, Chief Justice

PETRA JIMENEZ MAES, Justice

EDWARD L. CHÁVEZ, Justice

RICHARD C. BOSSON, Justice (concurring in part and dissenting in part)

BOSSON, Justice (concurring in part and dissenting in part).

{60} I concur in the majority's analysis of the trial court's error. The majority's revitalized analysis of harmless error is commendable, leading hopefully, to a clearer, more consistent application of the relevant standards for deciding that important question. It is the result in this particular case, however, with which I cannot agree. More specifically, I am not persuaded to reverse Defendant's convictions for first-degree murder and kidnapping. I do agree that we must reverse the convictions for conspiracy.

{61} It is relatively easy to conclude that the conspiracy offenses cannot stand. If A is accused of conspiring with B and C, and the jury hears evidence that the latter two have already been found guilty of that same conspiracy, well then, the prosecution is more than half way home without even firing a shot. Common sense and common experience teach that the state cannot carry its burden on the question of harmless error. No one could conclude that there is no reasonable *possibility* of any effect on the jury from such erroneous evidence with respect to the convictions for conspiracy.

{62} I cannot reach the same conclusion, however, regarding Defendant's convictions for first-degree murder and kidnapping. Defendant was convicted of these crimes, either as a principal or an accessory, based upon direct, eyewitness evidence demonstrating his presence at and active participation in most of the horrifying events of that evening, including murder and kidnapping. This eyewitness testimony was, I concede, subjected to forceful cross-examination and impeachment on a variety of grounds. But in my mind that eyewitness convinced the jury of Defendant's guilt, wholly apart from the misbegotten evidence of the conspiracy pleas of others. I cannot join in a conclusion that the jury may have reached a decision based not upon direct evidence of guilt, but upon evidence that someone else was guilty of a different, albeit related, crime.

{63} With respect, therefore, I would affirm the convictions for murder and kidnapping while I join in reversing the convictions for conspiracy.

RICHARD C. BOSSON, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMSC-009

Filing Date: March 22, 2012

Docket No. 32,776

RUDY SAIS,

Appellant-Respondent,

v.

NEW MEXICO DEPARTMENT OF CORRECTIONS,

Appellee-Petitioner.

New Mexico Corrections Department
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for Petitioner

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Albuquerque, NM

for Respondent

OPINION

BOSSON, Justice.

{1} This Court has previously established the principle that when an employer disciplines two public employees, arrested or convicted of driving while intoxicated (DWI), in a significantly different manner yet based on substantially similar conduct, the employer owes a legal duty to explain that difference satisfactorily with evidence in the record. If not, the court will reverse the action taken as arbitrary and capricious. *See In re Termination of Kibbe*, 2000-NMSC-006, ¶¶ 14-19, 128 N.M. 629, 996 P.2d 419. The present case offers this Court an additional opportunity to apply and amplify the principles we articulated over twelve years ago in *Kibbe*. In doing so, we conclude that the employer here, unlike *Kibbe*, did place substantial evidence in the record to justify the action taken and to explain any alleged differences in the treatment of other employees. Accordingly, we reverse the decision of the district court and uphold the State Personnel Board.

BACKGROUND

{2} In June 2005, the New Mexico Department of Corrections (DOC) adopted the Employee DWI Policy (the Policy). The Policy notes that "New Mexico continues to suffer from a relatively high rate of DWI and . . . [t]he Department incarcerates in its prisons and supervises on probation or parole, a large number of offenders who have been convicted of DWI." Accordingly, the Policy requires "[a]ll employees who are charged with, arrested for, adjudicated guilty, or convicted of the criminal offense DWI" to submit a written report regarding the incident to the employee's supervisor within three working days "of such occurrence."

{3} In addition, the Policy imposes certain minimum sanctions based on the number of offenses a particular employee incurred. According to the Policy, a first offense requires at least a five-day suspension, while a second offense requires dismissal. Notably, the term "offense" is not explicitly defined. The sanctions section of the Policy, however, makes clear that "[d]iscipline for DWI will not necessarily be dependent upon a criminal conviction, a finding of guilt, or any other final adjudication by a court," but also states that "the disposition of any criminal or administrative charges may be considered in determining the appropriate discipline."

{4} DOC hired Rudy Sais (Respondent) in April 2006 as a Correctional Officer I. Respondent reviewed the Policy and signed a DWI acknowledgment form, noting that he received a copy of the Policy and he understood its requirements.

{5} On November 8, 2006, Respondent was arrested on suspicion of aggravated DWI. Pursuant to the Policy, Respondent reported

the arrest to his supervisor the next day. Respondent received a seven-day suspension as a result of the arrest. The criminal charges against Respondent were ultimately dismissed without an adjudication of guilt or innocence.

{6} On March 13, 2008, Respondent was again arrested on suspicion of DWI. Again, Respondent's arrest was reported to DOC and an investigation was conducted. After the investigation, Respondent was dismissed based on a second offense under the Policy. The criminal charges against Respondent were once again dismissed without a finding of guilt or innocence.

{7} Respondent appealed his termination to the State Personnel Board (the Personnel Board) and a hearing was held before an administrative law judge (ALJ). At the hearing, Respondent claimed that he was treated differently than other employees under the Policy. He submitted evidence that at least three other DOC employees had been arrested two or more times for DWI but were still employed by DOC.

{8} DOC responded with explanatory evidence for each of the individuals still employed. Elona Cruz, Human Resource Bureau Chief for DOC, testified that DOC did not count DWI offenses that occurred prior to the date the Policy began. DOC still employed Officer Taracina Morgan, who Respondent claimed had two prior DWI arrests, because she had only one arrest after the Policy was put in place.

{9} Elona Cruz also testified that DOC had no record of any arrests for the second individual, Officer Armando Rel. Respondent attempted to put this fact in doubt. He admitted into evidence a printout from the "Case Lookup" on www.nmcourts.gov which showed that Officer Rel had been charged with a fourth and later, oddly enough, a third DWI *after* the Policy was adopted. But, it was not clear from this report if these charges were the result of separate arrests or when any prior arrests occurred. The third DWI was charged on the same date as a plea hearing, suggesting that it was the result of a plea agreement that reduced the original charge from a fourth DWI to a third. In addition, Mike Sanchez testified that he had heard rumors, before he became Captain of Investigations for DOC, of multiple DWI arrests for Officer Rel. Nevertheless, Captain Sanchez explained that he does not commence investigations under the Policy until an employee self-reports, and apparently Rel made no such reports. Warden Robert Ulibarri testified, however, that one investigation was commenced based on an anonymous letter and he believed police officers have notified DOC after an arrest of a DOC employee.

{10} The third individual, Raymond De La Cruz, testified that he had been arrested twice for DWI after the Policy was in effect, once in 2006 and again in 2007, but was still employed by DOC. Instead of being terminated, Officer De La Cruz received a five-day suspension for his second offense. In response, Elona Cruz testified that when Officer De La Cruz was arrested for the second time, the Policy was under review and as a result he was not terminated. No other evidence, such as meeting minutes or internal memoranda, was offered in support of the statement by Elona Cruz. Ultimately, after review, the Policy was not changed and was fully enforced after that time. According to Elona Cruz, six or seven DOC employees had been terminated as a result of a second offense under the Policy.

{11} In addition to this explanatory evidence, DOC also offered evidence of Respondent's arrests. Regarding Respondent's first arrest, DOC entered into evidence a letter from his supervisor, Warden Ulibarri, detailing the circumstances surrounding his arrest, including the results of a failed breath test and the discipline imposed. To prove the circumstances of the second arrest, the full report of Sanchez, who was charged with investigating the incident for DOC, was admitted into evidence. The Sanchez report contained the official police reports of the two state police officers who were present during Respondent's arrest and a criminal complaint that indicated Respondent had again failed two breath tests with a blood-alcohol content more than twice the legal limit. The parties stipulated that both of these state police officers would testify that Respondent was arrested for suspicion of DWI. None of this evidence was impeached nor was its admission contested.

{12} After the hearing, the ALJ submitted an extensive recommended decision to the Personnel Board that supported Respondent's termination. The recommended findings of fact included DOC's discussions concerning the Policy at the time of Officer De La Cruz's second arrest, and concluded that Officer "De La Cruz is the only [DOC] employee who has not been dismissed after a second DWI arrest; all other offending employees have been disciplined strictly by policy." The Personnel Board adopted the ALJ's proposed findings of fact and conclusions of law in their entirety and upheld Respondent's termination.

{13} Respondent then appealed to the district court. In his statement of appellate issues, Respondent continued to argue that he was treated differently from others under the Policy. He also argued, for the first time, that the Policy itself was contrary to law because NMSA 1978, Section 28-2-4(A) (1997)[1] requires that termination of public employees be based upon conviction of a crime, not a mere arrest. The district court reversed the Personnel Board, finding that "[t]he termination of [Respondent] was arbitrary, capricious and contrary to law" because "he was not treated in a similar fashion to several other officers in similar circumstances." In addition, the district court's order stated that "[t]he hearing officer was required to hear 'explanatory evidence' in accord with the holding in . . . *Kibbe*, [2000-NMSC-006, ¶ 19], and failed to comply with this requirement." The district court did not rule on Respondent's statutory argument regarding Section 28-2-4(A). The order required Respondent to be reinstated to his former position with back pay and benefits.

{14} DOC then petitioned for certiorari to the Court of Appeals, which denied the petition. We granted certiorari in order to address the important policy issues implicated when DWI and public employment intersect, especially in light of this Court's precedent on the same subject. *See Kibbe*, 2000-NMSC-006, ¶ 19. For the following reasons, we reverse.

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[1] NMSA 1978, §§ 28-2-1 to -6 (1974, as amended through 2010) is known as the Criminal Offender Employment Act. Its purpose is to remove barriers for criminal offenders or ex-convicts to employment "in a lawful trade, occupation or profession . . . to make rehabilitation feasible." Section 28-2-2. Section 28-2-4 governs when a public employee may have such employment revoked for criminal activity, and only discusses certain circumstances involving convictions, not arrests.

DISCUSSION

Standard of Review

{15} "[W]e apply the same administrative standard of review as the district court sitting in its appellate capacity." *Archuleta v. Santa Fe Police Dep't ex rel. City of Santa Fe*, 2005-NMSC-006, ¶ 15, 137 N.M. 161, 108 P.3d 1019. Thus, we "review the [Personnel Board's] order to determine if it is arbitrary, capricious, or an abuse of discretion; not supported by substantial evidence in the record; or, otherwise not in accordance with law." *Id.* (internal quotation marks and citation omitted).

{16} Such a ruling "is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record." *Id.* ¶ 17 (internal quotation marks and citation omitted). Though we must perform a whole record review, "[w]e must be careful not to substitute our own judgment for that of the agency . . . ." *Id.* Rather, "we must consider all evidence bearing on the findings, favorable or unfavorable, to determine if there is substantial evidence to support the result." *Tom Growney Equip. Co. v. Jouett*, 2005-NMSC-015, ¶ 13, 137 N.M. 497, 113 P.3d 320 (internal quotation marks and citation omitted). "Where the testimony is conflicting, the issue on appeal is not whether there is evidence to support a contrary result, but rather whether the evidence supports the findings of the trier of fact." *Id.* (internal quotation marks and citation omitted).

Disparate Treatment

{17} A worker's termination may be arbitrary and capricious if one employee is treated differently compared with others who are similarly situated and no rational explanation is offered for the difference. *See Kibbe*, 2000-NMSC-006, ¶ 19. Respondent has argued throughout these proceedings, and persuaded the district court, that he was treated disparately and should be reinstated as a result.

{18} Both the district court and Respondent rely on this Court's previous opinion in *Kibbe* to support their position that Respondent was disparately treated. In *Kibbe*, a school teacher was arrested for driving under the influence and was then terminated from his employment. *Id.* ¶¶ 3-4. Nothing indicated that the school district had a policy regarding DWI arrests. *Id.* ¶¶ 2-10. Appearing as a witness for the school district, the school superintendent offered no evidence of any previous instances in which discipline had been imposed in a manner similar to Kibbe. To the contrary, the superintendent testified about another teacher in the same district who had pled guilty to DWI while she was employed by the district, not only as a teacher but also as a substitute bus driver. *Id.* ¶ 8. Unlike Kibbe, the prior teacher was not disciplined by the school board, *id.*, and the superintendent "testified that under no circumstances would he have recommended terminating the other . . . teacher for her behavior, even if it had occurred at the present time," *id.* ¶ 17. This Court concluded "that the drastic difference in the school board's treatment of Kibbe compared to another . . . teacher for substantially similar conduct with no explanatory evidence in the record renders Kibbe's termination arbitrary and capricious." *Id.* ¶ 19. *Kibbe* remains good law today, and we reaffirm its holding in this Opinion.

{19} Relying upon *Kibbe*, Respondent argues that the decision to terminate him was arbitrary and capricious because he was treated differently from Officers De La Cruz and Rel. According to Respondent, those officers had multiple DWI arrests while the

Policy was in place, yet were not terminated. Respondent's claim of disparate treatment failed to persuade the Personnel Board, and we conclude that the evidentiary record supports the Personnel Board's decision.

{20} Most tellingly, Respondent's argument focused on Officers De La Cruz and Rel and overlooked the fact that he was treated *in the same manner* as at least six other DOC employees who self-reported a second DWI arrest, all of whom were terminated. Rather than being treated differently from other employees, as was the situation in *Kibbe*, the record shows that Respondent was treated the same as all but one similarly-situated corrections officer. Based on this record, Respondent is the norm, not the exception, to the rule.

{21} If anything, Officer De La Cruz is the exception, not Respondent. It was Officer De La Cruz who was not terminated for a second DWI offense, while at least seven others including Respondent were terminated. As we stated in *Kibbe*, a "decision not to impose disciplinary action against an employee for certain conduct does not foreclose disciplinary action against a different employee in the future for similar conduct" as long as there is a "meaningful distinction" between the employees. *Kibbe*, 2000-NMSC-006, ¶ 17.

{22} Unlike the record in *Kibbe*, a review of this record shows a consistent pattern in the enforcement of the Policy. Generally, if a DOC employee gets arrested twice for DWI, that employee is terminated. Even if an exception had been made in Officer De La Cruz's case, one exception cannot preclude enforcement of the Policy against all others for the foreseeable future. *See Archuleta*, 2005-NMSC-006, ¶ 34 (A "'decision not to impose disciplinary action against an employee for certain conduct does not foreclose disciplinary action against a different employee in the future for similar conduct.'" (quoting *Kibbe*, 2000-NMSC-006, ¶ 17)). One exception cannot be allowed to swallow the rule.

{23} Far from a random exception, however, the record shows that DOC put forth a defensible, policy-based reason for allowing Officer De La Cruz to remain employed. The uncontroverted testimony of Elona Cruz established that, at the time of Officer De La Cruz's second DWI arrest, DOC was reviewing its policy to determine whether it was appropriate to terminate employees based on mere arrests and not convictions. Accordingly, it was within DOC's discretion to refrain from terminating an officer during a period when DOC was not yet convinced termination was appropriate. The fact that the Policy was not ultimately changed is of no consequence, for if it were, any review of a policy by any state agency would then require some change to be made to that policy. However, we stress that the defense against irregular applications of a policy on the basis that the policy is under review is limited in scope. For example, if an employee could show that an employer claimed that a policy was repeatedly "under review" to let certain employees keep their jobs despite policy violations while holding others accountable under the policy, that pattern would suggest an arbitrary application of the policy.

{24} Explanatory evidence is required under *Kibbe* to show a "meaningful distinction" between employees who are treated differently. 2000-NMSC-006, ¶¶ 17, 19. A whole record review shows that DOC offered such evidence. Contrary to the conclusion of the district court, the ALJ and the Personnel Board could have rationally concluded that Respondent's termination was appropriate based upon the record and that

Officer De La Cruz's situation did not require a different result. When the district court concluded that Respondent "was not treated in a similar fashion to several other officers in similar circumstances," the court was simply incorrect based upon the record before it.

{25} In addition, we do not find Respondent's comparison of himself to Officer Morgan apt. These two employees were not similarly situated, as Officer Morgan has only been arrested once for DWI during the Policy period. Accordingly, we do not find this to be an appropriate comparison to determine disparate treatment. *See Archuleta*, 2005-NMSC-006, ¶ 24 (noting that differences may mean employees are not similarly situated).

{26} Respondent's comparison to Officer Rel is equally misplaced. While court records show that Officer Rel may have had multiple DWI arrests during the period when the Policy was in effect, it is also uncontroverted that Officer Rel did not report those arrests to his superiors, and therefore those arrests do not appear in DOC's records. While Captain Sanchez admitted that he had heard rumors about Officer Rel's arrests, Respondent did not offer any evidence that this informal and perhaps unreliable notice sufficed to trigger an obligation to investigate. Because the evidence does not indicate that management had an obligation to investigate Officer Rel's alleged arrests, Respondent has failed to show that he and Officer Rel are similarly-situated employees. In theory, a failure to report, if proven, could itself justify discipline, but the present record does not allow us to speculate on other charges involving other employees.

{27} We recognize the problems inherent in a policy that rewards those who disregard its requirements, while punishing those who comply. Such a policy can easily be abused which could lead to arbitrary enforcement. DOC should be mindful of that potential for abuse in carrying out its obligation to review personnel policy for all employees. In this case, however, the merits of the Policy itself, as opposed to its application, were not challenged either before the Personnel Board or the district court, and therefore we decline to pass judgment on that issue. In the end, DOC had no record of Officer Rel's arrests, and thus Rel was not similarly situated to Respondent for purposes of a *Kibbe* analysis. *See Archuleta*, 2005-NMSC-006, ¶ 24.

NMSA 1978, § 28-2-4 (1997)

{28} Respondent argues that the Policy is unlawful based upon the New Mexico Criminal Offender Act, NMSA 1978, §§ 28-2-1 to -6 (1974, as amended through 1997). Respondent interprets that Act to limit when public employment can be terminated, based upon a criminal conviction and not a mere arrest. However, this argument was not made to the ALJ and a ruling was not invoked before the Personnel Board. As such, we decline to address it. *Selmeczki v. N.M. Dep't of Corr.*, 2006-NMCA-024, ¶ 23, 139 N.M. 122, 129 P.3d 158 (requiring a ruling from the ALJ "sitting as the trier of fact, or the Personnel Board as the ultimate decision maker," in order to preserve an issue for review on appeal).

CONCLUSION

{29} Accordingly, we reverse the district court and affirm the ruling of the Personnel Board.

{30} IT IS SO ORDERED.

RICHARD C. BOSSON, Justice

WE CONCUR:

CHARLES W. DANIELS, Chief Justice

PETRA JIMENEZ MAES, Justice

EDWARD L. CHÁVEZ, Justice

PATRICIO M. SERNA, Justice (specially concurring)

SERNA, Justice (specially concurring).

{31} I concur in this opinion because it is legally correct based on the record and the arguments advanced by the parties. I write separately only to express my discomfort in that my conscience tells me the result is unjust. In this case we have an employee with several DWI's that was not terminated because he failed to "self report" his DWI's. The Respondent, on the other hand, along with several other employees, followed the "self reporting" rule and were terminated. It seems unfair to me. Martin Luther King, Jr. said: "Our lives begin to end the day we become silent about things that matter." Justice Potter Stewart stated: "Fairness is what justice really is."

{32} It is the duty and responsibility of a Judge to adhere to the rule of law and apply it free of any personal belief, and therefore, I specially concur. However, I cannot remain silent about something that matters and seems unfair to me.

PATRICIO M. SERNA, Justice

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-040

Filing Date: March 5, 2012

Docket No. 30,263

AARON PEREZ,

Plaintiff-Appellant,

v.

THE CITY OF ALBUQUERQUE, N. SANDERS, T. NOVICKI, M. FISHER, and MAYOR MARTIN CHAVEZ,

Defendants-Appellees.

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City of Albuquerque
Robert D. Kidd, Jr., Acting City Attorney
Kathryn Levy, Deputy City Attorney
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for Appellees

OPINION

CASTILLO, Chief Judge.

{1} Following a domestic disturbance at his residence, Aaron Perez (Plaintiff) was arrested by three police officers (Officers) employed by the City of Albuquerque (the City). Plaintiff filed suit against the City and the Officers claiming that the Officers used excessive force while he was handcuffed and lying on the ground. A verdict was entered in favor of the Officers and the City. Plaintiff appeals the denial of his motion for directed verdict and motion for judgment notwithstanding the verdict. We affirm.

BACKGROUND

{2} Officers Sanders, Novicki, and Fisher were called to the Plaintiff's residence during the early morning hours of November 28, 2003, based on a report of a domestic disturbance. When Plaintiff became combative, the Officers tackled him to the floor inside the home. The latter part of the arrest was recorded on videotape by Plaintiff's wife, who was his girlfriend at the time. Plaintiff did not immediately complain of injuries, but two months later he sought treatment for a sore neck and back, dizziness, and a bruised ankle.

{3} Plaintiff filed suit against the Officers and the City, alleging assault and battery under the New Mexico Tort Claims Act and claiming use of excessive force in violation of the Fourth Amendment of the United States Constitution. Before trial, Plaintiff filed a motion for summary judgment that was denied by the district court. After evidence was presented at trial, Plaintiff filed a motion for a directed verdict; that, too, was denied by the district court.

{4} At trial, Plaintiff's position was that after he was handcuffed and had stopped resisting, Officer Fisher threatened him with foul language, saying, "I will break your fucking arm[,]" cocked a clenched fist in his face, and grabbed Plaintiff's shirt collar so forcefully as to jerk Plaintiff's head back and forth to the extent that, according to Plaintiff, his head hit the floor. Officer Fisher denied that Plaintiff's head hit the floor. When questioned initially, he could not articulate why he grabbed Plaintiff's collar in such a way after handcuffing him. Later, he stated the following:

> [D]ue to his combativeness when he rolled over, I perceived that he was about to kick me [which] was why I grabbed him by the shirt collar. He needed to understand that . . . we weren't going to put up with his behavior anymore[,] and he needed to stop what he was doing.

The other two Officers also stated that Plaintiff continued to be combative after being handcuffed, and the amount of force used to subdue him, in general, was necessary to counteract his resistance, get him under control, and prevent him from rolling over and possibly kicking the Officers. Jurors were shown the videotape of the latter portion of the arrest, and they heard testimony from the Officers as well as from Plaintiff and his wife. The videotape was played numerous times during trial, and each witness—all of whom were in the house at the time of Plaintiff's arrest—gave a different account of what was depicted on the videotape, sometimes offering conflicting interpretations of the images.

{5} After deliberation, the jury returned a verdict in favor of the Officers. Pursuant to Rule 1-050 NMRA, Plaintiff moved for judgment notwithstanding the verdict against Officer Fisher. This motion was denied by the district court. We observe that in the same motion, Plaintiff also requested a new trial against the other two officers, but there is no challenge to the denial of that portion of the motion.

DISCUSSION

{6} On appeal, Plaintiff makes two claims. First, he claims that the district court erred in submitting to the jury the question of whether Officer Fisher used reasonable force because there were no disputed facts and the question of reasonableness is one for the court to decide. We understand this to be a challenge to the denial of Plaintiff's motion for a directed verdict. In his second point, Plaintiff maintains that the district court erred in not granting his motion for judgment notwithstanding the verdict.

The District Court Did Not Err in Denying Plaintiff's Motions for Directed Verdict and for Judgment Notwithstanding the Verdict

{7} We review de novo the district court's decisions on the motions for directed verdict. *See McNeill v. Burlington Res. Oil & Gas* Co., 2008-NMSC-022, ¶ 36, 143 N.M. 740, 182 P.3d 121. "A directed verdict is a drastic measure that is generally disfavored inasmuch as it may interfere with the jury function and intrude on a litigant's right to a trial by jury." *Torres v. El Paso Elec. Co.*, 1999-NMSC-029, ¶ 26, 127 N.M. 729, 987 P.2d 386, *overruled on other grounds by Herrera v. Quality Pontiac*, 2003-NMSC-018, 134 N.M. 43, 73 P.3d 181. A district court should not grant a motion for directed verdict unless it is clear that "the facts and inferences are so strongly and overwhelmingly in favor of the moving party that the judge believes that reasonable people could not arrive at a contrary result." *Melnick v. State Farm Mut. Auto. Ins. Co.*, 106 N.M. 726, 729, 749 P.2d 1105, 1108 (1988).

{8} Plaintiff's argument is straightforward: once he was handcuffed, there was no need for the officers to use any more force, but the officers did use additional force, and the use of any additional force was unreasonable as a matter of law. To support his argument, Plaintiff relies on the videotape of the incident and his reading of the holding in *Scott v. Harris*, 550 U.S. 372 (2007). According to Plaintiff, *Scott* stands for the proposition that when there is a videotape of an incident, the court must view "the facts in the light depicted by the videotape"; thus, the videotape shows clear and uncontradicted proof of the use of additional force. Plaintiff concludes that because the videotape conclusively shows the use of additional force and because Officer Fisher gave no lawful justification for his use of force, there are no material disputed facts about the reasonableness of the officer's actions, and a directed verdict in his favor is proper. Plaintiff's reliance on *Scott* is misplaced.

{9} In *Scott*, the plaintiff motorist was injured during a high-speed chase with law enforcement and brought a 42 U.S.C. § 1983 (1996) action alleging use of excessive force resulting in an unreasonable seizure under the Fourth Amendment. *Scott*, 550 U.S. at 375-76. Deputy Scott filed a motion for summary judgment that was denied by the district court. *Id.* at 376. The United States Supreme Court reversed the denial of summary judgment based on the videotape that had captured the events in question and that "quite clearly contradict[ed] . . . the story told by" the

plaintiff. *Id.* at 378. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.* at 380. Plaintiff contends that there is only one interpretation of the videotape and that no reasonable factfinder could disagree that the Officers acted unreasonably after Plaintiff was handcuffed and had become completely compliant. The record shows otherwise.

{10} Unlike the videotape in *Scott*, the videotape in this case does not provide an incontrovertible version of the interaction between Plaintiff and the Officers. First, it is not a complete recording of the events in question. The encounter between Plaintiff and the Officers began before the camera started rolling and only the latter portion of the struggle was captured on videotape. As a result, the videotape itself cannot be considered determinative or a definitive account of the full circumstances of the events of that early morning. Further, the videotape was shown during trial and Plaintiff, his wife, and the Officers had differing interpretations of the events depicted on the videotape. Additionally, Plaintiff admitted that he was upset when the Officers showed up in response to the domestic disturbance call and that before the video camera was rolling, he was cracking his knuckles while addressing the Officers, that he told them, "You need a warrant" and "Don't come in my house," and that he told them that he would "do anything I have to do to defend myself." Plaintiff's wife described him as being "upset" at the time of the incident. Plaintiff also admitted to struggling with the Officers and "trying to maybe roll over" after he was handcuffed. While Officer Fisher denied snapping Plaintiff's head and causing it to hit the floor, Plaintiff could say only that he was "pretty sure" that his head "went on the floor." All three Officers testified that Plaintiff was combative throughout the arrest and that he was not fully compliant even after he was handcuffed. Reasonable jurors watching the videotape and hearing the testimony of all five witnesses could disagree over the constitutionality of the Officers' actions. Whether the actions of the Officers were unreasonable under the circumstances was a question for the jury to decide. Thus, the district court properly denied Plaintiff's motion for a directed verdict.

The District Court Did Not Err in Denying the Motion for Judgment Notwithstanding the Verdict

{11} "When a motion for judgment notwithstanding the verdict has been denied, the verdict of the jury will not be disturbed unless unsupported by substantial evidence." *Page & Wirtz Constr. Co. v. Solomon*, 110 N.M. 206, 209, 794 P.2d 349, 352 (1990). A motion for a judgment notwithstanding the verdict is an "objection to the sufficiency of the evidence to support the jury's verdict." *Martinez v. City of Grants*, 1996-NMSC-061, ¶ 14, 122 N.M. 507, 927 P.2d 1045. "In reviewing a sufficiency of the evidence claim, this Court views the evidence in a light most favorable to the prevailing party and disregard[s] any inferences and evidence to the contrary." *Littell v. Allstate Ins. Co.*, 2008-NMCA-012, ¶ 13, 143 N.M. 506, 177 P.3d 1080 (alteration in original) (internal quotation marks and citation omitted). We examine the record for such relevant evidence as a "reasonable mind would find adequate to support a conclusion." *Id.* (internal quotation marks and citation omitted).

{12} Plaintiff contends that the evidence shows that Officer Fisher used force on him when he was already handcuffed and under

control. We have reviewed the evidence presented to the jury, including the testimony of all three Officers and the various interpretations of the videotape. After viewing this evidence in a light most favorable to the prevailing party and disregarding any inferences and evidence to the contrary, we conclude that it was sufficient to support the jury's verdict. Thus, the district court acted properly in denying Plaintiff's motion for a judgment notwithstanding the verdict.

CONCLUSION

{13} For the foregoing reasons, the verdicts below are affirmed.

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

CELIA FOY CASTILLO, Chief Judge

WE CONCUR:

TIMOTHY L. GARCIA, Judge

J. MILES HANISEE, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMSC-010

Filing Date: March 5, 2012

Docket No. 32,594

WALTER F. SMITH, III,

Plaintiff-Appellant,

v.

WILL DURDEN, DENISE DURDEN, WILLIAM A. DEVRIES, AND MARION DEVRIES,

Defendants-Appellees.

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OPINION

SERNA, Justice.

{1} Plaintiff Walter F. Smith, III, a former priest of St. Francis Episcopal Church in Rio Rancho, New Mexico, brought this defamation action against Will Durden and William DeVries, St. Francis Vestry members, and Denise Durden and Marion DeVries, members of the parish (Defendants). The issue before the Court is whether New Mexico requires a showing of injury to one's reputation to establish liability for defamation. We hold that it does, as injury to reputation is the very essence of the tort of defamation. Evidence of humiliation and mental anguish, without evidence of actual injury to reputation, is insufficient to establish a cause of action for defamation. We accordingly reverse the Court of Appeals.

I. BACKGROUND

{2} Plaintiff initiated this defamation action in 2006 after the publication of a packet of documents which, among other things, alluded to alleged sexual misconduct involving Plaintiff and minor parishioners. Defendant Will Durden had originally compiled the packet for a presentation before the Standing Committee of the Diocese of the Rio Grande by certain vestry members (lay leaders of the parish) who desired the removal of Plaintiff from his position. The packet included documentation related to financial problems at St. Francis, an alleged lack of leadership shown by Plaintiff, and personal attacks against Plaintiff. One of the documents was an anonymous letter accusing Plaintiff of several acts of pedophilia. After the presentation before the Standing Committee, and at the recommendation of the Episcopal Bishop of the Diocese of the Rio Grande, Plaintiff disclosed a summary of the allegations to the congregation during a Sunday service.

{3} At some point after Plaintiff's disclosure to the congregation, one or more of Defendants offered to make copies of the packet for inquiring parishioners. Plaintiff subsequently filed this defamation claim. Over a year after the filing of the complaint, Defendants moved for summary judgment on the ground that Plaintiff failed to establish a cause of action for defamation because he was unable to demonstrate that he had suffered any actual injury to his reputation as a result of the publication of the material by its distribution. Plaintiff responded that falsely accusing a religious leader of pedophilia is always defamatory and that personal humiliation and mental anguish, as defined in the damages instruction for defamation claims (UJI 13-1010 NMRA), qualified as the requisite actual injury. The district court granted Defendants' motion, finding that Plaintiff was unable to demonstrate actual injury to his reputation because he was never suspended from his position, nor did he suffer any "adverse employment consequences" or other related losses from distribution of the anonymous letter. The district court also found that Plaintiff improperly looked to UJI 13-1010 as defining the requisite actual injury, without first establishing the prima facie case pursuant to UJI 13-1002 NMRA (1991) (amended 2008), which requires a showing of actual injury to reputation. *See* UJI 13-1002(B)(8).

{4} Plaintiff appealed the district court's grant of summary judgment in favor of Defendants, and the New Mexico Court of Appeals reversed the district court, holding that UJI 13-1002(B)(8), the subsection requiring a plaintiff to prove actual injury to reputation as one element of the prima facie case for defamation, is an inaccurate statement of law because evidence of mental anguish and

humiliation is sufficient to establish actual injury for liability purposes. *Smith v. Durden*, 2010-NMCA-097, ¶¶ 11-12, 15, 148 N.M. 679, 241 P.3d 1119. This appeal followed.

II. STANDARD OF REVIEW

{5} We apply a de novo standard of review to the district court's granting of Defendants' motion for summary judgment. *See City of Rio Rancho v. AMREP Sw. Inc.*, 2011-NMSC-037, ¶ 14, 150 N.M. 428, 260 P.3d 414. Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Rule 1-056 NMRA. We view the facts in the light most favorable to the party opposing the summary judgment and indulge all reasonable inferences in favor of a trial on the merits. *See Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280. The moving party "has the initial burden of establishing a prima facie case for summary judgment by presenting such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." *City of Rio Rancho*, 2011-NMSC-037, ¶ 14 (internal quotation marks and citation omitted). Once the moving party has made the prima facie case, "the burden shifts to the non-movant to demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Id.* (internal quotation marks and citation omitted). Such facts are those which, under the guiding substantive law, are "necessary to give rise to a claim." *Id.* (internal quotation marks and citation omitted).

III. DISCUSSION

{6} In order to gain insight into the jurisprudential development of defamation, we first briefly discuss the historical underpinnings of the tort. Defamation actions in England "developed according to no particular aim or plan." William L. Prosser, *Handbook of the Law of Torts* 737 (4th ed. 1971). Slander (oral communication) was historically proscribed in order to clear the slandered party's name and "protect the soul of the slanderer," while libel (written communication) was later "created primarily as a means of protecting government from the power of the printing press." David A. Anderson, *Reputation, Compensation and Proof*, 25 Wm. & Mary L. Rev. 747, 774 (1984); *see Afro-Am. Publ'g Co. v. Jaffe*, 366 F.2d 649, 659 (D.C. Cir. 1966) (en banc).

{7} In the early Middle Ages, "reputation was amply protected in England by the combined secular and spiritual authorities." Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 Colum. L. Rev. 546, 546-47 (1903). Slander was at one time handled by manorial courts where the slanderer was required to vindicate the defamed party in front of those who heard the slanderous remarks. *See Afro-Am. Publ'g Co.*, 366 F.2d at 659; Veeder, *supra*, at 549. Slander later fell within the jurisdiction of ecclesiastical courts—which viewed defamation as a sin punishable by penance. Prosser, *supra*, at 737. The ecclesiastical courts redressed slander by bringing the slanderer before clergymen to confess and apologize to the person defamed. *See Afro-Am. Publ'g Co.*, 366 F.2d at 659 n.26.

{8} By the sixteenth century, common law courts began accepting slander actions, but only when temporal damages (damages related to business or money) could be shown, as without these damages slander remained the province of the church. Prosser, *supra*, at 754. In the seventeenth century, the concept of libel also emerged in common law courts as a way of suppressing and criminally punishing

printed political attacks. *Id.* at 738; *see* Anderson, *supra*, at 774. Nonpolitical libel was also eventually recognized and made actionable in common law courts. *Id.* Unlike slander, libel was actionable without proving damages, which were presumed. *See Afro-Am. Publ'g Co.*, 366 F.2d at 659; Prosser, *supra*, at 762.

{9} Following in these ancient footsteps, libel and slander are still commonly recognized and discussed as separate causes of action. Libel was established as a greater wrong, perhaps due to "the reverence of an illiterate nation for the printed word," Prosser, *supra*, at 751-52, or perhaps due to a perception that slanderous remarks are "often spoken in heat, upon sudden provocations, and are fleeting and soon forgotten." *Tonini v. Cevasco*, 46 P. 103, 104 (Cal. 1896) (internal quotation marks and citation omitted). Libel, on the other hand, was perceived as "more deliberate and more malicious, more capable of circulation in distant places . . . ." *Id.* These distinctions led not only to separate causes of action for libel and slander but also to the development of defamation as actionable per se or per quod. Defamation classified as "per se" historically has been actionable without proof of harm, as injury is presumed based on the nature of the communication. *Prosser and Keeton on the Law of Torts* 796 (W. Page Keeton et al. eds., 5th ed. 1984). Defamation classified as "per quod," on the other hand, is not defamatory on its face, and therefore extrinsic facts must be shown to prove its defamatory nature before recovery is allowed. *Id.*

{10} As this Opinion will discuss, actions for defamation have evolved in many ways due to both the tort's maturing constitutional infrastructure and reform aimed to eliminate the unnecessary distinctions and nuances which linger from eras past. At a fundamental level, defamation has shifted away from the obsolete considerations discussed above to a focus that "serve[s] a more legitimate purpose—compensating individuals for injury to reputation." Anderson, *supra*, at 774. Courts have long recognized that "damage to reputation is, of course, the essence of libel." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971). Pursuant to its origins, however, defamation historically focused on the wrong rather than the injury, Anderson, *supra*, at 747, and injury to reputation was therefore typically a presumed harm, *see Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 429, 773 P.2d 1231, 1236 (1989). Even where proof of special damages was required under the common law, presumed general damages for injury to reputation were recoverable once a showing of special damages had been made. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 372-73 (1974) (White, J., dissenting); *see also* Joel D. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349, 1437 (1975). This "theoretical underpinning"—that defamation law exists to provide redress for injury to reputation—was both recognized and maintained through the common law defamation action, although historically by presuming injury. *Id.*

A.

{11} More recent fundamental changes to the tort have been shaped by First Amendment concerns, which have largely conflicted with former notions of presumed injury and damages. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the United States Supreme Court for the first time recognized that defamation actions are subject to constitutional scrutiny in light of the "profound national commitment to the principle that debate on public issues should

be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270. *New York Times* established the actual malice standard of fault for public officials attempting to recover in defamation actions. *Id.* at 279-80, 283. In order to "free criticism of public officials from the restraints imposed by the common law of defamation," *New York Times* held that, in light of the importance of dialogue on issues of public concern, the Constitution requires more than mere reporting mistakes before a public official can recover damages for published falsehoods. *Gertz*, 418 U.S. at 334. This actual malice standard for defamation against public officials was later extended to public figures generally. *See Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967).

{12} The United States Supreme Court struggled in the following years with whether and how *New York Times* should apply to private individuals. In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43-44 (1971), *abrogated by Gertz*, 418 U.S. at 347, the Court—in separate opinions each commanding three votes or less—extended the *New York Times* standard to defamation actions by private citizens in areas of public interest. However, three years later in *Gertz*, the Court retreated from *Rosenbloom* in light of the "strong and legitimate state interest in *compensating private individuals for injury to reputation*." *Gertz*, 418 U.S. 348-49 (emphasis added). *Gertz* held that, "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of [a] defamatory falsehood injurious of a private individual." *Id.* at 347.

{13} After establishing the requirement of fault, *Gertz* turned to the issue of presumed injury in defamation actions and criticized defamation as "an oddity of tort law" because it allows for compensatory damages without proof of actual loss, thus permitting juries to "award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred," as well as permitting juries to "punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact." *Id.* at 349.

{14} *Gertz* addressed these concerns by holding that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Id.* at 349. In discussing this abolition of presumed damages, *Gertz* held that a state's interest in compensation for injury to reputation "extends no further than compensation for actual injury." *Id.* at 348-9. Recognizing that trial courts were experienced in crafting jury instructions for damages, *Gertz* simply clarified that actual injury is not limited to out-of-pocket losses, and that "more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Id.* at 349-50.

{15} The Supreme Court indicated in *Gertz* that only the state's interest in protecting an individual's *reputation* can justify the intrusion into otherwise constitutionally protected free speech. In the subsequent case of *Time, Inc. v. Firestone*, however, the Court narrowed *Gertz*'s emphasis on injury to reputation by providing that the states may permit recovery for injuries such as mental anguish without a showing of injury to reputation, and noting that by allowing the defamation plaintiff in *Firestone* to withdraw a claim for injury to reputation, leaving only a

claim for mental anguish, "Florida has obviously decided to permit recovery for other injuries without regard to measuring the effect the falsehood may have had upon a plaintiff's reputation. This does not transform the action into something other than an action for defamation as that term is meant in *Gertz*." *Firestone*, 424 U.S. 448, 460 (1976). In his dissenting opinion, Justice Brennan criticized the Court's retreat from the *Gertz* holding:

> It seems clear that by allowing this type of recovery the State has subverted whatever protective influence the actual injury stricture may possess. *Gertz* would, of course, allow for an award of damages for such injury after proof of injury to reputation. But to allow such damages without proof by competent evidence of any other actual injury is to do nothing less than return to the old rule of presumed damages supposedly outlawed by *Gertz* in instances where the *New York Times* standard is not met.

Firestone, 424 U.S. at 475 n.3 (Brennan, J., dissenting) (internal quotation marks and citation omitted). In the later case of *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), a split Court further narrowed the *Gertz* requirement that a plaintiff prove actual injury by holding that *Gertz* is controlling only in defamation actions involving private plaintiffs and issues of public concern. In contrast, where defamation actions involve private plaintiffs and issues of purely private concern, the Constitution allows the states to "permit[] recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice.'" *Dun & Bradstreet*, 472 U.S. at 763.

B.

{16} In the wake of *New York Times* and subsequent Supreme Court cases, states were in some areas forced to reassess defamation law while in other areas given the discretion to do so. New Mexico began reworking state defamation law in response to these developments. *See Marchiondo v. N.M. State Tribune Co.*, 98 N.M. 282, 289, 648 P.2d 321, 328 (Ct. App. 1981) (*Marchiondo I*) ("The law of libel and slander has taken on a federal constitutional aspect in recent years which needs to be reviewed . . . before finalizing jury instructions. Basically, the entire law of libel and slander needs to be restudied in the light of the decisions of the United States Supreme Court since 1964." (alteration in original) (internal quotation marks and citation omitted)), *overruled on other grounds by Marchiondo v. Brown*, 98 N.M. 394, 649 P.2d 462 (1982).

{17} In *Marchiondo v. Brown* (*Marchiondo II*), following the holding in *Gertz*, this Court ushered in many significant changes to our state defamation law. These changes reflect New Mexico's movement toward a concept of defamation law that both minimizes unnecessary discrepancies and provides adequate safeguards against encroachment on constitutionally protected free speech. *Marchiondo II* announced in pertinent part that strict liability was no longer applicable to defamation suits, the standard of fault in defamation cases involving private plaintiffs is ordinary negligence, defamation plaintiffs must plead and prove special damages, and punitive damages are recoverable only upon proof of actual malice. 98 N.M. at 402-03, 649 P.2d at 470-71. *Marchiondo II* also recited the language in *Gertz* regarding the state's ability to fashion appropriate "actual injury" instructions, *see id.*, and concluded that the then-current

Uniform Jury Instructions would need to be amended due to these numerous changes. *See id.* at 403.

{18} Further review of state law in the following years led to more change in the jurisprudence of the tort of defamation. New Mexico abolished the distinctions between libel and slander. *See Newberry*, 108 N.M. at 429, 773 P.2d at 1236 ("The lines of demarcation between slander . . . and libel . . . have become sufficiently blurred that we agree there are good reasons for abolishing the distinction between [them]." (third alteration in original) (quoting *Reed v. Melnick*, 81 N.M. 608, 612, 471 P.2d 178, 182 (1970), *overruled on other grounds by Marchiondo II*)); *see also* Eaton, *supra*, at 1434 (criticizing distinctions between libel and slander as "illogical distinctions, most of them relics from centuries past").

{19} The common law distinctions between defamation per se and defamation per quod were also recognized as essentially obsolete in light of modern defamation jurisprudence. *See Newberry*, 108 N.M. at 429, 773 P.2d at 1236. This Court accordingly articulated that the appropriate question was no longer "whether the defamation is per se or per quod, but whether the plaintiff is a private or public figure." *Id.*; *see Marchiondo II*, 98 N.M. at 399, 649 P.2d at 467; *see also* Committee Commentary to UJI 13-1002 ("Defamation spoken on national media has as much capacity for harm as a written statement published in a periodical of limited circulation. Written defamation published to a huge audience many members of which are aware of the extrinsic facts making it defamatory probably is more harmful than 'per se' libel contained in a letter or other communication of limited circulation."); *see also* Dan B. Dobbs et al., 3 *The Law of Torts* § 574, at 336 (2nd ed. 2011) ("The presumed damages rule may be headed for extinction. Commentators have attacked it and some states have abandoned it even when the Constitution does not require them to do so.").

{20} This Court, while acknowledging the United States Supreme Court's advisement in *Dun & Bradstreet* that states need not require private plaintiffs seeking punitive damages in defamation actions concerning private matters to prove actual malice, "decline[d] to follow *Dun & Bradstreet* on that issue." *Newberry*, 108 N.M. at 430, 773 P.2d at 1237. In line with this declination, and with efforts to rid state defamation jurisprudence of outmoded per se/per quod distinctions, we similarly decline to follow *Dun & Bradstreet* on the issue of permitting private plaintiffs in defamation actions concerning private matters to recover for presumed damages. *See Dun & Bradstreet*, 472 U.S. at 762-63 (stating that no credible argument favors special protection of a false and unfavorable credit report on a private person). Our current Uniform Jury Instructions, discussed below, follow this approach and require plaintiffs, irrespective of the plaintiff's and communication's classification as public or private, to prove actual injury to reputation and actual resulting damages.

{21} Numerous other courts have similarly declined to allow presumed damages in defamation cases. *See, e.g.*, *Arthaud v. Mut. of Omaha Ins. Co.*, 170 F.3d 860, 862 (8th Cir. 1999) (identifying historical allowance of defamation per se and noting that "Missouri courts [now] require a showing of actual damages in all defamation cases"); *United Ins. Co. of Am. v. Murphy*, 961 S.W.2d 752, 756 (Ark. 1998) (discussing *Dun & Bradstreet* and deciding to prohibit presumed damages in all defamation cases because "the better and more consistent rule . . . is to require plaintiffs to

prove reputational injury in all cases"); *Walker v. Grand Cent. Sanitation, Inc.*, 634 A.2d 237, 243, 244 (Pa. Super. Ct. 1993) ("We [have] eviscerated the distinction between libel *per se* and libel *per quod* and held that [c]ourts in libel cases should be guided by the same general rules that govern other types of tort recovery. . . . Allowing the plaintiff to submit a claim for redress upon the presumption that she was damaged, especially in a case such as this, where the record is patently clear that no harm was suffered, requires the court to blindly follow a rule of law without regard to the reality of the situation presented. We cannot sanction, nor can we find that our Supreme Court has ever intended to sanction, such a rule." (second alteration in original) (internal quotation marks and citation omitted)).

C.

{22} We now take the opportunity to further clarify the state of defamation law in New Mexico, and hold that actual injury to reputation must be shown as part of a plaintiff's prima facie case in order to establish liability for defamation. Although before now this Court had not explicitly considered the issue, we find ample support for this conclusion within the historical framework discussed above, this state's movement away from allowing recovery for any form of presumed harm, the manner in which the tort of defamation has generally been defined and discussed within our case law, and the wording and organization of our defamation jury instructions.

{23} In *Fikes v. Furst*, this Court's recent opinion analyzing elements of the defamation cause of action, we articulated that "[t]he primary basis of an action for libel or defamation is contained in the damage that results from the destruction of or harm to that most personal and prized acquisition, one's reputation." 2003-NMSC-033, ¶ 12, 134 N.M. 602, 81 P.3d 545 (quoting *Gruschus v. Curtis Publ'g Co.*, 342 F.2d 775, 776 (10th Cir. 1965)). Although the analysis in *Fikes* centered on elements of the prima facie case other than the reputational injury element—namely whether the communication itself was defamatory and the recipient of the communication understood the communication to be defamatory (UJI 13-1002(B)(5)-(6)), this Court emphasized that "no matter how opprobrious a defendant's statement may be, a plaintiff is not entitled to recover damages unless he or she can show that it caused an injury to reputation." *Fikes*, 2003-NMSC-033, ¶ 12; *see also Hagebak v. Stone*, 2003-NMCA-007, ¶ 5, 133 N.M. 75, 61 P.3d 201 (stating that defamation is defined in New Mexico as "a wrongful and unprivileged injury to a person's reputation" (citing UJI 13-1001 NMRA)).

{24} As Justice Brennan articulated in *Firestone*, allowing recovery for injuries such as mental anguish before a showing of injury to reputation subverts the intended "protective influence" of the actual injury stricture. 424 U.S. at 475 n.3 (Brennan, J., dissenting); *see* Eaton, *supra*, at 1435 (indicating that "[i]f the tort of defamation is to retain its identity at all, proof of actual injury to reputation would seem to be a prerequisite to any award of out-of-pocket loss, and it seems more logical to require proof in that order, not in the reverse."); *see also* Anderson, *supra*, at 757-58 (suggesting that the actual injury requirement, as established in *Gertz* and interpreted in *Firestone*, may have sent "an invitation to the states to convert the tort of defamation from its common law purpose of protecting reputation into a new remedy for mental distress"); Gerald G. Ashdown, *Gertz and Firestone: A Study in Constitutional Policy-Making*, 61 Minn. L. Rev. 645, 670-72

(1977) (criticizing *Gertz* and *Firestone* for increasing, rather than decreasing, "the likelihood and potential magnitude of [gratuitous] compensatory awards" in defamation actions).

{25} New Mexico is far from alone in requiring reputational injury to be shown as a prerequisite to recovery. *See* Earl L. Kellett, Annotation, *Proof of Injury to Reputation as Prerequisite to Recovery of Damages in Defamation Action–Post Gertz Cases*, 36 A.L.R. 4th 807, § 2[b] (1985) (noting that after the issuance of *Firestone* "the various jurisdictions have split into two camps on the question whether injury to reputation must be shown"); *see, e.g.*, *Little Rock Newspapers, Inc. v. Dodrill*, 660 S.W. 2d 933, 935-36 (Ark. 1983) ("An action for defamation has always required this concept of reputational injury and recovery for mental suffering alone has not been allowed. . . . The spirit of the *Gertz* decision on this point is clearly one to protect First Amendment rights from unjustifiable and unsubstantiated intrusions. To allow recovery in a defamation action where the primary element of the cause of action is missing not only sets the law of defamation on end, but also substantially undercuts the impact *Gertz* seeks to effect."); *see also Zeran v. Diamond Broad., Inc.*, 203 F.3d 714, 719 (10th Cir. 2000) ("Although Plaintiff suffered an injury, the district court correctly found that Plaintiff did not suffer an injury to his reputation, which is the essence of an action for defamation." (discussing Oklahoma law)); *but see, e.g.*, *Firestone*, 424 U.S. at 460-61 (applying and discussing Florida law to conclude that Florida allows recovery without regard to injury to reputation); *Freeman v. Cooper*, 390 So. 2d 1355, 1360 (La. Ct. App. 1980) ("[M]ental suffering alone, or only injured feelings which must inevitably be inferred from libelous statements, can be made the basis of a damage award.").

{26} Kansas, for example, has held that "damage to one's reputation is the essence and gravamen of an action for defamation. Unless injury to reputation is shown, plaintiff has not established a valid claim for defamation . . . . It is reputation which is defamed, reputation which is injured, reputation which is protected." *Gobin v. Globe Publ'g Co.*, 649 P.2d 1239, 1243 (Kan. 1982). Concerning damages, Kansas instructs that "[d]efamation is not concerned with the plaintiff's own humiliation, wrath or sorrow," except as an element of general damages recoverable as resulting from the underlying injury to reputation. *Id.* (quoting Prosser, *supra*, at 737); *see* Prosser, *supra*, at 761.

{27} As the dissent in the Court of Appeals Opinion below identified, our Uniform Jury Instructions follow a similar two-step approach. 2010-NMCA-097, ¶ 22 (Kennedy, J., dissenting). First, as a preliminary instruction, UJI 13-1001 defines the tort of defamation as a "wrongful injury to a person's reputation." UJI 13-1002 then sets forth the prima facie defamation case. One of the nine elements which must be established as part of the prima facie case is that "[t]he communication caused actual injury to the plaintiff's reputation." UJI 13-1002(B)(8). The Use Note for UJI 13-1002(B)(8) explains that "the requirement that plaintiff prove that the defamatory communication caused actual injury to plaintiff's reputation" is imposed because "New Mexico no longer allows presumed damages in defamation actions." This accurately reflects the fact that, because actual injury to reputation can no longer be presumed, the plaintiff has the burden to prove that the communication caused actual injury to reputation as part of the prima facie case.

{28} After the plaintiff has established a prima facie case for defamation pursuant to UJI 13-1002, the jury moves to the damages

instruction, UJI 13-1010, and decides the amount of money necessary to fairly compensate for the injury caused by the defamatory communication. UJI 13-1010 instructs the jury, after "decid[ing] in favor of plaintiff on the question of liability," to fix the amount of money necessary to compensate the plaintiff for the underlying injury. The instruction lists several injuries which are likely to result from the communication of defamatory statements, including the injuries exemplified in *Gertz* such as personal humiliation and mental anguish and suffering. A plaintiff must prove that the defamatory communication caused one or more of these injuries in order for the jury to award damages. The Committee Commentary for UJI 13-1010 notes that the instruction was derived from *Marchiondo II*'s adoption of the language in *Gertz*.

{29} In response to the abandonment of presumed damages—namely for presumed injury to reputation—our prima facie defamation instruction requires a plaintiff to show actual injury to reputation in order to establish the defamation. *See* UJI 13-1002(B)(8). The requirement that a plaintiff in a defamation action prove actual injury to reputation is an accurate reflection of the law, as UJI 13-1002 comports with *Gertz*'s identification of the state interest in compensating private individuals for injury to reputation. Additionally, UJI 13-1010 aligns with *Gertz*'s requirement that compensation "extends no further than compensation for actual injury." 418 U.S. at 348-49. In line with the exemplified damages in *Gertz*, which were later adopted in *Marchiondo II*, our damages instruction allows recovery for, among other injuries, personal humiliation and mental anguish.

{30} Cases such as *Fikes*, decided after modification of the jury instructions, have acknowledged the process of first establishing the cause of action, which includes proving actual injury to reputation, and then moving to the apportionment of damages necessary to compensate for that injury to reputation. 2003-NMSC-033, ¶ 12. *See Newberry*, 108 N.M. at 430, 773 P.2d at 1237 (identifying that, in addition to proving the other elements of the prima face case, a plaintiff must first prove the defendant "negligently published the communication, and that, the communication proximately caused actual injury to plaintiff's reputation," and then move on to prove "one or more of the following injuries . . ."); *see also Cowan v. Powell*, 115 N.M. 603, 604-05, 856 P.2d 251, 252-53 (Ct. App. 1993) (noting that UJI 13-1002 "require[s] Plaintiff only to prove that she suffered actual injury to her reputation as one of the elements of the cause of action," and that together, UJI 13-1002 and UJI 13-1010 "clearly establish a two-step process for reaching a verdict.")

D.

{31} We conclude that a plaintiff must first establish the prima facie case for defamation—which includes proof of actual injury to reputation—before a jury can award damages for mental anguish, humiliation, or any of the other recoverable harms listed in UJI 13-1010. Allowing recovery for such damages without first requiring proof of injury to reputation has been justifiably criticized, as under such an interpretation of defamation, "a plaintiff with a widespread reputation as a local hoodlum can keep that fact from the jury and recover for his mental anguish and person humiliation if he is negligently and falsely accused of scalping tickets at a football game." Eaton, *supra*, at 1439.

{32} Depending on the type and severity of facts presented in a given case, alternative tort recovery may more appropriately provide

redress for a plaintiff truly seeking recovery for injuries other than injury to reputation. *See, e.g.*, *Moore v. Sun Publ'g Corp.*, 118 N.M. 375, 383, 881 P.2d 735, 743 (Ct. App. 1994) (identifying false light invasion of privacy as a "close cousin" to defamation which does not require evidence that the plaintiff was defamed); *Zeran*, 203 F.3d at 719 (distinguishing defamation from false light invasion of privacy by recognizing that in a defamation action "recovery is sought primarily for the injury to one's reputation, that is, what others may think of the person," while in a false light action, the "interest to be vindicated is the injury to the person's own feelings." (internal quotation marks and citation omitted)); Robert D. Sack, *Libel, Slander, and Related Problems* 561-62 (2nd ed. 1994) (identifying false-light tort as "designed to compensate for falsehoods that injure feelings rather than reputation."); *see also Kitchell v. Pub. Serv. Co. of N.M.*, 1998-NMSC-051, ¶ 15, 126 N. M. 525, 972 P.2d 344 (describing prima facie tort as providing "a remedy for acts committed with intent to injure the plaintiff and without justification" and articulating the tort's elements: "(1) an intentional and lawful act, (2) an intent to injure the plaintiff, (3) injury to the plaintiff as a result of the intentional act, and (4) the absence of justification for the injurious act."); *see generally* Anderson, *supra*, at 760 (identifying "several bodies of law that compensate persons for mental suffering. Most notable are the tort actions of assault and intentional infliction of emotional distress.").

{33} We note that defamation law in New Mexico will not perfectly align with the Restatement (Second) of Torts (1977) in regard to requisite injury to reputation in defamation actions. The Restatement defines defamatory communication as that which "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him," and specifies that "actual harm to reputation [is] not necessary to make [a] communication defamatory." *Id.* §§ 559A, 559 cmt. d. Although our Uniform Jury Instructions provide a similar definition of defamatory communication to assist the jury in determining whether the communication itself is even "capable of a defamatory meaning" in situations where the statement may not be readily recognized as defamatory (UJI 13-1007 NMRA Use Note), our instructions go on to require proof that the communication was both defamatory (UJI 13-1002(B)(5)) and caused actual injury to reputation (UJI 13-1002(B)(8)) for the establishment of liability. The Restatement, on the other hand, allows for the recovery of damages for certain defamatory communications without requiring further proof of actual injury to reputation or otherwise. *See* Restatement (Second) of Torts § 570 (identifying, as defamatory communications subject to liability, traditional per se categories imputing certain criminal offenses or "loathsome disease[s]," unfitness for work or office, or serious sexual misconduct). Taken together, these provisions suggest that the Restatement allows for recovery without requiring proof of actual injury to reputation under a recognition of defamation per se—a theory we view as outmoded by modern defamation jurisprudence. *See generally Poorbaugh v. Mullen*, 99 N.M. 11, 20, 653 P.2d 511, 520 (Ct. App. 1982); *Marchiondo II*, 98 N.M. at 402, 649 P.2d at 470.

{34} In clarifying that New Mexico law requires plaintiffs to prove actual injury to reputation for recovery in all defamation cases, we acknowledge that "proof of actual damage will be impossible in a great many cases . . . ." *Dun & Bradstreet*, 472 U.S. at 760 (internal quotation marks and citation

omitted). It is undoubtedly the case that "[a] system that restricts recovery to actual loss will be imperfect, but so is any system that attempts to compensate human injury with money." Anderson, *supra*, at 775. The interest served by allowing recovery for defamation, however, is the interest of compensating individuals for injury to reputation. *See Gertz*, 418 U.S. at 348-49. Recovery for a mere tendency to injure reputation, or only upon a showing of mental anguish, is not only too speculative where "the tort action for defamation has existed to redress injury to the plaintiff's reputation," *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 515 (1991), but it inappropriately blends defamation, a tort properly limited by constitutional protections, with other causes of action.

{35} A showing of actual injury to reputation is not so high a barrier to surmount that it limits recovery only to monetary loss and employment termination, however. Injury to reputation may manifest itself in any number of ways. *See Gertz*, 418 U.S. at 349-50. Events indicating an injury to reputation in the present case might include a decline in membership at St. Francis, an unwillingness for parishioners to allow children to participate in parish-related activities, or a decline in general social invitations from fellow parishioners—assuming such evidence could be proved and linked to the defamatory communication. There is no indication that Plaintiff came forward with evidence of any kind to support an argument that his reputation was actually injured by the publication of the anonymous letter.

{36} Because we acknowledge that the requirement to show actual injury to reputation may not have been sufficiently clear prior to this Opinion, however, we remand in order to allow Plaintiff the opportunity to amend his complaint to raise other theories for recovery which may more appropriately provide redress for the injuries he alleges to have suffered. In doing so we note that Plaintiff chose to base his request for relief on a single cause of action rather than pleading alternative plausible theories of recovery, an imprudent decision if, as here, that sole cause of action should prove untenable.

IV. CONCLUSION

{37} We hold that the Court of Appeals erred in reversing the district court's order granting summary judgment in favor of Defendants. The district court was correct in ruling that Plaintiff's failure to produce evidence of actual injury to reputation precludes his defamation claim as a matter of law. We remand to the district court for further proceedings consistent with this Opinion.

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

PATRICIO M. SERNA, Justice

WE CONCUR:

CHARLES W. DANIELS, Chief Justice

PETRA JIMENEZ MAES, Justice

RICHARD C. BOSSON, Justice

SARAH M. SINGLETON, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMSC-011

Filing Date: April 12, 2012

Docket No. 32,400

DENNIS W. MONTOYA,

Plaintiff-Appellant,

v.

MARY HERRERA, Secretary of State, State of New Mexico,

Defendant-Appellee,

and

HON. LINDA M. VANZI,

Intervenor.

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for Intervenor

OPINION

PER CURIAM.

{1} Before the 2010 primary election, this Court was called upon to decide whether Dennis Montoya (Appellant), a candidate for a Court of Appeals judgeship, was properly disqualified by the Secretary of State (the Secretary) from receiving public campaign funding under the New Mexico Voter Action Act (the Act). In this, our first opportunity to construe the Act, we explain our previous oral ruling affirming the Secretary, and we address Appellant's constitutional challenges to the Act as well as the civil penalty the Secretary imposed upon him.

BACKGROUND

{2} During the 2010 primary election cycle, Appellant filed a declaration of intent to seek public funding for his judicial campaign and subsequently filed with the Secretary an application for certification to begin receiving public funds. Thereafter, the Secretary informed Appellant by letter that he was not qualified to receive public funding because he had violated the Act's contribution limits and reporting requirements. In particular, the Secretary declined to certify Appellant because he had exceeded the Act's $5000 limit for seed money contributions, spent more than $500 on his campaign before declaring his intent to seek public campaign financing,

and violated the Secretary's seed money reporting requirements. Appellant requested an administrative review of the Secretary's decision. The administrative hearing officer ultimately recommended upholding the Secretary's decision on two of the three grounds—that Appellant had exceeded the Act's seed money contribution limits and that he had failed to comply with the Secretary's reporting requirements.[1] The Secretary adopted the hearing officer's recommendation and declined to reverse her prior refusal to certify Appellant.

{3} Appellant appealed to the district court and also filed an original action in that court for declaratory and injunctive relief. Appellant focused his challenge on the Secretary's determination that he exceeded the $5000 seed money contribution limit required by the Act. Appellant also argued that the Secretary's interpretation of the Act violated his First Amendment rights. While the appeal was pending in district court, the Secretary imposed a $2000 civil penalty against Appellant. The district court upheld the Secretary's decision, and Appellant sought further review in the Court of Appeals. Because Appellant was running for election against a sitting member of the Court of Appeals, the appeal was transferred to this Court for a final determination before the impending primary election. Our order following an expedited proceeding affirmed the district court and ruled that the Secretary correctly disqualified Appellant from receiving public financing under the Act. In so doing, we rejected Appellant's constitutional challenges to the Secretary's application of the Act. However, we took under advisement the Secretary's imposition of the $2000 civil penalty against Appellant and asked the parties to file supplemental briefs before making a final decision on that issue. We explain our May 24, 2010 order and address the civil penalty in this Opinion.

[1] The failure to report the names and addresses of seed money donors was not challenged on appeal and will not be addressed in this opinion.

DISCUSSION

Standard of Review

{4} This case presents questions of statutory interpretation which we review de novo. *See Cobb v. State Canvassing Bd.*, 2006-NMSC-034, ¶ 33, 140 N.M. 77, 140 P.3d 498. To the extent that Appellant's constitutional arguments are considered, they too are reviewed de novo. *See State ex rel. New Mexico Judicial Standards Comm'n v. Espinosa*, 2003-NMSC-017, ¶ 5, 134 N.M. 59, 73 P.3d 197.

The Voter Action Act

{5} New Mexico is one of a number of states that provide public campaign financing for certain elective offices. In 2003, our Legislature adopted the Act to provide public funding of campaigns for the office of public regulation commissioner. *See* NMSA 1978, §§ 1-19A-1 to -17 (2003, as amended through 2007). In 2007, the Legislature expanded the Act to encompass the statewide judicial offices of Court of Appeals judge and Supreme Court justice. *See* § 1-19A-2(D) (amending the definition of "covered office" to include "any office of the judicial department subject to statewide elections").

{6} Under the Act, a candidate seeking one of the covered offices initiates the public financing process by filing a declaration of intent with the Secretary. *See* § 1-19A-3(A). By filing the declaration of intent, the candidate becomes known as an "applicant

candidate" under the Act. See §§ 1-19A-2(A), -3(A). The declaration of intent must explicitly confirm the candidate's past and future compliance with all contribution and expenditure limits and other requirements under the Act. *See* § 1-19A-3(B). The candidate must file the declaration of intent before or during what is known under the Act as the "qualifying period." Section 1-19A-3(A). For major party candidates, which Appellant was, the qualifying period begins on October 1 of the year preceding the election year and ends on the third Tuesday of March of the election year. *See* § 1-19A-2(I)(1). If a candidate has accepted contributions or made expenditures totaling $500 or more between the beginning of the qualifying period and filing the declaration of intent, that candidate is *not* eligible to become an applicant candidate for public financing under the Act. *See* § 1-19A-3(C).

{7} After filing the declaration of intent, an eligible applicant candidate may begin accepting "qualifying contributions" under the Act. *See* § 1-19A-3(B). Qualifying contributions are individual $5.00 donations made during the qualifying period in support of the applicant candidate by registered voters who are eligible to vote for the office the applicant candidate is seeking. *See* §. 1-19A-2(H)(1) & (2). To become certified for public financing, the applicant candidate must obtain a minimum number of qualifying contributions, among other conditions. *See* § 1-19A-4(A)(1) (setting the requisite number of qualifying contributions for statewide judicial elective offices as one-tenth of one percent of the number of voters in the state); *see also* § 1-19A-6 (providing the requirements for becoming a certified candidate).

{8} In addition to collecting qualifying $5.00 contributions, an applicant candidate may collect what is known under the Act as "seed money." Section 1-19A-5(A). The Act defines "seed money" as "a contribution raised for the primary purpose of enabling applicant candidates to collect qualifying contributions and petition signatures." Section 1-19A-2(K). In collecting seed money, an applicant candidate is limited to no more than $100 per donor and no more than $5000 in total donations; the applicant candidate may use personal funds for seed money but no more than the $5000 limit. *See* § 1-19A-5(A) & (H). Before being certified, "an applicant candidate shall not accept contributions, except for seed money or [the $5.00] qualifying contributions." Section 1-19A-5(F).

{9} To become a certified candidate entitled to receive public funds, the Secretary must determine that the applicant candidate has (1) filed a declaration of intent to obtain public financing under the Act, (2) submitted the requisite number of qualifying $5.00 contributions, (3) qualified as a candidate for office under state election law, (4) complied with restrictions on seed money contributions and expenditures, and (5) otherwise satisfied the requirements for obtaining public financing under the Act. Section 1-19A-6(A) & (B). In a primary election, a candidate certified for a contested statewide judicial office is entitled to an initial disbursement from the public election fund equal to "15 cents ($.15) for each voter of the candidate's party in the state." Section 1-19A-13(B)(2). If the primary election is uncontested, a certified candidate receives half that amount. Section 1-19A-13(C). If the certified candidate wins the primary election, the judicial candidate receives another disbursement from the public election fund for the general election equal to 15 cents per voter in the state. Section 1-19A-13(D)(2). In no event may the certified candidate's total campaign expenditures and debts exceed the

amount of money distributed from the public election fund, and the certified candidate may not accept contributions or loans from any other source except the candidate's political party. *See* § 1-19A-7(C).

The Act limits all contributions from an Applicant Candidate's own funds to the $5000 seed money limit in Section 1-19A-5(A).

{10} The dispute in this case centers on the provision in Section 1-19A-5(A), that "[a]n applicant candidate may contribute an amount of seed money from the applicant candidate's own funds up to" the $5000 limit. *See also* § 1-19A-5(H) (providing that applicant candidates "shall limit seed money contributions and expenditures to five thousand dollars"). Exceeding this limit, Appellant contributed at least $8887.29 to his campaign during the qualifying period when the limit applied. Attempting to avoid the $5000 seed money limitation, Appellant argued to the Secretary that his contribution in excess of $5000 was not used for "seed money purposes" but rather for "general campaign expenditures" that did not count toward the limit. We reject Appellant's argument for several reasons.

{11} First, that distinction is simply not in the Act. Nowhere does the Act distinguish between contributions and expenditures for "seed money" and contributions and expenditures for "general campaign expenditures." We will not read such language into the Act, nor would it make sense to do so. *See State v. Nick R.*, 2009-NMSC-050, ¶ 11, 147 N.M. 182, 218 P.3d 868 ("We must take care to avoid adoption of a construction that would render the statute's application absurd or unreasonable or lead to injustice or contradiction." (Internal quotation marks and citation omitted.)); *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 (noting that we will not read into a statute language which is not there, particularly if it makes sense as written).

{12} Trying to read the distinction into the Act, Appellant argues that his "general" contributions were intended to cover other kinds of expenses such as the costs of seeking his party's support at local preprimary convention gatherings leading up to the state preprimary convention. As such, his argument goes, these contributions were not intended to pay for the kinds of expenses that seed money is intended to cover and to limit. *See* § 1-19A-2(K) (defining "seed money" as "a contribution raised for the *primary purpose* of enabling applicant candidates to collect qualifying contributions and petition signatures" (emphasis added)). Being for a different purpose, Appellant's self-funded contributions for general expenditures should not be subject to the limitations for seed money, Appellant contends.

{13} We turn again to the language in the Act. Not only is such a distinction absent from its text, but the intended scope of seed money is not so limited as Appellant would have us believe. The definition of seed money, quoted above from Section 1-19A-2(K), extends beyond just collecting qualifying $5.00 contributions and petition signatures as long as that is its "primary purpose." Recognizing that seed money could be used for other purposes, the Legislature surely intended that its limitations would apply equally to those other purposes, thereby anticipating the very kind of semantic distinctions that Appellant proposes in this case. *See Key v. Chrysler Motors Corp.*, 121 N.M. 764, 768-69, 918 P.2d 350, 354-55 (1996) ("In interpreting statutes, we seek to

give effect to the Legislature's intent, and in determining intent we look to the language used and consider the statute's history and background.").

{14} Our conclusion is buttressed by the legislative mandate, elsewhere in the Act, that during the qualifying period "an applicant shall not accept contributions, except for seed money or qualifying contributions." Section 1-19A-5(F). The Act also states that "[a]n applicant candidate may *contribute* an amount of seed money from the applicant candidate's own funds . . . ." Section 1-19A-5(A) (emphasis added). The text of the Act makes our conclusion inescapable: an applicant candidate's personal expenditures on a campaign are considered "contributions" under the Act, subject to the $5000 limit, regardless of how the candidate may characterize those funds or their intended use.

{15} As the Secretary emphasizes, and the district court rightly recognized, the Act could easily become unworkable if an applicant candidate were allowed to circumvent the seed money contribution limit by labeling contributions as intended for "general expenditures." As the Secretary posits, if the candidate spent $6000 of his own funds on an event to (1) solicit party support for the pre-primary nominating convention, *and* (2) collect qualifying contributions in the process, how much of that $6000 was the seed money expenditure? Or if the candidate were to spend his own money on a direct mail or telephone campaign, soliciting support from members of the political party's central committee *and* soliciting qualifying contributions, what fraction of that expense would be seed money? How would the Secretary make these determinations and according to what criteria? We could envision a host of other realistic scenarios that would all call into question the feasibility and legitimacy of Appellant's proposal to characterize campaign expenditures.

{16} We agree with the Secretary's observation that the process of collecting qualifying contributions and petition signatures is far too intertwined with other campaign activities to draw such a fine line. As this case illustrates, any attempt to do so would prove difficult to administer and susceptible to abuse. In short, when Appellant contributed more than $8000 of his own money to the campaign, while simultaneously applying for public funds, he violated the Act. Under the law, the Secretary had no choice but to disqualify him from public financing, and she did so.

The Act's limitation on the amount of money that may be contributed from an applicant candidate's own funds does not violate constitutional rights to free speech.

{17} Because the Act limits the amount of money that a candidate may contribute from the candidate's own funds, Appellant claims the Act unconstitutionally burdens his First Amendment right to free speech. In this regard, Appellant makes much of the United States Supreme Court's recent opinion in *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 898 (2010), which equates campaign contributions with speech, subjecting any government infringement on the free exercise of that right to strict scrutiny. In contrast, the Secretary argues that the Act is simply a state election law that seeks to establish a fair and efficient method for regulating some of this state's elections. And as such, the Secretary maintains the Act must only withstand a less rigorous balancing test first enunciated by the United States Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). We need not decide, however, which test applies to Appellant's

constitutional challenge because Appellant voluntarily chose to apply for public financing under the Act and agreed to its terms. *See See Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1976) (per curiam) ("[Government] may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations.").

{18} The Act's public funding system is a voluntary one. A candidate for one of the covered offices may seek public funding under the Act, but is not required to do so. If the candidate chooses not to seek public financing, the Act does not impose any restriction on that candidate's contributions or expenditures, including self-financing.

{19} Instead, Appellant chose to limit the amount of his personal finances he could expend on his campaign when he filed his declaration of intent under the Act, and Appellant never claimed that his choice was anything but voluntary. *See, e.g.*, *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 739 (2008) (distinguishing an involuntary limit on personal expenditures from a voluntary limit imposed as a condition of public campaign financing); *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 467 (1st Cir. 2000) ("[T]he appropriate benchmark of whether candidates' First Amendment rights are burdened by a public funding system is whether the system allows candidates to make a 'voluntary' choice about whether to pursue public funding." (citation omitted)); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996) (providing that a public campaign finance system that is voluntary promotes rather than infringes on First Amendments rights). Accordingly, we need not address Appellant's constitutional challenges to a system that he voluntarily chose to join and could have chosen to avoid altogether.

The Secretary was required under the Act to impose a civil penalty against Appellant for violating the Act.

{20} In addition to disqualifying Appellant from receiving public funding under the Act, the Secretary subsequently imposed a $2000 civil penalty on Appellant for his violations of the Act. Under Section 1-19A-17(A), "a person who violates a provision of the [Act] is subject to a civil penalty of up to ten thousand dollars ($10,000) per violation." As discussed above, the record supported the Secretary's determination that Appellant violated the Act. Under the Act, the Secretary could have referred the matter to the attorney general for possible criminal prosecution but elected, in her discretion, not to do so. The imposition of a civil penalty is statutorily mandated because when "the secretary makes a determination that a violation of [the Act] has occurred, the secretary shall impose a fine or transmit the finding to the attorney general for prosecution." Section 1-19A-17(A); *see also* NMSA 1978, § 1-1-3 (1969) (explaining that "[a]s used in the election code 'shall' is mandatory").

{21} We acknowledge that our Court of Appeals recently held that the options of a civil penalty imposed by the Secretary and criminal prosecution by the attorney general are not mutually exclusive. *See State v. Block*, 2011-NMCA-101, ¶ 23, 150 N.M. 598, 263 P.3d 940. In *Block*, the Court of Appeals explained that a criminal prosecution could go forward even though the Secretary had already imposed a civil penalty. *Id.* ¶¶ 18-23. Here, the record indicates that the Secretary did not refer Appellant to the attorney general for possible criminal prosecution. Accordingly, the Secretary was statutorily obligated to impose a civil penalty under the Act. *See* § 1-

19A-17(A). We conclude that the Secretary had discretion only to determine the amount of the penalty. *See id.*

{22} Despite the language of Section 1-19A-17, Appellant challenges the civil penalty on three grounds. First, Appellant claims the civil penalty was an unconstitutional infringement on his right to free speech. In essence, Appellant simply reiterates his constitutional challenge to the Secretary's decision to disqualify him from public funding under the Act. Appellant's arguments in this regard are unpersuasive for the reasons discussed above. Appellant chose to subject himself to the Act and cannot simply accept its benefits and exempt himself from the mandatory civil penalties that he knew would be imposed for violations of the Act.

{23} Next, Appellant misplaces his reliance on a number of federal cases to suggest that a civil penalty cannot be imposed on him for voluntarily exercising his First Amendment right to free speech. In those federal cases, the United States Supreme Court reversed the denial of access to government benefits that was based on the content of the person's speech. *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 835-37 (2003) (holding that state university guidelines which denied student activity fund support to the student newspaper on the basis of religious content violated the First Amendment right to free speech); *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 537 (2001) (holding that restrictions which prohibited Legal Services Corporation's funding of any organization representing clients who challenge existing welfare law violated the First Amendment right to free speech). In contrast, the Act's restrictions on the amount of money a candidate may contribute to his own campaign is completely unrelated to the content of the candidate's speech. The Act's restriction on campaign contributions is not a method for restricting speech nor is Appellant's civil penalty a restriction of his speech.

{24} Appellant finally contends that a civil penalty was inappropriate in this case because there was no evidence of misconduct on his part, let alone willful misconduct. Appellant's argument ignores the plain language of the statute. A willful or knowing violation is required for *criminal* sanctions under the Act, but the Secretary is authorized to institute a *civil* penalty for any "person who violates [the Act]." *Compare* § 1-19A-17(A) *with* § 1-19A-17(B). Our Court of Appeals recently recognized that a showing of scienter is not necessary to support the imposition of a civil penalty. *See Block*, 2011-NMCA-101, ¶ 40. Accordingly, a violation of the Act is all that is required for the Secretary to fine the violator.

{25} The extent to which Appellant did or did not intend to violate the Act has no bearing on whether the Secretary should impose a civil penalty, though such questions would undoubtedly play a role in the amount of the civil penalty that the Secretary decides to impose. And to the extent that Appellant seeks to equate a civil penalty under Section 1-19A-17(A) with a Rule 1-011 NMRA penalty for which a showing of willful misconduct is required, we simply note that the requirements of Rule 1-011 have no bearing on what Appellant was prohibited from doing under the Act. We find no basis for concluding that the Secretary erred by imposing a civil penalty against Appellant for exceeding seed money contribution limits and failing to comply with the Act's reporting requirements. We therefore affirm the district court's decision to uphold the Secretary's imposition of the $2000 civil penalty against Appellant. Accordingly, we hereby hold that

(1) the Secretary properly disqualified Appellant, (2) the Act and the Secretary's actions are not subject to Appellant's constitutional challenge, and (3) the civil penalty imposed on Appellant is justified.

CONCLUSION

{26} The judgment of the district court is hereby affirmed.

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

PETRA JIMENEZ MAES, Chief Justice

PATRICIO M. SERNA, Justice

RICHARD C. BOSSON, Justice

CHARLES W. DANIELS, Justice

EDWARD L. CHÁVEZ (recused)

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMSC-012

Filing Date: April 13, 2012

Docket No. 33,069

MR. and MRS. RON GLASER, THERESA CULL, CHERYL HOST, EDMUND AUERBACH, DR. and MRS. DAVIS SPENCE, DONALD R. ASHER, HEIDI LARSEN, BRAD LEONARD, TED THRASHER, ANNE DANIELS, BRYAN and LISALEE GOSS, WILLIAM W. MERSHON, KEITH and DEBORAH HILLEGOND, and MR. and MRS. BRUCE CHARNLEY,

Plaintiffs-Petitioners,

v.

JAMES L. LEBUS, DANIEL E. RAKES, CHARLES VERRY, ALAN G. YOUNG, STEVEN R. OLIVER, NEW MEXICO FINANCE AUTHORITY, AUI, INC., ANGEL FIRE RESORT OPERATIONS, L.L.C., and VILLAGE OF ANGEL FIRE,

Defendants-Respondents.

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for Respondents

OPINION

SERNA, Justice.

{1} Defendant-Appellee (Appellee) the Village of Angel Fire (the Village) held an election to determine whether a public improvement district (PID) should be formed within its boundaries, after supporters of the PID petitioned the Village to do so. The requisite majority of eligible voters approved formation of the PID. Plaintiffs-Appellants (Appellants), owners of real property located in Angel Fire, filed suit in district court, seeking a declaration that the PID formation election was procedurally defective and therefore void, that the PID lacks legal existence, and that a special levy approved and assessed by the PID is invalid. The district court dismissed Appellants' complaint as untimely, and Appellants sought review by the Court of Appeals.

{2} The Court of Appeals determined that Appellants' complaint presents an election contest, which is subject to a thirty-day statute of limitations under the Election Code. *See* NMSA 1978, § 1-14-3 (1971). The Court further determined that because Appellants waited more than one year to file suit, their complaint is time-barred. After thoroughly analyzing these issues, however, the Court of Appeals ultimately concluded that it lacked jurisdiction and transferred the appeal to this Court, pursuant to the Election Code's directive that appeals in election contest proceedings shall be made directly to this Court. *See* NMSA 1978, § 1-14-5 (1969). Although we agree that the Court of Appeals did not have jurisdiction over this appeal, we find its opinion to be both comprehensive and persuasive. We therefore adopt its result as well as its reasoning, with one exception that we discuss below.

I. BACKGROUND

{3} In April and October of 2007, Defendant-Appellee Angel Fire Resort Operations, LLC submitted petitions to the Village for the creation of a PID to manage the construction of various infrastructure improvements within the district's boundaries. These improvements were to be funded by the sale of bonds secured by the proceeds of a special levy that would be assessed against owners of property located within the proposed district. After notice to the property owners and a hearing, the Village Council approved a resolution on February 14, 2008 supporting the formation of the PID. In April 2008, the Village conducted an election by mail-in ballot to determine whether to form the PID. More than three-quarters of eligible residents voted in the affirmative, which was

sufficient to approve formation. Later that year, the Village mailed property tax assessments, which included the PID special levy, to owners of property located within the district's boundaries, including Appellants.

{4} Appellants filed suit on June 1, 2009, roughly thirteen months after the PID formation election. In addition to the Village and Angel Fire Resort Operations, LLC, Appellants named as defendants the individual members of the Angel Fire PID Board of Directors (but not the PID itself), the New Mexico Finance Authority, and AUI, Inc., a company that the PID hired to perform construction work within the district. The complaint sought a declaration that the PID "was not properly authorized pursuant to law [and] has no legal existence, and all of the contracts and agreements made by its Board are void and unenforceable." Appellants also asked the district court to undo the results of the April 2008 formation election and to enter an "order requiring the PID to refund all or part of the special levy funds improperly collected from property owners" within the district.

{5} On June 8, 2009, the PID filed a motion to intervene, which the district court granted. The PID also filed a joint motion with Appellees for dismissal as to Appellees and judgment on the pleadings as to the PID. This motion sought dismissal pursuant to Rule 1-012(B)(6) NMRA and judgment on the pleadings pursuant to Rule 1-012(c) on various grounds, including that the complaint presented a challenge to the validity of the PID formation election and therefore was time-barred under the Election Code, which requires election contests to be brought within thirty days of certification of the election results. *See* § 1-14-3.

{6} On June 19, 2009, Appellants filed an amended complaint with allegations that were substantially similar to those in their original complaint, including that the PID formation election was "so materially out of compliance with statutory requirements as to invalidate it as a matter of law," that the PID "has no legal existence," that the special levy authorized and assessed by the PID is illegal, and that "the PID possesses no authority to levy or collect any tax or assessment." By order filed July 15, 2009, the district court granted Appellees' and the PID's joint motion and dismissed both the complaint and the amended complaint (hereinafter, "the complaint") on the ground that they were untimely filed. Appellants sought review by the Court of Appeals.

{7} The Court of Appeals determined that the PID formation election was subject to the procedures set forth in the Election Code, that the entirety of Appellants' complaint constitutes an election contest subject to the Election Code's thirty-day statute of limitations, and accordingly that the complaint was properly dismissed. *Glaser v. LeBus*, 2012-NMCA-028, ¶¶ 1, 8-12, 15, 21-24. Because the complaint presents an election contest, the Court of Appeals ultimately concluded that it lacked jurisdiction, due to the Election Code's mandate that challenges to an election shall be appealed directly to the New Mexico Supreme Court. *Id.* ¶¶ 25- 26 (citing § 1-14-5). The Court of Appeals therefore transferred the appeal to this Court, pursuant to NMSA 1978, Section 34-5-10 (1966). *Id.* ¶ 26. After the parties submitted briefing to this Court, Appellees filed a motion to dismiss the appeal as moot on the ground that a substantial majority of the PID's infrastructure improvements already had been constructed, a motion which the Court denied on September 30, 2011. The Court heard oral argument on October 11, 2011.

II. STANDARD OF REVIEW

{8} We review de novo the district court's grant of Appellees' motion to dismiss and for judgment on the pleadings. *See Delfino v. Griffo*, 2011-NMSC-015, ¶ 9, 150 N.M. 97, 257 P.3d 917. A motion to dismiss "tests the legal sufficiency of [a] plaintiff's complaint," and "should be granted only when it appears that the plaintiff is not entitled to recover under any facts provable under the complaint." *Kirkpatrick v. Introspect Healthcare Corp.*, 114 N.M. 706, 709, 845 P.2d 800, 803 (1992). A judgment on the pleadings is treated as a motion to dismiss when the district court considers matters contained solely within the pleadings. *See GCM, Inc. v. Ky. Cent. Life Ins. Co.*, 1997-NMSC-052, ¶ 9, 124 N.M. 186, 947 P.2d 143. "In reviewing a district court's decision to dismiss for failure to state a claim, we accept all well-pleaded factual allegations in the complaint as true and resolve all doubts in favor of sufficiency of the complaint." *Delfino*, 2011-NMSC-015, ¶ 9 (citation omitted). De novo review similarly applies to questions of statutory interpretation. *Cobb v. State Canvassing Bd.*, 2006-NMSC-034, ¶ 33, 140 N.M. 77, 140 P.3d 498.

III. DISCUSSION

{9} As the Court of Appeals correctly determined, the Angel Fire PID formation election is subject to the Election Code's thirty-day limitation period for filing a complaint. *Glaser*, 2012-NMCA-028, ¶¶ 1, 10-15. The procedures set forth in the Election Code apply to general elections, primary elections, statewide special elections, elections to fill congressional vacancies, and school district elections. NMSA 1978, § 1-1-19(A) (1985). In addition, "[t]o the extent procedures are incorporated or adopted by reference by separate laws governing such elections or to the extent procedures are not specified by such laws, certain provisions of the Election Code shall also apply to . . . special district officer or special district bond or other special district elections." *Id.* § 1-1-19(B)(2). Under the Public Improvement District Act (PID Act), a PID formation election must meet certain specifically enumerated requirements, NMSA 1978, § 5-11-7 (2001), and "[e]xcept as otherwise provided . . . the election shall comply with the general election laws of this state," *id.* § 5-11-7(E), i.e., the Election Code. Because the PID Act incorporates the Election Code by reference unless it is otherwise specified, and because the PID Act nowhere provides a different limitations period for filing a challenge to a PID formation election, the Election Code's thirty-day statute of limitations applies.

{10} The Court of Appeals also correctly concluded that the gravamen of Appellants' complaint is a challenge to the PID formation election. *Glaser*, 2012-NMCA-028, ¶¶ 1, 21-24. Appellants allege that the proponents of the PID made various misrepresentations in their petitions to form the PID, and that the formation election was procedurally flawed because the mail-in ballots lacked adequate detail and were not properly scrutinized by the Village. The principal relief Appellants request is a declaration that the PID formation election was invalid and that the PID therefore lacks legal existence. Because Appellants' suit is thus properly construed as an election contest, and because Appellants failed to file their complaint within the thirty-day period mandated by the Election Code, the district court properly dismissed the complaint, a result the Court of Appeals would have affirmed if it had jurisdiction over the appeal.

{11} We now take the opportunity to

correct the Court of Appeals in one respect. While Appellants unquestionably contest the PID formation election, their complaint also asks for declaratory relief with respect to various actions that the PID took after formation, particularly the imposition of the special levy and the execution of contracts to perform the infrastructure improvements. The Court of Appeals determined that these claims "also rest on challenges to the underlying validity of the formation election." *Glaser*, 2012-NMCA-028, ¶¶ 23-24. We disagree. A legal challenge to governmental action is not converted into an election contest simply because the action at issue followed an election; otherwise, virtually every lawsuit against a governmental entity would be subject to the Election Code's thirty-day statute of limitations.

{12} The district court nonetheless was correct in dismissing the complaint. *See Maralex Res., Inc. v. Gilbreath*, 2003-NMSC-023, ¶ 13, 134 N.M. 308, 76 P.3d 626 ("[A]n appellate court will affirm the district court if it is right for any reason and if affirmance is not unfair to the appellant." (citation omitted)). Appellants assert that the special levy is invalid because it was approved by resolution of the PID Board of Directors rather than by election. The PID Act, however, explicitly authorizes a PID's board of directors to assess a special levy by resolution after notice and a hearing, NMSA 1978, § 5-11-20(A) & (B) (2001), or alternatively by election. *Id.* § 5-11-7(A)(5) & (7-8). Because the applicable statute does not require a PID special levy to be approved through an election, Appellants' complaint fails as a matter of law.

{13} Appellants' complaint seeks declaratory relief regarding other aspects of the levy, such as the method for its apportionment and the alleged disparity between the amounts assessed and the benefits conferred on affected property owners. Appellants also request a declaration that all contracts the PID entered into are "void and unenforceable." Appellants, however, do not offer any factual allegations whatsoever in support of those claims. Their complaint, therefore, was properly dismissed for failure to state a claim for which relief could be granted. *See Delfino*, 2011-NMSC-015, ¶ 12. Finally, we note that Appellants were required to include in their brief-in-chief "a statement explaining how the issue was preserved in the court below, with citations to authorities, record proper, transcript of proceedings or exhibits relied on." Rule 12-213(A)(4) NMRA. Because Appellants fail to inform this Court where in the record they have preserved their challenge to the apportionment of the levy or other post-formation acts of the PID, it is within this Court's discretion to refuse to consider those issues. *See State v. Goss*, 111 N.M. 530, 533, 807 P.2d 228, 231 (Ct. App. 1991) ("Where a party fails to comply with Rules 12-208 and -213 and fails to indicate "that [an] issue was properly preserved for appellate review, an appellate court may decline to address such contention on appeal.").

IV. CONCLUSION

{14} We affirm the order of the district court. In doing so we adopt the reasoning and result of the Court of Appeals' opinion, with the one exception discussed above regarding Appellants' challenge to the PID's apportionment of the special levy and other post-formation acts of the PID, which as we explain are not properly construed as an election contest but nonetheless were properly dismissed.

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

PATRICIO M. SERNA, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

RICHARD C. BOSSON, Justice, recused

Certiorari Denied, March 23, 2012, No. 33,482

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-041

Filing Date: February 9, 2012

Docket No. 30,434

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

JOSE ANTONIO ARMENDARIZ-NUNEZ,

Defendant-Appellant.

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for Appellee

Jacqueline L. Cooper, Chief Public Defender
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for Appellant

OPINION

KENNEDY, Judge.

{1} Jose Antonio Armendariz-Nunez (Defendant) was convicted by a jury of possession of cocaine, possession of marijuana, no proof of insurance, and no evidence of registration stemming from a driving while impaired (DWI) stop, which occurred on June 6, 2009. In this appeal, Defendant challenges only his conviction for possession of cocaine. Defendant contends that (1) the district court erred in denying his motion to suppress the physical evidence found on his person because the search

violated the United States Constitution and New Mexico Constitution, and (2) there was insufficient evidence to support his conviction. For the reasons that follow, we find no error and affirm.

I. BACKGROUND

{2} Defendant was pulled over on June 6, 2009, after he almost struck the vehicle of Deputy Eduardo Flores of the Doña Ana County Sheriff's Office. Upon approaching Defendant, the deputy detected an odor of alcohol on Defendant's breath and asked for a DWI investigator to be sent to the scene. Deputy Larry Bleimeyer arrived, conducted field sobriety tests, concluded that Defendant was under the influence, and placed him under arrest for DWI. The deputy testified that his determination that Defendant was under the influence was based upon "the odor of alcohol coming from [Defendant], . . . [b]loodshot watery eyes, slurred speech, and the [results of] standardized field sobriety tests."

{3} After Defendant was placed under arrest, Deputy Bleimeyer conducted a search incident to arrest. The deputy testified that he found a dollar bill in Defendant's right pocket that was folded in a particular and unique way. In his experience, the dollar bill was folded in a way that he recognized as packaging for cocaine. The deputy asked if the dollar bill contained cocaine, and Defendant nodded "yes." The deputy then opened the folded dollar bill, exposing a white, powdery substance that was later confirmed to be cocaine. Narcotics Agent Joseph Misquez, who field tested the powder, also testified at trial and confirmed that dollar bills are often used as a way to conceal and later snort cocaine after it is made into a line.

{4} In district court, Defendant filed a motion to suppress his statements made to the deputy and the cocaine found on Defendant's person. The district court excluded Defendant's statement regarding the contents of the dollar bill because he had not yet been given his *Miranda* rights, but admitted the physical evidence found on him. After a jury trial, Defendant was found guilty of possession of a controlled substance. This appeal followed.

II. DISCUSSION

A. Defendant's Motion to Suppress

{5} Under both the United States and New Mexico Constitutions, Defendant argues that the district court erred in refusing to suppress the cocaine found on him. The State concedes that Defendant preserved his Fourth Amendment claim by filing and obtaining a ruling by the district court on his motion to suppress evidence. However, the State argues that Defendant's claim under the New Mexico Constitution should be rejected because he failed to show a compelling reason that Article II, Section 10 should afford more protection than the Fourth Amendment, pursuant to *State v. Gomez*, 1997-NMSC-006, ¶¶ 19-22, 122 N.M. 777, 932 P.2d 1. We interpret the State's argument as one of preservation. "To preserve a question for review[,] it must appear that a ruling or decision by the district court was fairly invoked[.]" Rule 12-216(A) NMRA.

> We require parties to assert the legal principle upon which their claims are based and to develop the facts in the trial court primarily for two reasons: (1) to alert the trial court to a claim of error so that it has an opportunity to correct any mistake, and (2) to give the opposing party a fair opportunity to respond and show why the court should rule against the objector.

Gomez, 1997-NMSC-006, ¶ 29. Where a state constitutional provision has previously been interpreted more expansively than its federal counterpart, trial counsel must develop the necessary factual base and raise the applicable constitutional provision in the trial court. *Id.* ¶ 22. Where the provision has never before been addressed under our interstitial analysis, trial counsel additionally must argue that the state constitutional provision should provide greater protection and suggest reasons why "a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics." *Id.* ¶ 19.

{6} Here, Defendant was required to meet the less stringent of *Gomez*'s preservation requirements because "a plethora of precedent already interprets Article II, Section 10 more expansively than the Fourth Amendment." *State v. Leyva*, 2011-NMSC-009, ¶ 50, 149 N.M. 435, 250 P.3d 861 (quoting *State v. Garcia*, 2009-NMSC-046, ¶ 52, 147 N.M. 134, 217 P.3d 1032 (Bosson, J., specially concurring)). Defendant met this requirement by citing both the Fourth Amendment and Article II, Section 10 and by stating that the New Mexico Constitution provides him with greater protections from unreasonable searches and seizures. Defendant's Article II, Section 10 argument was preserved, and we therefore analyze his claim under both the United States and New Mexico Constitutions.

> The review of a denial of a motion to suppress presents a mixed question of fact and law. We review the factual basis of the court's ruling for substantial evidence, deferring to the district court's view of the evidence. When, as here, there are no findings of fact and conclusions of law, we draw all inferences and indulge all presumptions in favor of the district court's ruling. Our review of the legal conclusions of the district court . . . is de novo.

State v. Williams, 2011-NMSC-026, ¶ 8, 149 N.M. 729, 255 P.3d 307 (internal quotation marks and citations omitted).

{7} "Both the Fourth Amendment to the United States Constitution and Article II, Section 10[] of the New Mexico Constitution protect the right of the people to be free from unreasonable searches and seizures." *State v. Gutierrez*, 2004-NMCA-081, ¶ 6, 136 N.M. 18, 94 P.3d 18. "The Fourth Amendment requires all searches and seizures be executed in a reasonable manner. Reasonableness depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Williams*, 2011-NMSC-026, ¶ 10 (internal quotation marks and citations omitted).

{8} Under the New Mexico Constitution, "[a] search incident to a lawful arrest may fall under an exception to the warrant requirement . . . if the State meets its burden of proving that the search occurs as a contemporaneous incident to the lawful arrest of the defendant and is confined to the area within the defendant's immediate control." *State v. Arredondo*, 1997-NMCA-081, ¶ 27, 123 N.M. 628, 944 P.2d 276, *overruled on other grounds by State v. Steinzig*, 1999-NMCA-107, 127 N.M. 752, 987 P.2d 409. "A search incident to arrest is a reasonable warrantless search because courts have long acknowledged that the societal interest in preventing the destruction of evidence and protecting the arresting officer outweighs the minimal intrusion of a pat- down." *Williams*, 2011-NMSC-026, ¶ 13; *see State v. Rowell*, 2008-NMSC-041, ¶ 13, 144 N.M. 371, 188 P.3d 95.

{9} Here, Defendant does not challenge the arrest, nor does he challenge whether the dollar bill found in his pocket was within his immediate control. Instead, he challenges the search and claims that the dollar bill was not found pursuant to a valid search incident to arrest. We read Defendant's argument as a challenge to the reasonableness of the search.

{10} "Our search incident to arrest exception is a rule of reasonableness anchored in the specific circumstances facing an officer." *Rowell*, 2008-NMSC-041, ¶ 24. Our court has "eschewed bright-line rules [and] instead emphasiz[ed] the fact-specific nature of the reasonableness inquiry." *Arredondo*, 1997-NMCA-081, ¶ 28 (alterations in original) (internal quotation marks and citations omitted). Once probable cause to arrest is established, reasonableness is the governing inquiry. *See Rowell*, 2008-NMSC-041, ¶ 24; *State v. Burgholzer*, 59 P.3d 582, 585 (Or. Ct. App. 2002). ("We do not agree that the search of a particular place, or the opening of a container, during a search incident to a lawful arrest must be supported by probable cause. Rather, . . . once an officer has probable cause to support the arrest, the proper inquiry is the *reasonableness* of the time, scope, and intensity of the search for evidence of the crime for which the defendant is being arrested.").

{11} Our Supreme Court has recognized that "officers may draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." *State v. Neal*, 2007-NMSC-043, ¶ 21, 142 N.M. 176, 164 P.3d 57 (internal quotation marks and citation omitted). "Courts defer to the training and experience of the officer when determining whether particularized and objective indicia of criminal activity existed." *Leyva*, 2011-NMSC-009, ¶ 23 (internal quotation marks and citation omitted). We therefore examine the evolving circumstances facing the officer and consider whether "the officer's . . . actions were fairly responsive to the emerging tableau—the circumstances originally warranting the stop, informed by what occurred, and what the officer learned, as the stop progressed." *State v. Funderburg*, 2008-NMSC-026, ¶ 27, 144 N.M. 37, 183 P.3d 922 (internal quotation marks and citation omitted); *see State v. Sewell*, 2009-NMSC-033, ¶ 22, 146 N.M. 428, 211 P.3d 885; *State v. Duran*, 2005-NMSC-034, ¶ 36, 138 N.M. 414, 120 P.3d 836, *overruled on other grounds by Leyva*, 2011-NMSC-009.

> Objects commonly associated with particular criminal activities can reasonably give rise to inferences that are distinct from objects ordinarily used for benign, non-criminal purposes. An officer's experience and training, considered within the context of the incident, may permit the officer to identify drug paraphernalia or drug packaging with a reasonable level of probability, sufficient for probable cause.

State v. Ochoa, 2004-NMSC-023, ¶ 13, 135 N.M. 781, 93 P.3d 1286.

{12} Here, Defendant was pulled over after almost striking the vehicle of Deputy Flores, who then called for Deputy Bleimeyer, a DWI investigator, to be sent to the scene. The deputy smelled alcohol on Defendant's breath, conducted field sobriety tests, determined that he was under the influence, and placed him under arrest. During the search incident to arrest, the deputy found a

dollar bill folded in a way that he recognized as packaging for cocaine. As the stop progressed, the circumstances facing the deputy changed. In such a situation, we have never required an officer to close his eyes to evidence which his training and experience tell him is a container of narcotics. *See State v. Ramirez*, 79 N.M. 475, 478-79, 444 P.2d 986, 989-90 (1968) ("A majority of the cases in which the question has arisen hold that officers who search incidental to a lawful arrest may seize things incidental to another and wholly unrelated offense which may be uncovered by such a search."). Our Court also has never limited the search incident to a DWI arrest for weapons and alcohol, as it appears that Defendant asks us to do here. This is because relevant evidence can take many forms. *See State v. Barela*, 88 N.M. 446, 447, 541 P.2d 435, 436 (Ct. App. 1975) (holding that, during a search incident for arrest for public drunkenness, an officer had both the authority to search an eye glass case found during the search, and the right to open it in order to effectuate the search). In this case, the deputy was entitled to search Defendant's pockets incident to arrest because his pockets may have contained any number of different items that could be evidence of the crime. The deputy found cocaine and marijuana on Defendant's person, which the deputy may have reasonably thought could have contributed to Defendant's intoxicated state.

{13} We disagree with Defendant's argument that the cocaine was not evidence of the DWI crime for which he had been arrested. *See* NMSA 1978, § 66-8-102(B) (2008) (amended 2010); *State v. Aleman*, 2008-NMCA-137, 145 N.M. 79, 194 P.3d 110 (affirming the defendant's conviction for driving while under the influence of cocaine). While the deputy observed that Defendant smelled of alcohol, there was no indication that other substances could not have contributed to his intoxicated state. As the State points out, both alcohol and marijuana emit a distinct odor, while cocaine and many other controlled substances do not. The discovery of a particular drug on a suspect's person could be relevant evidence that the suspect may be under the influence of that drug and, therefore, may be appropriately seized.

{14} Finally, we also disagree that the physical evidence should have been excluded as fruit of the poisonous tree because, as Defendant argues, "[t]he only reason that the deputy opened the dollar bill was because [Defendant] told him, in a statement excluded by the trial court, that the dollar bill had [cocaine] inside of it." However, as discussed above, because the deputy had an independent basis for the seizure and search of the folded dollar bill, the fact that Defendant confirmed the deputy's opinion of what he was about to discover is insignificant.

B. Sufficiency of the Evidence

{15} Defendant additionally argues, pursuant to *State v. Franklin*, 78 N.M. 127, 428 P.2d 982 (1967), and *State v. Boyer*, 103 N.M. 655, 712 P.2d 1 (Ct. App. 1985), that the evidence presented at trial was insufficient to result in his conviction for possession of a controlled substance. We are unconvinced.

{16} Our review of a sufficiency of the evidence question involves a two-step process. *See State v. Apodaca*, 118 N.M. 762, 766, 887 P.2d 756, 760 (1994). Initially, we view the evidence in the light most favorable to the verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict, and then we must "make a legal determination of whether the evidence

viewed in this manner could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt." *Id.* (internal quotation marks and citation omitted). "The question is whether the [conviction] is supported by substantial evidence, not whether the [fact finder] could have reached a different conclusion." *In re Ernesto M., Jr.,* 1996-NMCA-039, ¶ 15, 121 N.M. 562, 915 P.2d 318; *see State v. Mora,* 1997-NMSC-060, ¶ 27, 124 N.M. 346, 950 P.2d 789 ("The reviewing court does not weigh the evidence or substitute its judgment for that of the fact finder as long as there is sufficient evidence to support the verdict."), *abrogated on other grounds as recognized by Kersey v. Hatch,* 2010-NMSC-020, 148 N.M. 381, 237 P.3d 683.

{17} To convict Defendant of possession of a controlled substance, the State was required to prove that (1) Defendant had cocaine in his possession; and (2) Defendant knew it was cocaine or believed it to be some drug or other substance, the possession of which is regulated by law. Here, Deputy Bleimeyer conducted a search incident to the arrest of Defendant and found a uniquely folded dollar bill in his pocket. The deputy unfolded the dollar bill and uncovered a white, powdery substance, which was later confirmed to be cocaine. Additionally, both the deputy and Agent Misquez testified that dollar bills are often used as a way to conceal and later ingest cocaine.

{18} This evidence is sufficient for a reasonable jury to conclude that the evidence found on Defendant was cocaine and, based on the peculiar packaging and its location inside his pocket, he was aware that the substance was cocaine or another controlled substance. Viewing the facts in the light most favorable to the State, we hold that there was sufficient evidence to support Defendant's conviction.

III. CONCLUSION

{19} For the foregoing reasons, we conclude that the folded dollar bill found on Defendant's person was validly seized and searched, pursuant to a reasonable search incident to arrest under the United States Constitution and New Mexico Constitution, and there was sufficient evidence to support his conviction for possession of cocaine. We affirm the district court's denial of Defendant's motion to suppress and affirm his convictions.

{20} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

CYNTHIA A. FRY, Judge

Certiorari Denied, March 23, 2012, No. 33,481

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-042

Filing Date: February 15, 2012

Docket No. 30,558

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

WILLIAM SHARP,

Defendant-Appellee.

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for Appellee

OPINION

SUTIN, Judge.

{1} In a de novo appeal from magistrate court, the district court dismissed with prejudice the charges against Defendant owing to a violation of Rule 6-506 NMRA, commonly referred to as "the six-month rule." The district court's stated reasons for dismissing the case were (1) the State's failure to respond, in writing, to Defendant's magistrate court motion to dismiss, and (2) the magistrate court's failure to provide a statement in the record as to the extraordinary basis pursuant to Rule 6-506(C)(5) upon which it found exceptional circumstances to extend the time limit within which to hold a trial. On the State's appeal, we hold that the district court improperly treated the matter as an on-the-record appeal instead of as a de novo appeal and that the district court failed to apply Rule 6-506(E). We reverse and remand to the district court for an independent determination of whether, under the particular facts of this case, the violation of the six-month rule warranted dismissal.

DISCUSSION

{2} Defendant was charged in a criminal complaint filed March 16, 2009, with aggravated driving while intoxicated (DWI) and failing to maintain a lane. On March 23, 2009, Defendant filed a waiver of arraignment. This gave rise to the Rule 6-506(B)(1) requirement that Defendant's trial commence within 182 days, by September 21, 2009. On June 10, 2009, Defendant filed a motion to suppress. On July 31, 2009, with the State's consent, Defendant filed a motion to continue the trial scheduled for August 4, 2009. The trial was rescheduled for September 1, 2009. On September 1, 2009, the matter was vacated to allow a hearing on Defendant's motion to suppress, which was set for October 2, 2009. Also on September 1, 2009, jury selection was reset for October 6, 2009. On October 6, 2009, the trial was

rescheduled for October 28, 2009. On October 2, 2009, Defendant filed a motion to dismiss for failure to comply with the six-month rule, which the magistrate court denied on October 5, 2009. Following the jury trial on October 28, 2009, Defendant was found guilty of the charges in the complaint.

{3} In Defendant's de novo appeal to the district court, he filed a motion to dismiss based on violation of the six-month rule and based on the State's failure in magistrate court to file a motion to extend the deadline for trial. At the hearing on Defendant's motion, Defendant acknowledged that the delays were to his benefit. The district court dismissed the case with prejudice, stating as grounds for dismissal that (1) the State had not responded to Defendant's magistrate court motion to dismiss, and (2) the magistrate court extended the time limit within which to hold a trial "without a statement on the record as to the extraordinary basis upon which it was to be extended."

{4} On appeal, the State argues that the district court erred in dismissing the case because the court relied on the former version of Rule 6-506(E) which mandated dismissal with prejudice for failure to comply with the six-month rule, rather than the current and applicable version of Rule 6-506(E), which affords the court discretion in determining whether to dismiss the case or to consider other sanctions as appropriate. The State also argues that Rule 6-506 was not violated in the first place because the delay was requested by and benefitted Defendant, and because the magistrate court correctly extended the time pursuant to Rule 6-506(C)(5).

{5} "We review de novo questions of law concerning the interpretation of Supreme Court rules and the district court's application of the law to the facts of [the] case." *State v. Foster*, 2003-NMCA-099, ¶ 6, 134 N.M. 224, 75 P.3d 824. The appeal of a magistrate court decision to a district court is de novo. Rule 6-703(J) NMRA. In hearing a de novo appeal, "the district court is not in any way bound by the proceedings in the lower court." *State v. Hicks*, 105 N.M. 286, 287, 731 P.2d 982, 983 (Ct. App. 1986). Further, the district court must independently determine whether the magistrate court rules were followed. *See id.* (stating that in a de novo appeal from a metropolitan court decision, "it was incumbent upon the district court to make an independent determination of whether" the law enforcement officer had complied with the metropolitan court rule requiring a criminal complaint to be filed "forthwith" in accordance with the then-applicable rule (internal quotation marks omitted)).

{6} The former version of Rule 6-506(E) mandated dismissal with prejudice in the event of non-compliance with Rule 6-506(B). *See* Rule 6-506 compiler's annots. (explaining that the 2008 amendment, effective January 15, 2009, to Subsection (E) changed "shall" to "may"). The former version was replaced with the current version of Rule 6-506(E) that allows the court to exercise discretion to dismiss the case for a violation of the six-month rule or to apply other sanctions, as appropriate, depending upon the circumstances of the case. *See Duran v. Eichwald*, 2009-NMSC-030, ¶ 15, 146 N.M. 341, 210 P.3d 238 (stating that all versions of the six-month rule, including Rule 6-506, were amended by a Supreme Court order to give courts discretion to decide whether the failure to timely commence trial should result in dismissal of the charges or whether some other sanction would be more appropriate).

{7} In the district court hearing on Defendant's motion to dismiss, Defendant's counsel advised the court that dismissal was

mandatory, stating that "the fact remains that under the rule . . . if the . . . time is not extended then the court shall dismiss it, and it's a shall rule." The State did not seek to correct Defendant's incorrect statement of the law nor did the State alert the court to the current, discretionary version of Rule 6-506(E). Because there is no evidence in the record that the district court considered or applied any particular version of Rule 6-506(E) in this case, and because the State failed to preserve a Rule 6-506(E) issue by raising it in the district court, we do not consider this aspect of the State's argument. *See State v. Riley*, 2010-NMSC-005, ¶ 24, 147 N.M. 557, 226 P.3d 656 ("To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked." (alteration omitted) (internal quotation marks and citation omitted)); *State v. Garcia*, 2005-NMCA-065, ¶ 6, 137 N.M. 583, 113 P.3d 406 ("We generally do not consider issues on appeal that are not preserved below."); *see also State v. Hunter*, 2001-NMCA-078, ¶ 18, 131 N.M. 76, 33 P.3d 296 ("Matters not of record present no issue for review.").

{8} The record does not support the district court's first stated ground for dismissal, which was that the State failed to respond in magistrate court to Defendant's written motion to dismiss. The record reflects that Defendant filed his written motion to dismiss in magistrate court at 11:48 a.m. on the day of the hearing on Defendant's motion to suppress, which was scheduled for 11:30 a.m., and also at which the magistrate court heard Defendant's argument on his motion to dismiss. Thus, although it is true that the State did not file a written response to the motion, it appears that the State did not have an opportunity to do so. The record does reflect that the State orally argued its opposition to Defendant's motion to dismiss and that three days later the magistrate court, "having heard arguments of both parties[,]" entered a written order denying Defendant's motion to dismiss. Even if the district court's view of the proceedings in the magistrate court were accurate, it was error for the district court to base its dismissal on this rationale given that the failure of the State in the magistrate court proceedings to adhere to the formality of a written response in magistrate court motion practice should not be the subject of a district court's independent consideration in a de novo proceeding on the issue of a violation of the six-month rule. *Cf. Hicks*, 105 N.M. at 287, 731 P.2d at 983 (stating that in a de novo appeal "it [is] incumbent upon the district court to make an independent determination of whether the . . . [rules of magistrate court were followed]").

{9} The State's next contention is that the district court erred in determining that the magistrate court violated Rule 6-506. The magistrate court, acting on its own motion, extended the time to commence trial pursuant to Rule 6-506(C)(5), which states that

> [t]he time for commencement of trial may be extended by the court . . . upon a determination by the court that exceptional circumstances exist that were beyond the control of the state or the court that prevented the case from being heard within the time period provided that the aggregate of all extensions granted pursuant to this subparagraph may not exceed sixty . . . days[.]

In a written order, the magistrate court denied Defendant's motion to dismiss "due to circumstances in this case being outside the control of the State or the [c]ourt" and ordered that the time within which to commence trial would be extended for thirty days pursuant to

Rule 6-506(C)(5). The State's position is that the magistrate court properly extended the time to commence trial and that, in doing so, acted in compliance with the rule. Citing *State v. Lobato*, 2006-NMCA-051, ¶¶ 26, 28, 139 N.M. 431, 134 P.3d 122, the State contends that because the delay was to Defendant's benefit and because he acquiesced in the delay, common sense supported the magistrate court's decision to extend the time within which to hold trial, and the district court should have concluded the same.

{10} Defendant argues that his motion to dismiss was properly granted because, as the district court held, the magistrate court failed to make a record of what was "the extraordinary basis upon which [the time within which to hold trial] was to be extended." Defendant argues that it was incumbent upon the magistrate court to make a written record of its findings and to specifically state the exceptional circumstances that warranted an extension of the six-month rule because the magistrate court's statement of exceptional circumstances was "clearly something which [was] necessary for review of this issue."

{11} We see no necessity for the requirement advanced by Defendant and the district court given that the appeal to the district court is not an on-the-record review but, instead, is de novo. Thus, were we to decide this case on this single circumstance, we would reverse the district court's ruling because no rule or case law required the magistrate court to create a record of what were the exceptional circumstances that led to its decision. For the reasons explained later in this Opinion, we reverse the district court on other, broader grounds. Unlike appeals to this Court, in which we often afford deference to the discretionary decisions of the lower court, in de novo appeals from the magistrate court, the district court "is not in any way bound" by the magistrate court's decision, and it is "incumbent upon the district court to make an independent determination" of whether the magistrate court rules were followed. *Hicks*, 105 N.M. at 287, 731 P.2d at 983. A de novo appeal in the district court is conducted "as if the trial in the [magistrate] court had not occurred." *Foster*, 2003-NMCA-099, ¶ 9.

{12} In *Hicks*, the defendant was arrested, and a criminal complaint was filed eight days later. 105 N.M. at 286-87, 731 P.2d at 982-83. Then-applicable Metropolitan Court Rule 38(d) required the arresting officer to file a criminal complaint in the magistrate court "forthwith." *Id.* at 287, 731 P.2d at 983. The metropolitan court determined that the complaint had not been filed "forthwith" and dismissed the charge accordingly. *Id.* The district court, concluding that the decision whether to dismiss was left to the magistrate court's discretion and that the prosecution had failed to demonstrate that the metropolitan court had abused its discretion, affirmed the ruling. *Id.* The prosecution appealed to this Court, claiming that it was error for the district court to apply an appellate, rather than a de novo standard of review. *Id.* Agreeing with the prosecution, this Court remanded for the district court to independently consider, de novo, whether the officer had complied with the "forthwith" requirement of the metropolitan court rule. *Id.*

{13} Here, as in *Hicks*, the district court improperly engaged in an appellate, rather than a de novo review. Rather than basing its decision on an independent determination of whether the violation of the six-month rule warranted dismissal in this case, the district court reviewed the action of the magistrate court and dismissed the case based on what it believed was the magistrate court's error. The

record does not reflect that the district court made an independent determination on the issue of violation of the six-month rule. Therefore, as in *Hicks*, we reverse the district court's ruling and remand for a de novo proceeding in which the district court shall independently determine whether dismissal was warranted under the facts of the case.

CONCLUSION

{14} We reverse the district court's dismissal of the case with prejudice and remand the case for de novo proceedings in accordance with this Opinion.

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

JONATHAN B. SUTIN, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

RODERICK T. KENNEDY, Judge

Certiorari Granted, May 2, 2012, No. 33,565

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-043

Filing Date: March 8, 2012

Docket No. 30,187

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

WILLARD BALLARD,

Defendant-Appellant.

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OPINION

SUTIN, Judge.

{1} Defendant Willard Ballard took his laptop computer and two external hard drives to a coworker's home and asked the coworker to install a software upgrade. After Defendant later told the coworker that he had child pornography on the computer and asked the coworker to erase the memory, the coworker viewed the pornography and then made the computer and hard drives available for police viewing. The police seized the computer and the two external hard drives that were in the coworker's possession. The police then searched for child pornography and found it in multiple files, following which the police obtained a search warrant permitting the computer and the external hard drives to be sent for forensic analysis. Twenty-five files, consisting of or containing twenty-five separate images, constituted the basis for charging Defendant with twenty-five counts of sexual exploitation of children (possession) contrary to NMSA 1978, Section 30-6A-3(A) (2007).

{2} Convicted of all twenty-five counts, Defendant appeals, claiming (1) based on double jeopardy grounds the twenty-five counts merge into one count consisting of a unitary course of conduct; (2) the district court erroneously denied his motion to suppress the contents of the external hard drive that contained the images; (3) because *Apprendi v. New Jersey*, 530 U.S. 466, 547 (2000) prohibits judicial fact-finding that directly affects sentencing, the district court erred when it reviewed evidence to determine the number of victims; (4) the district court erred in failing to grant Defendant's motion to dismiss where no *corpus delicti* existed without Defendant's extrajudicial statements to police; and (5) the district court erred in reconsidering Defendant's sentence sua sponte absent intervening circumstances providing a basis for amendment of the sentence. We hold on the double jeopardy point that the twenty-five counts should have been merged into five counts, requiring reversal of twenty counts on which Defendant was convicted, and we hold that the court did not err in regard to the remaining points.

BACKGROUND

{3} Defendant asked his coworker, Daniel Etlicher, to do software updates on his laptop computer because Defendant did not have access to the internet where he lived and therefore could not download the updates himself. Defendant gave the computer and two external hard drives to Mr. Etlicher. Approximately two weeks later, Defendant called Mr. Etlicher, but Mr. Etlicher did not answer because he was eating dinner. Mr. Etlicher later received a text message from Defendant asking Mr. Etlicher to call Defendant. Mr. Etlicher called Defendant. During their conversation, Mr. Etlicher overheard Defendant tell another person that there was child pornography on the computer. Mr. Etlicher asked, "Are you serious?" After acknowledging to Mr. Etlicher that he had child pornography on his computer, Defendant stated that when he downloaded a pornography file he got everything that came with it. Defendant asked Mr. Etlicher to erase the memory on the two external hard drives.

{4} Mr. Etlicher took the computer and external hard drives to work and met with his supervisor. In the presence of his supervisor, Mr. Etlicher turned on the computer and one of the first files that opened on one of the hard drives was one captioned as "child pornography." The two looked at the file, closed it, and the supervisor called the police.

{5} Officer Daniel Mailman responded to the call. When the officer arrived at the workplace, the computer was on, and Mr. Etlicher showed the officer the same file that he and his supervisor had viewed earlier, which was described by the officer as a brief video of a male and female of approximately eleven to thirteen years of age engaged in sexual activity. The officer told Mr. Etlicher to turn the computer off, and the officer seized the computer and external hard drives.

{6} Officer Mailman took the computer and external hard drives to his supervisor, Sergeant Max Stansell, who was aware of the investigation as to possible child pornography. Sergeant Stansell testified that it took him about five minutes, viewing approximately ten files, on the computer to find a file that he could positively identify as a child engaged in sexual activity with an adult. He then sealed the computer, placed it in evidence, and obtained a warrant for forensic evaluation. The computer and external hard drives were sent to Rocky Mountain Information Network (RMIN) for forensic evaluation.

{7} Defendant gave Sergeant Stansell a statement in which Defendant said he downloaded some files while he was in Illinois and admitted that he knew there were more than ten files containing child pornography. He said further that he had downloaded the files from a peer-to-peer computer program, that he was an "avid" user of the hard drives, and that he knew what was on them and where the items were on the hard drives.

{8} A computer forensics analyst with RMIN, Christopher Tschupp, testified that he made a bit-for-bit copy of the laptop hard drive and of the two external hard drives. Mr. Tschupp testified that this process makes an exact copy of all of the material on the hard drives so that the copy can be analyzed without disturbing the original evidence. More particularly, Mr. Tschupp reported that twenty-five files had been "created" or "downloaded" on five occasions. The State based its charges on possession of twenty-five files of downloaded images, divided into possession of eight files consisting of video clips and seventeen files consisting of still images. Of the twenty-five counts with which Defendant was charged, images for Counts 1-3 and 9-25 were downloaded April 7, 2007; the image for Count 8 was downloaded April 17, 2007; images for Counts 4 and 6 were downloaded May 11, 2007; the image for Count 7 was downloaded May 21, 2007; and the image for Count 5 was downloaded May 25, 2007. Defendant established on cross-examination of Mr. Tschupp that, as characterized by Defendant, the "E-Mule" program allegedly used by Defendant to download the files was "peer-to-peer" software on the laptop that allowed for direct file sharing from computer to computer upon entering keyword searches and did not involve purchasing or selecting files from a specific source. Mr. Tschupp testified as to each of the twenty-five images of children engaged in sexual activity that were displayed for the jury from two digital video discs (DVDs) made from the bit-for-bit copy prepared by Mr. Tschupp from the laptop and external hard drives. All of the illicit images Defendant downloaded were contained on only one of his external hard drives at the time the computer and hard drives were seized.

DISCUSSION

The Suppression Issue

{9} Defendant contends that the warrant requirement was violated three separate times when (1) with no warrant, an officer first viewed the computer and then seized Defendant's computer and hard drives;

(2) with no warrant, another officer independently searched the computer after it was taken to the police station; and (3) the computer and the hard drives were forensically searched pursuant to a warrant obtained based on evidence unconstitutionally acquired from the warrantless search at the police station.

{10} We review the district court's denial of Defendant's motion to suppress to determine whether the law was correctly applied to the facts, viewing the facts in a light most favorable to the prevailing party. *State v. Rivera*, 2008-NMSC-056, ¶ 10, 144 N.M. 836, 192 P.3d 1213, *rev'd on other grounds*, 2010-NMSC-046, 148 N.M. 659, 241 P.3d 1099; *State v. Diaz*, 1996-NMCA-104, ¶ 7, 122 N.M. 384, 925 P.2d 4. A defendant claiming violation of a Fourth Amendment privacy right must show an actual, subjective expectation of privacy in the area searched and must show that the subjective expectation of privacy is one that society is prepared to recognize as reasonable. *State v. Bomboy*, 2008-NMSC-029, ¶ 10, 144 N.M. 151, 184 P.3d 1045; *State v. Gurule*, 2011-NMCA-063, ¶ 7, 150 N.M. 49, 256 P.3d 992, *cert. granted*, 2011-NMCERT-006, 150 N.M. 764, 266 P.3d 633.

{11} Defendant argues that he had a reasonable expectation of privacy in the contents of his computer and external hard drives, an expectation that he maintained and never lost at any point in time. Thus, he argues, his privacy was unlawfully infringed when Officer Mailman viewed and seized the computer and was continually infringed thereafter. In particular, Defendant argues that he had a heightened expectation of privacy in the entire contents of both of the external hard drives and in the computer's hard drive as containers of simultaneously stored legitimate, private, lawful information. Based on this standing, Defendant asserts that the police violated the warrant requirement in the Fourth Amendment and in Article II, Section 10 of the New Mexico Constitution. Defendant relies on *United States v. Burgess*, 576 F.3d 1078 (10th Cir. 2009), *United States v. Carey*, 172 F.3d 1268 (10th Cir. 1999), *State v. Sublet*, 2011-NMCA-075, 150 N.M. 378, 258 P.3d 1170, and *Gurule*, 2011-NMCA-063.

{12} Defendant's authorities do not assist him. They are not applicable to the circumstances in this case, where Defendant lost any expectation of privacy he may have had once he gave the computer and external hard drives to Mr. Etlicher to update the software and admitted to Mr. Etlicher that child pornography existed on the computer. Even were there some question (and we do not think there is any question) in regard to a privacy expectation in the computer itself, there is no question that Defendant lost any expectation of privacy in the content of the external hard drives when he asked Mr. Etlicher to erase the memory on those drives. Defendant voluntarily placed control of the existing contents of the computer and the hard drives in Mr. Etlicher's hands.

{13} Under the circumstances, we cannot say that society is prepared to reasonably expect Mr. Etlicher to erase the memory as requested by Defendant or that society would affirm or ratify such action. We can say that society would reasonably expect Mr. Etlicher to report the existence of contraband to a law enforcement officer who, as here, lawfully viewed the child pornography in accordance with the private search doctrine. *See Rivera*, 2010-NMSC-046, ¶¶ 16-17 (setting out the private search doctrine and indicating that *United States v. Jacobsen*, 466 U.S. 109, 115 (1984) "held that the opening of [a] package by the employees . . . did not violate the

Fourth Amendment because of their private character" (internal quotation marks and citation omitted)).

{14} Although society will recognize an individual's expectation of privacy in a person's personal computer and external hard drives, Defendant lost his expectation of privacy when he voluntarily relinquished possession of the computer and external hard drives to Mr. Etlicher and specifically asked him to destroy the child pornography stored on the hard drives. Because Defendant lost any privacy expectation he may have had in the computer and external drives, Officer Mailman's seizure of them was reasonable and lawful under the Fourth Amendment and under Article II, Section 10 of the New Mexico Constitution. *See State v. Ryon*, 2005-NMSC-005, ¶ 23, 137 N.M. 174, 108 P.3d 1032 ("The touchstone of search and seizure analysis is whether a person has a constitutionally recognized expectation of privacy."). By the time of Officer Mailman's involvement, Defendant's expectation of privacy had been fully breached and lost by his own actions and statements, and it was not somehow regained before the officer and Sergeant Stansell observed the contents. Because we have determined that no unconstitutional search or seizure occurred, we reject Defendant's argument that the evidence obtained from the forensic search was tainted and therefore invalid pursuant to the fruit-of-the-poisonous-tree doctrine.

The Double Jeopardy Issue

{15} This is a unit-of-prosecution, double jeopardy case. We review this double jeopardy issue de novo. *State v. Leeson*, 2011-NMCA-068, ¶ 10, 149 N.M. 823, 255 P.3d 401. The first question in a unit-of-prosecution case is what is the appropriate unit of prosecution. *Herron v. State*, 111 N.M. 357, 359, 805 P.2d 624, 626 (1991). When the language of a statute does not indicate unambiguously whether the Legislature intended to create a separate offense for each of the multiple acts or whether it intended to create one offense for a continuous course of conduct involving multiple acts based on a single criminal intent, we turn to lenity and distinctness factors to guide our further analysis. *Id.* at 361, 805 P.2d at 628; *see State v. DeGraff*, 2006-NMSC-011, ¶ 35, 139 N.M. 211, 131 P.3d 61 (stating that the *Herron* indicia of distinctness include "the timing, location, and sequencing of the acts, the existence of an intervening event, the defendant's intent as evidenced by his conduct and utterances, and the number of victims"); *State v. Boergadine*, 2005-NMCA-028, ¶ 15, 137 N.M. 92, 107 P.3d 532 (stating that, after the first step in which we ask whether the statute clearly defines the unit of prosecution and we determine that the statute is ambiguous, we employ the *Herron* factors "to determine whether there was a sufficient showing of distinctness between a defendant's acts" (internal quotation marks and citation omitted)).

{16} The sexual exploitation of children statute in question here, Section 30-6A-3(A), reads:

> It is unlawful for a person to intentionally possess any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts any prohibited sexual act or simulation of such act and if that person knows or has reason to know that one or more of the participants in that act is a child under eighteen years of age. A person who violates the provisions of

this subsection is guilty of a fourth degree felony.

This Court has held that the unit of prosecution for possession in violation of Section 30-6A-3(A) is unclear, requiring the district courts to turn to the *Herron* factors. *State v. Olsson*, 2008-NMCA-009, ¶¶ 1, 7-10, 143 N.M. 351, 176 P.3d 340. On the other hand, with respect to the proscription in Section 30-6A-3(D) against manufacturing any obscene visual or print medium, this Court has held that the unit of prosecution is readily discernable. *Leeson*, 2011-NMCA-068, ¶ 17. The State contends that the unit of prosecution in Section 30-6A-3(A) is clear, with no need to engage in a distinctness analysis. We disagree, as reflected in the following discussion.

{17} The principal unit-of-prosecution focus in cases under Section 30-6A-3 is on the definition of "visual or print medium" because possession (under Subsection 3(A)) or manufacturing (under Subsection 3(D)) *of any medium* is what we must concentrate on in this case. "Visual or print medium" is defined as follows:

> (1) any film, photograph, negative, slide, computer diskette, videotape, videodisc[,] or any computer or electronically generated imagery; or
>
> (2) any book, magazine or other form of publication or photographic reproduction containing or incorporating any film, photograph, negative, slide, computer diskette, videotape, videodisc[,] or any computer generated or electronically generated imagery[.]

NMSA 1978, § 30-6A-2(B) (2001).

{18} In *Leeson*, this Court distinguished manufacturing from possession, stating that, with respect to manufacturing under Section 30-6A-3(D),"producing or copying a single image of child pornography is sufficient to constitute a violation[,]" and further explained that in *Olsson* we were left uncertain "whether the Legislature meant to criminalize the possession of a collection of child pornography or the possession of each individual image within that collection." *Leeson*, 2011-NMCA-068, ¶¶ 18-19; *see State v. Smith*, 2009-NMCA-028, ¶ 17, 145 N.M. 757, 204 P.3d 1267 (holding that the defendant "did more than possess pornographic images; he made a transportable, shareable copy of the images" and recognizing that such conduct was considered manufacturing).

{19} Section 30-6A-3(A) proscribes possession and this case involves the possession of visual or print medium consisting of computer or electronically generated imagery (which we will refer to as "image," "images," or "imagery") in video and still form downloaded through peer-to-peer file sharing.[1] Computer- generated images under that section are images of real children that are saved, loaded, or displayed on a computer or computer screen. *See State v. Alinas*, 171 P.3d 1046, 1050 n.2 (Utah 2007) (suggesting that future jury instructions should contain language indicating that a "computer-generated image" is properly defined as images of real children that are saved, loaded, or displayed on a computer or computer

[1] *See* http://en.wikipedia.org/wiki/Peer-to-peer_file_sharing, which describes peer-to-peer file sharing and states that "[i]n 2004, an estimated 70 million people participated in online file sharing."

screen and defined as computer-generated virtual images). Two DVDs were admitted as State's Exhibits 1 and 2. Exhibit 1 contained eight video clips that were downloaded on four different dates. Exhibit 2 contained seventeen still images, all of which were downloaded on April 7, 2007, at approximately the same time. It appears that all of the images were contained in files stored in a subdirectory which was a peer-to-peer downloading program called E-Mule that was installed on Defendant's laptop.

{20} Defendant characterizes the ultimate storage of the contraband as contained in a single folder on a single external hard drive. The prosecutor represented to the court that these twenty-five images were charged so that no child or image was duplicated. The State asserts that, therefore, "there were twenty-five distinct sexual acts and at least twenty-five distinct victims in different locations." At a continued hearing on the motion to merge the counts, Exhibits 1 and 2 were reviewed by the court and counsel. The district court determined that each of the twenty-five separately charged images involved a different child victim and a distinct act.

{21} Defendant argues that our focus must be "on the distinctness involved in possessing more than one image, in a single file folder, downloaded on five dates, in two formats (still and video)." He shows that the State's answer brief addresses *Herron* in only one page and then "fails to analyze any factor other than the number of victims[,]" appearing "to treat [Defendant's] conduct as though he manufactured or distributed the images rather than assessing [Defendant's] actual conduct, which is limited to possession." He contends that "the number of victims is a highly problematic factor in the pure possession context[,]" citing and characterizing *Gurule*, 2011-NMCA-063, ¶21, as noting a qualitative difference between viewing or downloading, on the one hand, and creating one's own child pornography, on the other hand. Defendant argues that analyzing distinctness based on the number of children "is simply unhelpful to determining the distinctness of a particular possessor's conduct[,]" pointing out that past unit-of-prosecution cases involving victims involved direct interaction between the defendants and the victims.

{22} In sum, Defendant argues that in this case distinctness should be analyzed principally, if not solely, based on his knowledge or mens rea, and his acts or actus reus. In that regard, Defendant argues that his unique conduct, involving his anonymous "file sharing" acquisition peer to peer, could not have had the effect of furthering the pornography industry or of spreading any image beyond his single possession. He argues further that the proscribed visual or print medium here is not the image seen but, instead, is the computer through which the images are viewed. He reasons that, as defined in the dictionary, a "medium" is an instrumentality through which something is conveyed; ergo, it is the computer that is the proscribed visual or print medium. He argues, too, perhaps alternatively, that the contraband images, as "digital files," were nothing more than a type of substance no different than, say, an illicit drug contained in several baggies. *See State v. Quick*, 2009-NMSC-015, ¶¶ 17-21, 146 N.M. 80, 206 P.3d 985 (holding that "the prohibited act is simply possession of a particular controlled substance" even if based on "multiple packages" and further that the possession of methamphetamine stored in separate areas constituted a single count of possession, being a singular actus reus). That is, the digital files constitute a single substance, namely, "ones and zeros" possessed in separate collections or separate confined spaces on a hard drive. In

Defendant's estimation, the circumstances call for the application of lenity and under the proper distinctness analysis only a single count, or, as hinted to by Defendant, at worst, five counts can be charged. He requests this Court to determine "that [twenty-five] counts of possession on a single medium violate double jeopardy and . . . that this Court vacate some or all but one of his convictions."

A. Lack of Unit of Prosecution Clarity

{23} The clarity issue begins and ends with legislative intent. *See DeGraff*, 2006-NMSC-011, ¶ 32 ("In unit of prosecution cases, . . . we inquire whether the Legislature intended punishment for the entire course of conduct or for each discrete act." (alteration, internal quotation marks, and citation omitted)); *see also State v. Bernal*, 2006-NMSC-050, ¶ 14, 140 N.M. 644, 146 P.3d 289 ("[T]he ultimate goal is to determine whether the [L]egislature intended multiple punishments."); *State v. Alvarez-Lopez*, 2004-NMSC-030, ¶ 40, 136 N.M. 309, 98 P.3d 699 ("If the Legislature's intent is unclear, we presume the Legislature did not intend to fragment a course of conduct into separate offenses." (alteration, internal quotation marks, and citation omitted)).

{24} What strikes us as one unclear aspect of the unit of prosecution here, requiring analysis of distinctness, is how we are to determine the medium and its chargeable possession under Section 30-6A-3(A) when we examine the two definitions of "visual or print medium" in Subparts (1) and (2) of Section 30-6A-2(B). Subpart (1) addresses possession of individual items of visual medium such as a photograph, a negative, or a slide, but also includes items that could contain one or more individual images such as a film, computer diskette, videotape, videodisc, as well as computer or electronically generated imagery. Subpart (2) appears to refer to collections of the items listed in Subpart (1) in the form of publication or photographic reproductions. The dichotomy raises the question about whether the Legislature intended to treat individual items and collections of items differently for purposes of prosecution. The dichotomy also raises questions, such as, (1) that which was at issue in *Olsson*—whether individual photographs contained or incorporated in a photograph or scrap book are to be charged separately, or are to be charged as a single possession, and (2) whether certain types of collections might fit more into one subpart than another. Here, Defendant raises the question whether possession of twenty-five images are to be charged separately or as a single possession based on the timing and manner in which they were collected and housed together in an external hard drive.

{25} Yet another clarity issue is how, if at all, the concept of actus reus, or here of "only one act of possession" should be applied under Section 30-6A-3(A) while employing the definitional subparts in Section 30-6A-2(B)(1) and (2). *See Quick*, 2009-NMSC-015, ¶¶ 18-19 ("Although this case involves two different possession-based offenses, nothing in the language of the statutes at issue suggests to us that the actus reus of these crimes—the control of all of a particular type of controlled substance by the defendant at a given time—should be construed differently."). Thus, for example, in the peer-to-peer downloading here, which may have entailed en gross digital file downloading in some or all instances, is the actus reus of the crime and therefore the chargeable possession of the medium based on the timing of downloading, the number of files downloaded, or how the images were contained? What effort, conduct, and placement, if any, must be characterized as a unitary and single act of possession?

{26} Further, and given the clarity issues we have discussed, also unclear is how and to what extent distinctness factors are to be employed. *See Herron*, 111 N.M. at 362, 805 P.2d at 629 (stating that "[e]xcept for penetrations of separate orifices with the same object, none of [the distinctness] factors alone is a panacea"). The State argues that we should consider the victims, given that the sexual exploitation of children legislation is special and unique, having been separated from child abuse legislation, and the further view that society understands the need to protect children from exploitation—being used as sexual objects—proscribed in Section 30-6A-3(A). When, if at all, do factors such as timing, location, sequencing, and intervening events, come into play? Defendant argues that only Defendant's knowledge, intent, and actions in the downloading and storage processes should be considered.

{27} The point of the foregoing clarity discussion is to drive home that Section 30-6A-3(A) does not clearly point to a unit of prosecution. Double jeopardy cases outside of this exploitation of children arena are not of much assistance. The pigeon-hole process in which our courts have been required to engage over the years to define the unit of prosecution has not been a particularly easy one. Evermore present now is our Supreme Court's insightful comment in *Swafford* and repeated in *Bernal* that "'[t]he case law is replete with failed attempts at judicial definitions of the same factual event.'" *Bernal*, 2006-NMSC-050, ¶ 16 (alteration in original) (quoting *Swafford v. State*, 112 N.M. 3, 13, 810 P.2d 1223, 1233 (1991)). One can easily see why the process forced the courts into the need to turn to the realm of lenity and to distinctness analyses, including guidelines such as the *Herron* factors. *Bernal*, 2006-NMSC-050, ¶¶ 14-15; *Herron*, 111 N.M. at 361, 805 P.2d at 628 (stating that lenity is "to assist in resolving ambiguous legislative intent" through a distinctness analysis). In conducting a distinctness analysis, once acts are determined to be either unitary or distinct, lenity has served its purpose. *Bernal*, 2006-NMSC-050, ¶ 14 ("If the acts are not sufficiently distinct, then the rule of lenity mandates an interpretation that the [L]egislature did not intend multiple punishments[.]"); *Herron*, 111 N.M. at 361, 805 P.2d at 628. As it always is with ambiguous legislation, we are called on to interpret and clarify. And this we must do here, faced with ever-present, ever-changing, technology and methods of obtaining and possessing digital imagery.

B. Legislative Intent

{28} In this case we settle on interpretations of Sections 30-6A-3(A) and 30-6A-2(B)(1) and (2) as they may be applied here and on resolving the unit-of-prosecution issue in this case, in the following manner. The unit of prosecution is ambiguously expressed in those statutes. Here, initial possession started at the point Defendant completed each digital file download of one or more illicit images. Defendant's possession continued as long as the image remained on his computer or on any external hard drive. The process of downloading and the manner of storage of the files does not complicate the possession analysis. Nor does anonymous or file-sharing acquisition play a significant role.

{29} Blending lenity with an attempt to employ distinctness factors in this unusually difficult analysis of ambiguous legislation, in this fast-moving, astonishing, sometimes bewildering, digital age, we arrive at the following conclusions. First, the Legislature intended Subparts (B)(1) and (B)(2) to be separate avenues for charging unlawful

possession of obscene visual or print medium under Section 30-6A-3(A). Second, Defendant's chargeable unlawful possession fits within Section 30-6A-2(B)(2) as possession of a form of reproduction "containing or incorporating . . . any computer generated or electronically generated imagery[.]" Third, Defendant's chargeable unlawful possession under Subpart (B)(2) consists of five separate and distinct downloads. Each of Defendant's five separate downloads was in the nature of a single bundling of images for possession purposes, little different than obtaining a book or magazine or other form of publication or photographic reproduction containing or incorporating a videotape or computer diskette, as set out in Subpart (B)(2).

{30} We reject the State's argument that charging Defendant based on possessing multiple images with different victims conforms to legislative intent because the victims are the principal, if not the sole distinctness factor in possession cases and in this case. The circumstance of multiple images and victims can exist from possession of a single videotape or single computer diskette as described in Subpart (B)(1). Additionally, Section 30-6A-3(A) specifically recognizes that the medium may depict "one or more" under-aged participants in a prohibited sexual act. Thus, multiple images or victims depicted in the possessed medium cannot, under the definitions in the subparts, be identified as the principal or sole distinguishing or distinctiveness factor in determining what constitutes "obscene visual or print medium" under Section 30-6A-3(A). At the same time, we reject Defendant's argument that only one count of possession is permissible based on his view that distinctness can be analyzed here principally or solely based on his knowledge, intent, and conduct.

{31} We respectfully recommend that the Legislature revisit Section 30-6A-2 with the rapid developments in this digital age in mind. That section was enacted in 1984 and amended in 1993 and in 2001. Significant changes have developed and will continue to develop in technology that have raised and will continue to raise puzzling questions if the statute remains as written. Further, if prosecutors continue to charge unlawful possession for each image or based on each separate victim, convicted defendants can conceivably be sentenced to imprisonment for tens of years for one peer-to-peer download of images that ultimately are received, contained, stored, and possessed essentially as one group or unit in one computer. If that is the Legislature's intent, this intent should be more definitely stated in the legislation than is currently described in Section 30-6A-2. At this point, this Court has no room to effectuate a broader interpretation of the present statute. We have done the best we can, hoping that our view of the Legislature's intent is correct, and continuing to engage in the difficult task of applying lenity and any applicable distinctiveness factor to arrive at a reasonable result under ambiguous legislation.

{32} We hold that Defendant was erroneously charged with and convicted on twenty-five counts. Those counts should have been merged into five counts as explained in this Opinion.

The Sentencing Issue

{33} Defendant asks that, if this Court determines that double jeopardy was not violated, we determine that the district court's factual determination of the number of victims "drastically affected punishment" and, therefore, the court erred under *Apprendi* in failing to submit that factual determination to a jury. We review this constitutional issue de

novo. *State v. Smith*, 2000-NMSC-005, ¶ 6, 128 N.M. 588, 995 P.2d 1030.

{34} We agree with the State that *Apprendi* does not apply. Furthermore, Defendant's punishment was not enhanced beyond his base thirty-seven and one-half years punishment that consisted of eighteen months on each of the twenty-five counts. The district court considered the number of children exploited in considering whether to merge the counts. Nothing in the record shows that the court used these factual determinations in the sentencing process as sentencing factors or that the court's consideration of the number of children involved exposed Defendant to greater punishment. We reject Defendant's argument that essentially conflates the double jeopardy merger and unit-of-prosecution issue, which tests whether a defendant receives greater or lesser multiple punishments, with the *Apprendi* punishment enhancement issue. This is not an *Apprendi* issue.

The Corpus Delicti Issue

{35} Defendant contends that in order to establish corpus delicti, the State was required to present the actual hard drive in question to the jury instead of a third-generation copy of the hard drive burned to DVD discs. Defendant argues that "the trial court erred in denying [his] motion to dismiss for lack of the corpus delicti, without which his extrajudicial statements to police are inadmissible."

{36} The corpus delicti rule provides that "unless the corpus delicti of the offense charged has been otherwise established, a conviction cannot be sustained *solely* on the extrajudicial confessions or admissions of the accused." *State v. Weisser*, 2007-NMCA-015, ¶ 10, 141 N.M. 93, 150 P.3d 1043 (alteration, internal quotation marks, and citation omitted). A purpose of the rule is "to prevent the conviction of those who confessed to non-existent crimes as a result of coercion or mental illness." *Id.* ¶ 14 (internal quotation marks and citation omitted). In *Weisser*, this Court found that the corpus delicti can be established "through independent evidence establishing the trustworthiness of [the d]efendant's extrajudicial statements plus independent proof of the loss or injury." *Id.* ¶ 26. Here, the district court determined that the DVD copies were sufficiently accurate to establish corpus delicti. We review de novo whether the corpus delicti was established. *See Weisser*, 2007-NMCA-015, ¶ 17.

{37} At the end of the State's case, defense counsel moved to dismiss on the grounds that at trial the State did not have the hard drive from which the DVDs were produced. The hard drives were in Arizona where they were tested. The State responded that their expert would testify about the DVDs that would be introduced at trial to verify that they came from the hard drive in question and that the images were unaltered. The court agreed to hear the foundation laid by the expert witness before ruling. The court understood that the hard drive was "condensed" on to DVDs for the jury's consideration so the parties could control the images viewed. The court opined that the hard drive need not be present as long as the witness could testify that the copy was exact.

{38} Mr. Tschupp testified that he made a bit-for-bit copy of Defendant's hard drives. A bit-for-bit copy makes an exact copy of the hard drive including not just files but also deleted information and any unallocated data. This is done to preserve the original data, and Mr. Tschupp then worked off his bit-for-bit copy of the hard drives. Mr. Tschupp identified the computer and external hard drives from photographs that he took. He then

analyzed the exact copy of the hard drives and found child pornography images and videos on one of the hard drives.

{39} The DVDs, State's Exhibits 1 and 2, were not created by Mr. Tschupp, and the prosecutor noted they were created pursuant to the court's order. Defense counsel was given leave to voir dire Mr. Tschupp before the court ruled on the admission of the DVDs. The court then admitted the DVDs. Mr. Tschupp identified each file shown and testified as to its name and when it was downloaded onto the hard drive in question. Mr. Tschupp testified that those twenty-five images contained on the DVDs were the same images he saw on the bit-for-bit copy he made of Defendant's hard drive.

{40} Based on *Weisser*, Defendant states that the "traditional *corpus delicti* rule prevents conviction based solely on extrajudicial confessions, requiring additional proof that the charged crime was actually committed." *Weisser*, 2007-NMCA-015, ¶¶ 10, 36 (holding that an alleged victim's behavioral symptoms of abuse were insufficient proof of harm to support admission of the defendant's confessions to police). Defendant asserts that the corpus delicti consisted of the contraband images on the external hard drive containing them. He argues that because the actual hard drive as well as the forensically made copy were not produced at trial, the corpus delicti was missing—foundation evidence establishing the accuracy of the forensic copy may have in part justified admission of the DVDs, but the connection between the DVDs and the files possessed by Defendant was "grossly attenuated" having been made by an unidentified person from "another copy." Defendant complains that the court's finding that the DVD copies were made pursuant to a bit-for-bit process was in error, as was the court's ruling on the accuracy of the bit-for-bit copy, since the copies produced at trial were not made using that technique, thus making the evidence to establish corpus delicti "highly questionable" and insufficient to meet the trustworthiness test of *Weisser*. *See id.* ¶¶ 18, 25. Defendant also argues that although he agreed to the DVDs being used for the jury, "the actual hard drive was expected to be produced." Defendant asserts in his reply brief that he did not become aware of the State's failure to transport it from Arizona until after the State had rested its case. This appears to be inaccurate given that the State's expert had not yet testified.

{41} Defendant acknowledges that Mr. Tschupp presented "extensive foundational evidence regarding the accuracy of the forensic copy made of [Defendant's] hard drive" and agrees that such "foundation may have justified admission[,]" but states that the connection between the DVDs and the files Defendant possessed was attenuated, in that the DVDs were not themselves made using a bit-for-bit technique. He argues that "[t]he court's finding that the [DVDs] were made pursuant to the bit-for-bit process was in error" and "[a]s such, its conclusion that the discs are sufficiently accurate copies to establish *corpus delicti* is highly questionable."

{42} We are not persuaded by Defendant's arguments and hold that the district court did not err in denying Defendant's motion to dismiss for lack of corpus delicti. Defendant agreed with the process of copying the charged images onto the DVDs so as to keep uncharged images from the jury. *Cf. Midkiff v. Commonwealth*, 694 S.E.2d 576, 578 (Va. 2010) (holding that the trial court did not abuse its discretion in admitting a bit-for-bit copy of a hard drive where an expert "testified that [the] . . . copy of a hard drive is a

reproduction of the actual hard drive without degradation and is considered forensically to be an original"). In addition, Defendant presented no evidence suggesting corruption or irregularity in any copying process, including copying the charged images onto the DVDs. *See id.* (admitting DVD of child pornography images reproduced from hard drives as reliable evidence when the defendant "made no assertions that the admitted photographs or video clips were in any way manipulated or altered from the images that resided on his computer's hard drives"). Defendant's statements that he possessed child pornography were admitted in evidence without objection before Defendant raised any corpus deliciti issue. Even were admission of the statements questionable, there was abundant proof that Defendant possessed child pornography on his external hard drive without his own statements to the police. *See Weisser*, 2007-NMCA-015, ¶ 10 (stating that the corpus delicti rule provides that "unless the corpus delicti of the offense charged has been otherwise established, a conviction cannot be sustained *solely* on [the] extrajudicial confessions or admissions of the accused" (alteration in original) (internal quotation marks and citation omitted)). Furthermore, Sergeant Stansell had already testified, without objection, that Defendant said he knew he had downloaded more than ten files with child pornography. And Mr. Etlicher also had testified, without objection, that Defendant said there was child pornography on his computer.

The Sua Sponte Amendment of the Sentence Issue

{43} Sentencing was held on August 13, 2009, after Defendant completed a court-ordered, sixty-day diagnostic evaluation. The maximum time allowable was thirty-seven and one-half years as each of the twenty-five counts is a fourth degree felony carrying an eighteen-month sentence. *See* NMSA 1978, § 31-18-15(A)(10) (2007). The State noted that the diagnostic evaluation indicated Defendant felt no remorse for the victims depicted in the images and identified himself as the victim. Defendant was also described in the evaluation as a recluse with an isolated and transient lifestyle. He was living with a woman who was not a citizen and did not speak English, who had two daughters. The diagnostic report noted that this situation had overtones of grooming used by pedophiles to get access to children. The State asked for twenty-five years imprisonment followed by five years of probation.

{44} Defense counsel argued that Defendant's possession did not promote the industry of child pornography because no money was exchanged, that there was no allegation that Defendant ever touched a child inappropriately, that Defendant had no prior criminal history, and that his inability to feel remorse was a possible issue of mental illness. Defendant declined the invitation to speak to the court.

{45} At the hearing, the district court found Defendant was not a good candidate for treatment as noted in the diagnostic report. The court considered the victimization of the children in the images, the need to deter such conduct, and Defendant's lack of criminal history. The court sentenced Defendant to three years of imprisonment, suspending thirty-four and one-half years, followed by five years of supervised probation.

{46} Yet, when the parties again appeared before the district court the next day, the court said it believed it had placed too much emphasis on Defendant's lack of criminal history, and the court revised the sentence to nine years of imprisonment instead of three.

The State said the court still had jurisdiction to modify the sentence as no judgment and sentence had yet been filed. Defense counsel said it was not sure of the court's ability to modify the sentence. The court stated:

> I sentenced [Defendant] yesterday to basically three years and he'll have credit for time served. Since that hearing, I've been thinking of nothing else. This case [has] really caused me to examine what I had done and the evaluation of the evidence and I decided last night, in the middle of the night, that I had placed too much emphasis on [Defendant's] lack of any history. To his credit, he's apparently been a law-abiding citizen up to now and I sentenced what I thought was an appropriate sentence. Thinking back though of the evidence and balancing the interests that you must balance when you sentence someone—and these include issues related to deterrence, punishment, rehabilitation—factors such as that. One of the things that I'm considering is revising the sentence. I believe I have the authority still to do that. We don't have a [judgment and sentence] that's been signed. . . .
>
> . . . .
>
> Well, I have reconsidered my sentence of three years in prison and the five years of probation. I feel that doesn't adequately address what I need to do here. This is a type of crime that I haven't had much experience with as a judge and had no experience with as a lawyer. This is new, relatively new. So, that's why I do feel that after giving it additional consideration that I will revise my sentence in two ways.

{47} Defendant acknowledges that a district court has authority to reconsider and amend a sentence before the sentence is entered and final, but nevertheless complains that the amendment was improper in that the district court lacked authority to amend because it was not triggered by any circumstances warranting reconsideration and amendment. Defendant contends that our standard of review is de novo, because the issue is a legal one involving the appropriateness of the court's authority to alter its sentence under the circumstances, citing *State v. Lopez*, 1996-NMCA-101, ¶ 13, 122 N.M. 459, 926 P.2d 784, which discusses differing standards of review on different issues. The State contends that our review is abuse of discretion because the court considered the various sentencing factors, citing *State v. Segotta*, 100 N.M. 498, 501, 672 P.2d 1129, 1132 (1983), which involved review of a district court's consideration of various factors when sentencing within a presumptive sentence range, but did not explicitly state a standard of review. Both are correct. We review the legal issue of authority de novo and the issue of the propriety of a sentence for abuse of discretion.

{48} We hold that Defendant has failed to provide authority or persuasive argument that supports a theory that the district court cannot change its oral sentence pronouncement after reflecting on it overnight. We see nothing in law or the evidence that indicates any lack of authority that would prohibit the district court's change of mind and oral sentence under the circumstances. Furthermore, the court's explanation for changing the sentence does not reflect whim, arbitrariness, or irrationality. We see no basis on which to

conclude that the district court abused its discretion. *See State v. Diaz*, 100 N.M. 524, 525, 673 P.2d 501, 502 (1983); *State v. Rushing*, 103 N.M. 333, 335, 706 P.2d 875, 877 (Ct. App. 1985).

CONCLUSION

{49} We reverse Defendant's convictions and remand for further proceedings consistent with this Opinion.

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

JONATHAN B. SUTIN, Judge

WE CONCUR:

CELIA FOY CASTILLO, Chief Judge

TIMOTHY L. GARCIA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-044

Filing Date: March 20, 2012

Docket Nos. 30,458 and 30,459 (consolidated)

LOS CHAVEZ COMMUNITY ASSOCIATION, et al.,

Petitioners-Appellees,

v.

VALENCIA COUNTY and the BOARD OF COUNTY COMMISSIONERS,

Respondents,

and

JOHN WHISENANT and ELIAS BARELA,

Interested Parties-Appellants.

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OPINION

CASTILLO, Chief Judge.

{1} The issue in this case is whether a county commissioner is required to recuse herself from voting on an application for a zoning map amendment if she is a first cousin to one of the applicants. We conclude that the due process protections of the state and federal constitutions, as well as the language in Article VI, Section 18 of the New Mexico Constitution, require recusal. Thus, we affirm the decision of the district court.

BACKGROUND

{2} The facts are not in dispute. Appellants John Whisenant and Elias Barela (Appellants) applied to the Valencia County Board of County Commissioners (Board) for a zone change to allow a planned residential subdivision on adjacent properties they own in Valencia County. Appellants sought to turn three parcels of land encompassing about forty acres into fifteen residential lots of between two and two-and-a-half acres in size. The Board, on a 3-2 vote, approved the change in zoning status from Agricultural Preservation to Rural Residential 2, which would allow division of the land into the smaller lot sizes. Commissioner Georgia Otero-Kirkham, who is a first cousin to Barela, voted in favor of the change. Before the vote was taken, a neighborhood resident asked Commissioner Otero-Kirkham at the public hearing whether she would recuse herself from the vote because of her family ties to Barela. Commissioner Otero-Kirkham stated that "we're not that close" and that she had sought an opinion from the Board's attorney who informed her that she need not recuse herself.

{3} After the Board approved the zoning change, Los Chavez Community Association and a number of individuals (Los Chavez) appealed the decision to district court. Los Chavez sought reversal on the grounds that the decision of the Board was arbitrary and capricious and that it lacked substantial evidentiary support. Los Chavez also maintained that the group was denied fundamental due process because Commissioner Otero-Kirkham's refusal to recuse herself presented an appearance of impropriety and bias, essentially denying Appellants' opponents of an opportunity for a fair hearing before the Board. The district court reversed the decision of the Board, relying on the "spirit" of the New Mexico Constitution and citing the failure to recuse as a due process violation. The court remanded the case for a hearing without Commissioner Otero-Kirkham's participation, and Appellants filed this appeal.

DISCUSSION

{4} In addition to the question of recusal and due process, we asked the parties to brief two threshold issues: whether the district court's order is final for purposes of this appeal and whether the issue is properly before us pursuant to a discretionary petition for writ of certiorari from the district court's exercise of its appellate jurisdiction or as a direct appeal as of right from the district court's exercise of its original jurisdiction. We address those threshold issues before proceeding to the main issue.

The Doctrine of Practical Finality Applies Here

{5} We first decide whether this appeal is

properly before us on a final order from the district court. "In general, the right to appeal is restricted to final judgments and decisions." *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 119 N.M. 29, 33, 888 P.2d 475, 479 (Ct. App. 1994). "A final order is commonly defined as an order that decides all issues of fact and law necessary to be determined or which completely disposes of the case to the extent the court had the power to dispose of it." *State v. Begay*, 2010-NMCA-089, ¶ 11, 148 N.M. 685, 241 P.3d 1125. "Ordinarily, an order remanding a case for further proceedings in a lower court is not considered 'final' for purposes of appeal." *State v. Ahasteen*, 1998-NMCA-158, ¶ 11, 126 N.M. 238, 968 P.2d 328, *abrogated on other grounds by State v. Savedra*, 2010-NMSC-025, 148 N.M. 301, 236 P.3d 20. But some appeals from cases otherwise not considered final may be permitted under the doctrine of "practical finality." *High Ridge Hinkle Joint Venture*, 119 N.M. at 34, 888 P.2d at 480. The issue of finality is not to be treated robotically but instead "is to be given a practical, rather than a technical, construction." *Kelly Inn No. 102, Inc. v. Kapnison*, 113 N.M. 231, 236, 824 P.2d 1033, 1038 (1992), *limited on other grounds by Trujillo v. Hilton of Santa Fe*, 115 N.M. 397, 398, 851 P.2d 1064, 1065 (1993). In reversals and remands by a lower reviewing court, it is helpful to consider "the context in which the district court ordered the remand." *Alba v. Peoples Energy Res. Corp.*, 2004-NMCA-084, ¶ 11, 136 N.M. 79, 94 P.3d 822. We consider this flexible approach, though, in light of "the strong policy in New Mexico disfavoring piecemeal appeals." *Kelly Inn No. 102, Inc.*, 113 N.M. at 239, 824 P.2d at 1041.

{6} Despite the policy against piecemeal litigation, "our jurisprudence has permitted appeals from certain orders even though a disputed issue remains." *Roark v. Farmers Grp., Inc.*, 2007-NMCA-074, ¶ 42, 142 N.M. 59, 162 P.3d 896. "Such interests must be of the greatest importance, given the countervailing powerful interest in avoiding piecemeal appeals." *State v. Apodaca*, 1997-NMCA-051, ¶ 16, 123 N.M. 372, 940 P.2d 478. We note that "[t]he considerations that determine finality are not abstractions but have reference to very real interests—not merely those of the immediate parties, but, more particularly, those that pertain to the smooth functioning of our judicial system." *Kelly Inn No. 102, Inc.*, 113 N.M. at 239, 824 P.2d at 1041 (alteration in original) (internal quotation marks and citation omitted). We take note of that philosophy in the case before us, where "the underlying legal issue . . . is important to the continuing ability of the [c]ommission to function[.]" *Cox v. Mun. Boundary Comm'n*, 1998-NMCA-025, ¶ 12, 124 N.M. 709, 954 P.2d 1186. Thus, we are mindful of "the policies of judicial efficiency and facilitation of meaningful appellate review." *Roark*, 2007-NMCA-074, ¶ 45.

{7} In the matter at hand, we find two bases for allowing this appeal to proceed under the doctrine of practical finality. First, we agree with Appellants that the question of when a county commissioner must recuse herself in deciding a zoning-use matter involving a relative is one of continuing importance to the Board in Valencia County and to other such bodies statewide. As noted above, even though the circumstances in this case can be distinguished, the reasoning in *Cox* applies because the issue before us affects the operation of the Board and potentially other county boards across the state. The issue of the impartiality of a county zoning board commissioner in cases involving a relative is likely to be repeated in Valencia County and elsewhere. The policies of judicial efficiency and meaningful appellate review apply here.

{8} Second, fairness to the parties dictates that we accept this appeal. Appellants should not have to go back to the beginning of the application process if there is a chance that appellate review by this Court would spare them that time and expense in a process that could be burdensome and wasteful. *See Begay*, 2010-NMCA-089, ¶ 14 (accepting appeal and refusing to subject a defendant to a potentially needless revocation hearing at the magistrate court level). We also agree with Appellants that a change in the makeup of the Board (since the election in 2010) and the effect of the current economic climate could make the district court's remand order tantamount to a denial because of the constantly shifting political and economic landscape. If this Court refuses to hear the appeal, the matter would be reconsidered by the Board absent Commissioner Otero-Kirkham, and if the application were rejected, Appellants would be faced with deciding whether to appeal on the same grounds as in the present case: that the district judge's decision regarding recusal was error. *See id* ¶ 13. Deciding the issue now would eliminate the possibility of more years of litigation and appeal only to end up in this very spot. For the foregoing reasons, we conclude that practical finality is present in this case.

This Appeal Arises From the District Court's Original Jurisdiction

{9} We also asked the parties to brief whether the issue before us is a discretionary appeal pursuant to a writ of certiorari or if it is an appeal of right based on the district court's original jurisdiction. We agree with both parties that this appeal properly arises from the district court's original jurisdiction. "Whether the district court is possessed of jurisdiction over the subject matter of a case is a question of law that we review de novo." *Ottino v. Ottino*, 2001-NMCA-012, ¶ 6, 130 N.M. 168, 21 P.3d 37.

{10} When appeals arise out of administrative proceedings, we distinguish between issues that the district court takes up under its appellate jurisdiction and those it addresses under its original jurisdiction. Our district courts are recognized as courts of general jurisdiction. *See id.* A district court is given "original jurisdiction in all matters and causes not excepted in this [C]onstitution, and such jurisdiction of special cases and proceedings as may be conferred by law, and appellate jurisdiction of all cases originating in inferior courts and tribunals in their respective districts[.]" N.M. Const. art. VI, § 13. We have previously acknowledged that, regarding the appellate role of district courts in the administrative scheme, the idea of original jurisdiction "may appear to be contrary to the rule that when the district court sits as an appellate tribunal, in the absence of a statutory exception, it is limited to consideration of the record below." *Maso v. N.M. Taxation & Revenue Dep't*, 2004-NMCA-025, ¶ 16, 135 N.M. 152, 85 P.3d 276, *aff'd*, 2004-NMSC-028, 136 N.M. 161, 96 P.3d 286. But in *Maso*, we observed that due process claims are appropriately addressed by the district court under its powers of original jurisdiction. *Id.* ¶ 15. "To hold otherwise would effectively foreclose any due process challenges to the administrative process, which would impermissibly constrain the right of access to the courts." *Id.* ¶ 16. Thus, we reasoned, a district court "can simultaneously exercise its appellate and original jurisdiction." *Id.* ¶ 17. And we concluded that "[w]ithout question, the district court has the authority to consider constitutional claims in the first instance." *Id.* ¶ 14.

{11} In the case before us, as in *Maso*, the district court was faced with a constitutional

question of due process. And here, the district court based its ruling exclusively on the question of Commissioner Otero-Kirkham's refusal to recuse herself, which the district court concluded was a violation of Los Chavez's due process right to a fair and impartial tribunal. The fact that Los Chavez's original appeal to the district court invoked only that court's appellate jurisdiction is not fatal to our analysis. *See State v. Roybal*, 2006-NMCA-043, ¶ 17, 139 N.M. 341, 132 P.3d 598 (stating that "it is the substance of the [pleading], and not its form or label, that controls" the question of jurisdiction). Thus, Los Chavez's appeal is properly before this Court through an appeal of right based on the district court's original jurisdiction.

Due Process Requires Recusal

{12} We now turn to the merits of the case. "We review questions of constitutional law and constitutional rights, such as due process protections, de novo." *N.M. Bd. of Veterinary Med. v. Riegger*, 2007-NMSC-044, ¶ 27, 142 N.M. 248, 164 P.3d 947.

{13} Under the zoning ordinance for Valencia County, the Board is the ultimate decision-making body for zone changes such as the one requested by Appellants. Valencia County Ordinance No. 2004-05, § 154.061(B)(3)(a) (2004). When making this type of decision, the Board acts in a quasi-judicial capacity. *Id.* § 154.061. Appellants recognize that when Board members act in a quasi-judicial capacity, they "must act like a judicial body bound by ethical standards comparable to those that govern a court in performing the same function." *Albuquerque Commons P'ship v. City Council of Albuquerque* (*ACP*), 2008-NMSC-025, ¶ 33, 144 N.M. 99, 184 P.3d 411 (internal quotation marks and citation omitted).

{14} Relying on *West Bluff Neighborhood Ass'n v. City of Albuquerque*, 2002-NMCA-075, ¶ 52, 132 N.M. 433, 50 P.3d 182, *overruled on other grounds by Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 16 & n.10, 133 N.M. 97, 61 P.3d 806, Appellants argue that not all allegations of bias or prejudice are the same and not all render a proceeding fundamentally unfair. Appellants' position is that quasi-judicial adjudicators are presumed to be impartial and that the measure of the appearance of bias on the part of such a fact-finder is found in ethical standards comparable, but not identical, to those to which we hold judges. They suggest a "flexible and pragmatic" approach to gauging the impartiality of quasi-judicial decision-makers whereby a court would consider whether the relevant circumstances would lead an objectively reasonable individual to doubt the decision-maker's impartiality. Appellants point out that the Valencia County zoning ordinance is silent on the issue of recusal and further, that the New Mexico Code of Judicial Conduct, specifically Rule 21-211(A)(2) NMRA, requires recusal only when a party to the proceeding is within the third degree of relationship to the judge. Appellants' position is that because first cousins are fourth-degree relatives, they are not covered by the Code, and actual bias must be shown. Appellants argue that Commissioner Otero-Kirkham's first-cousin relationship is an insufficient basis for recusal in light of the fact that there is no claim of actual bias. Appellants urge reversal of the district court's determination because "the record reveals no circumstance that would disqualify Commissioner Otero-Kirkham from acting on the [Appellants'] zone change application."

{15} To evaluate Appellants' arguments, we begin by looking to the history of judicial

disqualification.[1] "Under early English law[,] a judge could be disqualified from presiding over a matter only when he could be shown to possess a disqualifying pecuniary interest—and then only when another judge was available to hear the cause." Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* § 1.4, at 7 (2d ed. 2007). Essentially, a judge's bias or prejudice was not enough to require disqualification. Throughout the United States' early independence, the narrow recusal standards of the common law prevailed, but near the turn of the nineteenth century, both federal and state governments began attempts to restrain judicial bias through statutory control. *Id.* at 8-9.

{16} Disqualification of judges based on kinship is found in Rule 21-211(A)(2)(a) and requires disqualification when the judge knows that a "person within the third degree of relationship . . . is . . . a party to the proceeding[.]" The New Mexico Constitution sets a higher standard with regard to judges and the parties who appear before them.

> No justice, judge or magistrate of any court shall, except by consent of all parties, sit in any cause in which either of the parties are related to him by affinity or consanguinity within the degree of first cousin, or in which he was counsel, or in the trial of which he presided in any inferior court, or in which he has an interest.

N.M. Const. art. VI, § 18.

{17} The New Mexico Legislature has imposed the higher constitutional restriction on other quasi-judicial tribunals. For example, quasi-judicial unemployment compensation hearing officers are prohibited from sitting "in any administrative or adjudicatory proceeding in which . . . either of the parties is related to the hearing officer, member of the board of review or secretary by affinity or consanguinity within the degree of first cousin[.]" NMSA 1978, § 51-1-8(E)(1) (2004). Similarly, the language of Article VI, Section 18 of the New Mexico Constitution is repeated in NMSA 1978, § 35-3-8(A)(1) (1968), and it states that no magistrate shall sit in any action in which "either of the parties is related to him by affinity or consanguinity within the degree of first cousin[.]" In determining that Commissioner Otero-Kirkham should have recused herself, the district court referred to these constitutional and statutory requirements.

{18} Los Chavez agrees with the district court's approach. They argue that quasi-judicial decision-makers should be held to the same constitutional standard as judges. Clearly, judges and unemployment compensation hearing officers are restricted from sitting on cases with parties who are related to them within the degree of first cousin. The New Mexico Constitution does not specifically mention quasi-judicial decision- makers, and there is no statute that deals specifically with disqualification of New Mexico county commissioners when they are acting in a quasi-judicial capacity. Thus, our question is whether board members who sit in a quasi-judicial capacity should be bound by the kinship-based disqualification requirements found in the language of Article VI, Section 18 of the New Mexico Constitution based on due process protections of the state and federal constitutions, as construed in applicable case law. We conclude that they do.

[1] We recognize that the terms "recusal" and "disqualification" are often used interchangeably. *See* Rule 21-211 comm. cmt. at ¶ 1.

{19} We begin by reaffirming the proposition that those who sit on boards adjudicating individual property applications for changes in zoning designations act in a quasi-judicial capacity. *See ACP*, 2008-NMSC-025, ¶¶ 32-33. "Small-scale zone changes" are quasi-judicial when they "involve[] a determination of the rights, duties, or obligations of specific individuals on the basis of the application of currently existing legal standards." *Id.* ¶ 32 (internal quotation marks and citation omitted). Such a quasi-judicial zoning hearing "carries with it important procedural consequences." *Id.* ¶ 33. Such zoning matters "are not politics-as-usual as far as the municipal governing body is concerned[,]" and the presiding board members "must act like a judicial body bound by 'ethical standards *comparable to those that govern a court* in performing the same function.'" *Id.* (emphasis added) (quoting *High Ridge Hinkle Joint Venture*, 119 N.M. at 40, 888 P.2d at 486).

{20} The Fourteenth Amendment of the United States Constitution protects citizens from state action that leads to "deprivations of liberty and property without due process of law." *Mills v. State Bd. of Psychologist Exam'rs*, 1997-NMSC-028, ¶ 14, 123 N.M. 421, 941 P.2d 502. The New Mexico Constitution's Due Process Clause echoes the federal one: "No person shall be deprived of life, liberty or property without due process of law[.]" N.M. Const. art. II, § 18. "Procedural due process requires a fair and impartial hearing before a trier of fact who is disinterested and free from any form of bias or predisposition regarding the outcome of the case." *Riegger*, 2007-NMSC-044, ¶ 27 (internal quotation marks and citation omitted). These principles of fairness are basic to our justice system.

{21} The substance of Article VI, Section 18 has been part of the New Mexico Constitution since statehood. "[T]he disqualification of judges for certain causes, raising a presumption of partiality, has been ever present in our Constitution[.]" *State ex rel. Hannah v. Armijo*, 38 N.M. 73, 83, 28 P.2d 511, 516 (1933). The purpose of this provision is based on due process considerations—"to secure to litigants a fair and impartial trial by an impartial and unbiased tribunal." *State ex rel. Bardacke v. Welsh*, 102 N.M. 592, 603, 698 P.2d 462, 473 (Ct. App. 1985) (internal quotation marks and citation omitted). The recusal grounds listed in Article VI, Section 18 of the New Mexico Constitution are "recognized dangerous sources of partiality" and were included in the Constitution so as to prevent "the possibility of legislative detraction in any legislative scheme of disqualification of judges on account of partiality." *Hannah*, 38 N.M. at 82, 28 P.2d at 515-16. A judge "is presumptively partial or biased if he is related to any party to the proceeding[.]" *State ex rel. Anaya v. Scarborough*, 75 N.M. 702, 704, 410 P.2d 732, 733 (1966).

{22} Our Supreme Court has determined it to be "imperative" that when governmental agencies adjudicate the legal rights of individuals they "use the procedures which have traditionally been associated with the judicial process." *Reid v. N.M. Bd. of Exam'rs of Optometry*, 92 N.M. 414, 416, 589 P.2d 198, 200 (1979). And, while such procedural matters as the rules of evidence or hearsay need not be adhered to by administrative agencies to the same degree as in a court of law, the right to an impartial tribunal is held to the higher standard.

> The rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative

> adjudication where many of the customary safeguards affiliated with court proceedings have, in the interest of expedition and a supposed administrative efficiency, been relaxed.

Id.; *see also Ohio Bell Tel. Co. v. Pub. Utils. Comm'n*, 301 U.S. 292, 304 (1937) (suggesting of the adjudicative role of administrative agencies: "All the more insistent is the need, when power has been bestowed so freely, that the inexorable safeguard of a fair and open hearing be maintained in its integrity." (internal quotation marks and citations omitted)).

{23} Due process requires a "neutral and detached judge in the first instance." *Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972). The "requirement of impartiality applies not only to judicial officers but also to private persons who serve as adjudicators." *Rissler v. Jefferson Cnty. Bd. of Zoning Appeals*, 693 S.E.2d 321, 328 (W. Va. 2010). These principles are equally applicable to administrative proceedings. *See Schweiker v. McClure*, 456 U.S. 188, 195 (1982) (stating that "due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities"). By incorporating Article VI, Section 18 into our Constitution, New Mexicans have decided that absent consent, a judge cannot hear a case in which a first cousin to the judge is a party, and this is because there is a presumption of bias. As *Reid* advises, this type of a requirement is even more relevant at the quasi-judicial level, where other trial-like rules of administrative proceedings are relaxed. 92 N.M. at 416, 589 P.2d at 200. Here, Los Chavez had a right to expect that the hearings before the Board would be conducted under the basic rubric of fairness and impartiality by the decision-makers. We cannot ignore the plain language of our Constitution and the clear mandate of *Reid* and its progeny, which, when combined, tell us that the presumption of bias is fatal to the due process rights of parties appearing before quasi-judicial administrative tribunals. *See, e.g.*, *Riegger*, 2007-NMSC-044, ¶ 27 ("[D]ue process protections apply to administrative proceedings."); *City of Albuquerque v. Chavez*, 1997-NMCA-054, ¶ 11, 123 N.M. 428, 941 P.2d 509 (stating that due process guarantees that "a person . . . with interests terminated by an arm of the state receive a fair, adjudicative-style hearing").

{24} As Appellants recognize, New Mexico law binds quasi-judicial decision-makers to "ethical standards comparable to those that govern a court in performing the same function." *ACP*, 2008-NMSC-025, ¶ 33 (internal quotation marks and citation omitted). Appellants argue, however, that "comparable" does not mean "the same." But the basic safeguards established by standards set out in the federal and state constitutions, as well as in New Mexico statutes and rules, all have one goal—to ensure that the decision-maker is not biased. There is no principled reason to apply the prohibitions in Article VI, Section 18 of the New Mexico Constitution to judges but not to board members who are acting in an adjudicatory capacity. Our Constitution and our case law mandate that the Board member in this case, Commissioner Otero-Kirkham, should have recused herself from consideration of the zoning amendment sought by her first cousin, Barela, the co-applicant before the Board.

{25} Appellants also argue that such a restriction on local board members adjudicating matters involving first cousins could present hurdles in small communities where relation by blood may be harder to avoid. We also recognize Appellant's arguments that this Opinion could at times

hamper administrative efficiency or the rights of residents to fully serve their communities. We have previously observed that city council members are not expected to be "so insulated from their community as to require them to be detached from all issues coming before them." *Siesta Hills Neighborhood Ass'n v. City of Albuquerque*, 1998-NMCA-028, ¶ 20, 124 N.M. 670, 954 P.2d 102. In *Siesta Hills Neighborhood Ass'n*, a city councilor participated in a zoning-change application by a day-care center to which the councilor had previously sent her children to attend a program. *Id.* ¶ 17. We concluded that because there was no evidence that the city councilor had prejudged the merits of the petition and because the councilor's actions did not "give rise to an appearance of impropriety[,]" her participation did not invalidate the proceedings. *Id.* ¶¶ 19-20. In our case, the family ties between adjudicator and applicant are not tenuous in any way; they are obvious and direct. Although our Opinion could in some instances affect the processing of zoning applications in smaller counties of New Mexico, we are not convinced by Appellants' conjecture that such a restriction on local board members would create difficulty in adjudicating zoning matters. We do not see the occasional recusal of one zoning board member causing a significant or detrimental effect on local government decisions. When acting in a quasi-judicial capacity, board members are bound by the requirements of the New Mexico Constitution that they be impartial. We do not agree that this due process safeguard will materially inhibit the carrying out of governmental business in Valencia County or other smaller counties around New Mexico.

CONCLUSION

{26} For the foregoing reasons, we affirm the decision of the district court and remand to the Valencia Board of County Commissioners for action not inconsistent with this Opinion.

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

CELIA FOY CASTILLO, Chief Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

TIMOTHY L. GARCIA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-045

Filing Date: March 21, 2012

Docket No. 31,311

STATE OF NEW MEXICO ex rel. CHILDREN, YOUTH and FAMILIES DEPARTMENT,

Petitioner-Appellee,

v.

STEVE C.,

Respondent-Appellant,

and

JULIA A.,

Respondent,

IN THE MATTER OF ALEXIS C. and MICHAEL C.,

Children.

Oneida L'Esperance, Chief Children's Court Attorney
Rebecca J. Liggett, Children's Court Attorney
Santa Fe, NM

for Appellee

Jane B. Yohalem
Santa Fe, NM

for Appellant

Michael J. Doyle
Los Lunas, NM

Guardian ad Litem

OPINION

CASTILLO, Chief Judge.

{1} Father appeals from an adjudication of abuse of his two children pursuant to NMSA 1978, Section 32A-4-2(B)(1) (2009). Father claims that hearsay evidence was improperly admitted and that the district court erred in allowing an amendment to the petition at the end of the adjudicatory hearing to include the claim of abuse. We hold that the amendment to the pleading was improper, and we reverse the adjudication of abuse on that ground.

BACKGROUND

{2} In December 2010, the Children, Youth and Families Department (CYFD) filed a petition against Father and Mother alleging neglect and abandonment of their children Alexis and Michael (Children). *See* § 32A-4-2(E)(1) (defining a neglected child as one "who has been abandoned by the child's parent); § 32A-4-2(E)(2) (defining a neglected child as one who is "without proper parental care and control or subsistence, education, medical or other care or control necessary for the child's well-being because of the faults or habits of the child's parent . . . or [the] refusal of the parent . . . when able to do so, to provide them"). The adjudicatory hearing for Father was held on April 14-15, 2011; Mother was not part of this hearing and is not a party to this appeal.

{3} We provide a short summary of the facts presented at the hearing in order to give context to this appeal. Mother abandoned Children as toddlers, after which they were raised for the most part by their maternal grandmother (Grandmother). At first, Father would drop Children off with Grandmother and leave them for a week or two at a time. Eventually, he left Children with Grandmother as the primary caregiver until late 2009. During that time, Children would occasionally live with Father for a few months at a time, such as when Alexis was of kindergarten age;

when Michael was in fourth, fifth, or sixth grade; and in the summer of 2010. Grandmother said Father was often hard to find and that her contact with him was limited to the times she needed his signature to give her power of attorney in order to care for the Children, which Father provided several times over the years. When Michael was twelve years old, Father lived nearby, and on about four occasions Michael would go over to Father's house for short visits. Grandmother testified that generally Father did not visit on holidays nor did he show an interest in Children's education or extracurricular activities. Father provided no financial support to Grandmother but allowed her to deduct Children as dependents on her tax return. Father explained that at one point he had paid for psychotherapy sessions for Michael and interacted with the therapist, but except for that, Father left it to others to provide for Children's medical care. Father testified that the therapist told him that Michael had seen bad things when the boy had been with Mother. Several witnesses testified that Mother used drugs and that she associated with and exposed Children to others who used drugs.

{4} In December 2009, Mother returned to Children's lives and brought them to live with her boyfriend, Gustavo, in Santa Fe. When Mother abandoned Children a second time in February 2010, Gustavo continued to take care of Children. Children had an overnight visit with Father in May or June 2010, and when Gustavo picked them up, he noticed that Michael seemed lethargic and glassy-eyed. When Gustavo inquired about the boy's demeanor, Michael became insolent and stated that Father had allowed him to smoke marijuana. Gustavo testified that in July 2010 Mother took Children, and Gustavo later had to rescue Michael from nearby Grandmother's home after Michael called Gustavo explaining that "there was a guy who was beating him up" and "a pound of meth on the table." Father continued to allow Children to live with Gustavo during 2010, but Father provided no financial or medical support despite Gustavo's attempts to contact Father for this assistance. Father asserted his parental rights when he found out that Children had been taken into custody by CYFD in December 2010. Gustavo told CYFD that he had trouble providing medical care for Children and called police to help resolve the custody issue. Grandmother offered to seek custody of Children, but Children resisted staying there because of others in the home who were alleged to drink and take drugs.

{5} At the end of the hearing—after all of the evidence had been presented—CYFD asserted in its closing argument that there was sufficient evidence presented at the hearing to support a finding of abuse. The court considered this as a motion to conform to the evidence pursuant to Rule 1-015(B) NMRA and granted the motion. The court then found clear and convincing evidence that Father had neglected and abused Children, but insufficient evidence that Father had abandoned Children. This appeal followed.

DISCUSSION

Preliminary Issues

{6} We have two preliminary issues. First, we note that Father is not challenging the adjudication of neglect against him under Section 32A-4-2(E)(2). Thus, we do not review the adjudication of neglect by Father as determined by the district court. *Durham v. Guest*, 2007-NMCA-144, ¶ 9, 142 N.M. 817, 171 P.3d 756 (stating that issues not argued on appeal will not be reviewed on appeal), *overruled on other grounds by* 2009-NMSC-007, 145 N.M. 694, 204 P.3d 19.

Accordingly, the district court had a basis on which to make a disposition of the case. NMSA 1978, § 32A-4-22(B) (2005).

{7} Secondly, Father argues that the district court erred in admitting and relying on hearsay statements by Children and by Mother to conclude that Father abused Children. Because we reverse the portion of the adjudication based on abuse, we need not address this evidentiary question.

Amendment of the Petition After the Close of Evidence

{8} We now turn to the question of whether the district court erred in allowing the amendment of the petition after closing statements. As a general matter, "Amendments are within the [district] court's discretion and will be reversed on appeal only for abuse of discretion." *Bellet v. Grynberg*, 114 N.M. 690, 692, 845 P.2d 784, 786 (1992) (internal quotation marks and citation omitted). Because resolution of this matter involves the interpretation and application of rules and a statute, our review is de novo. *In re Daniel H.*, 2003-NMCA-063, ¶ 8, 133 N.M. 630, 68 P.3d 176. The review of issues dealing with the denial of Father's rights to procedural due process is also a question of law that we review de novo. *See State ex rel. Children, Youth & Families Dep't v. Ruth Anne E.*, 1999-NMCA-035, ¶ 22, 126 N.M. 670, 974 P.2d 164.

{9} After closing arguments, the district court addressed the amendment question as follows:

> Rule 10-101 [NMRA] does bootstrap, essentially, the Rules of Civil Procedure, so we look to [Rule 1-015] for guidance on the issue of whether the pleadings should be amended to conform to the evidence. I just want to lay out my thinking on this in the event there is a need to have a court review this. What we see is Rule 1-015(B), amendments to conform to the evidence. [reading:] "When issues not raised by the pleadings" —and specifically we're talking about the allegation of abuse—"are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

Rule 10-101 is found in the Children's Court Rules, while Rule 1-015 is part of the Rules of Civil Procedure for the District Courts. CYFD concedes that "[a]djudications of abuse and neglect are governed by the Children's Code and the Children's Court Rules and not the Rules of Civil Procedure[,]" and therefore the district court incorrectly applied Rule 1-015. We agree. Rule 10-101(A) directs:

> Except as specifically provided by these rules, the following rules of procedure shall govern proceedings under the Children's Code [NMSA 1978, § 32A-1-1 (1995)]:
>
> (1) the Children's Court Rules govern procedure in the children's courts of New Mexico in all matters involving children alleged by the state:
>
> . . .
>
> (c) to be abused or neglected as defined in the Abuse and Neglect Act[.]

The Children's Code sets forth the procedure to be used when petitions are amended:

> When it appears from the facts during the course of any proceeding under the Children's Code that some finding or remedy other than or in addition to those indicated by the petition or motion are appropriate, the court may, either on motion by the children's court attorney or that of counsel for the child, amend the petition or motion *and proceed to hear and determine the additional or other issues, findings or remedies* as though originally properly sought.

NMSA 1978, § 32A-1-18(A) (1995) (emphasis added).

{10} Along these lines, CYFD acknowledges that Section 32A-1-18 does not contain language allowing an amendment when issues not raised by the pleadings are tried by the express or implied consent of the parties. Relying on *State v. Franks*, 119 N.M. 174, 889 P.2d 209 (Ct. App. 1994), and *State v. Salgado*, 112 N.M. 793, 819 P.2d 1351 (Ct. App. 1991), CYFD argues that the district court ruling should be affirmed under the "right for any reason" doctrine. *Franks*, 119 N.M. at 177, 889 P.2d at 212 (allowing affirmance when a district court ruling is correctly based "on a ground not relied upon by the district court" but not "if reliance on the new ground would be unfair to the appellant"); *Salgado*, 112 N.M. at 796, 819 P.2d at 1354 (same). According to CYFD, allowing the amendment under Rule 1-015 would be consistent with the primary purpose of the Children's Code to "provide for the care, protection[,] and wholesome mental and physical development of children coming within the provisions of the Children's Code" as set forth in NMSA 1978, Section 32A-1-3(A) (2009). We disagree.

{11} We begin by looking at the plain language of the statute. *In re Jade G.*, 2001-NMCA-058, ¶ 16, 130 N.M. 687, 30 P.3d 376 ("In pursuing this question of construction of the Children's Code, we look initially to the plain language of the Code to ascertain legislative intent."). Section 32A-1-18(A) refers to facts presented that would support "some finding or remedy other than or in addition to those indicated by the petition or motion" and then directs that the district court may "amend the petition or motion and proceed to hear and determine the additional or other issues, findings[,] or remedies as though originally properly sought." Father was put on notice regarding claims of neglect and abandonment, but he first learned of the abuse claim during CYFD's closing argument at the end of the proceedings. Once the district court grants a motion to amend, Section 32A-1-18(A) requires the court to "proceed to hear and determine the additional or other issues, findings[,] or remedies," which in this case pertain to the new allegation of abuse. Here, the district court granted the motion to amend the petition, immediately made its ruling, and did not "proceed to hear" the additional issue. We note that proof of abuse requires elements that are different from those elements required to prove neglect. An abused child is defined as one "who has suffered or who is at risk of suffering serious harm because of the action or inaction of the child's parent[.]" Section 32A-4-2(B)(1). A neglected child is one "who is without proper parental care and control or subsistence, education, medical[,] or other care . . . because of the faults or habits of the child's parent[.]" Section 32A-4-2(E)(2). Throughout the proceedings, Father was defending against allegations of neglect and abandonment, not abuse. Once the petition was amended, Father was not given the opportunity to defend against the new charge of abuse. We conclude that the court erred by relying on Rule 1-015 and by not following the requirements of

Section 32A-1-18.

{12} Our interpretation of Section 32A-1-18 is consistent with the guarantees of due process. "[N]eglect and abuse proceedings must . . . be conducted in a manner that affords the parents constitutional due process." *In re Pamela A.G.*, 2006-NMSC-019, ¶ 11, 139 N.M. 459, 134 P.3d 746. "Process is due when a proceeding could affect or interfere with the relationship between a parent and a child." *State ex rel. Children, Youth & Families Dep't v. Browind C.*, 2007-NMCA-023, ¶ 20, 141 N.M. 166, 152 P.3d 153. Even though the early stages of neglect and abuse proceedings do not involve the termination of parental rights, that due process requirement "begins with the filing of a petition for neglect and abuse." *Pamela A.G.*, 2006-NMSC-019, ¶ 11 (internal quotation marks and citation omitted).

{13} Due process requires "timely notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; [and] a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation[.]" *Id.* ¶ 12 (internal quotation marks and citation omitted). To evaluate the process owed to a parent in abuse and neglect proceedings, we utilize the balancing test from *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See State ex rel. Children, Youth & Families Dep't v. Mafin M.*, 2003-NMSC-015, ¶ 19, 133 N.M. 827, 70 P.3d 1266. We weigh three factors under the *Mathews* test: (1) the parent's interest, (2) the risk to the parent of an erroneous deprivation in light of the probable value of additional or substitute procedures as safeguards, and (3) the government's interest. *Browind C.*, 2007-NMCA-023, ¶ 31. "Parents' interest in maintaining a parental relationship with [their] children is a fundamental right that merits strong protection." *Pamela A.G.*, 2006-NMSC-019, ¶ 13 (alteration in original) (internal quotation marks and citation omitted). "The government's interest in protecting the welfare of children is equally significant." *Id.* We thus focus on the second prong and compare the risk to the parent of erroneous deprivation of rights with the potential burden to the state associated with additional procedures.

{14} Here, the risk to Father of erroneously depriving him of his rights is high. As we explained above, the procedure followed by the court prevented Father from presenting a defense to the new charge of abuse. Father was not given adequate notice of the new charge nor was he given the opportunity "to be heard at a meaningful time and in a meaningful manner." *State ex rel. Children, Youth & Families Dep't v. Maria C.*, 2004-NMCA-083, ¶ 26, 136 N.M. 53, 94 P.3d 796 (internal quotation marks and citation omitted). Father "did not have a fair opportunity to defend" against the claim of abuse, nor was he allowed to "offer[] additional evidence on the new theory." *Bellet*, 114 N.M. at 692, 845 P.2d at 786. Denial of notice and the opportunity to be heard is especially prejudicial in light of the relationship between the adjudicatory findings and any proceedings related to the termination of Father's parental rights. We agree with Father that he was "blind-sided" by the amended petition "sprung on him" at the end of the proceedings.

{15} By contrast, the burden on the state to provide additional procedural safeguards—i.e., "proceed[ing] to hear and determine the additional or other issues" and allowing Father to mount a defense to the charge of abuse—is minor. The district court

spent parts of one afternoon and the next morning adjudicating the case against Father. According to CYFD, all of the facts that supported the court's findings were readily discoverable before the hearing and the evidence supporting neglect was equally relevant to a claim of abuse. Therefore, there was nothing to prevent CYFD from moving to amend its petition before the hearing. And once the motion was granted at the end of the hearing, the court could have extended the proceedings to allow Father to present his defense to the added charge, or if time presented a problem, the court could have adjudicated the neglect issue and set the abuse issue for another day. None of these options place a significant burden on CYFD or the district court.

{16} We also observe that whether Father was afforded due process is not dependent on whether he would have prevailed had he been given adequate notice; rather, Father need only show "that there is a reasonable likelihood that the outcome *might* have been different." *Maria C.*, 2004-NMCA-083, ¶ 37. Because Father was not aware that he was facing allegations of abuse, he had not investigated or prepared a defense in this regard. His evaluation of the evidence presented was in relation to the neglect and abandonment issues, not to abuse. His strategy regarding objections might have been different had he known that he needed to defend against claims of abuse. Accordingly, we conclude that there is a reasonable likelihood that the outcome might have been different had notice been given. Applying the *Mathews* test to the circumstances of this case, we conclude that Father's due process rights were violated by the amendment procedure.

CONCLUSION

{17} For the foregoing reasons, we reverse the adjudication of child abuse against Father. As we have explained, the adjudication as to neglect was not appealed and the disposition of the case based on neglect was proper. We remand for any proceedings the court may want to take with regard to the disposition now that the determination as to abuse has been reversed.

{18} IT IS SO ORDERED.

CELIA FOY CASTILLO, Chief Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

J. MILES HANISEE, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-046

Filing Date: March 22, 2012

Docket No. 30,921

TOWN & COUNTRY FOOD STORES, INC., d/b/a TOWN AND COUNTRY FOOD STORES #241, Liquor License #0996,

Appellant-Respondent,

v.

NEW MEXICO REGULATION AND LICENSING DEPARTMENT, ALCOHOL AND GAMING DIVISION, AND THE

DIRECTOR OF THE ALCOHOL & GAMING DIVISION,

Appellees-Petitioners.

Consolidated with

NO. 30,922

TOWN & COUNTRY FOOD STORES, INC., d/b/a TOWN AND COUNTRY FOOD STORES #248, Liquor License #4035,

Appellant-Respondent,

v.

NEW MEXICO REGULATION AND LICENSING DEPARTMENT, ALCOHOL AND GAMING DIVISION, AND THE DIRECTOR OF THE ALCOHOL & GAMING DIVISION,

Appellees-Petitioners.

Linda L. Aikin
Santa Fe, NM

for Respondent

Gary K. King, Attorney General
Andrea R. Buzzard, Assistant Attorney General
Santa Fe, NM

for Petitioners

OPINION

WECHSLER, Judge.

{1} In this case, we consider whether criminal liability is a condition precedent to the imposition of a civil penalty on a licensee in an administrative hearing under the Liquor Control Act (the Act), NMSA 1978, §§ 60-3A-1 to -8A-19 (1981, as amended through 2011). Appellant, the New Mexico Regulation and Licensing Department Alcohol and Gaming Division (the Department), filed a petition for a writ of certiorari in this Court seeking review of a district court decision reversing two administrative decisions finding that Appellee, Town and Country Food Stores, Inc. (Town & Country), violated Section 60-7B-1(A)(1) by selling alcohol to a minor and imposing a one-day suspension of Town & Country's liquor license and a fine pursuant to Section 60-6C-1(A)(1). We granted the Department's petition.

{2} In its petition to this Court, the Department argues that the district court erred by (1) holding that criminal liability of the server is a condition precedent to the imposition of a civil penalty against a licensee under Section 60-6C-1(A)(1) for a violation of Section 60-7B-1(A)(1) and (2) raising the issue sua sponte because Town & Country did not raise the issue in the administrative hearing. We hold that the district court erred in determining that a criminal conviction of the server pursuant to Section 60-7B-1(F) is a

condition precedent to the Department's imposing civil liability on the licensee under Section 60-6C-1(A)(1). As a result, we reverse the decision of the district court and need not address the Department's second issue. We remand for the district court to consider the remaining appellate issues presented to, but not reached by, the district court.

BACKGROUND

{3} This case arises out of two consolidated appeals from the Department. In each case, the Department found that Town & Country violated Section 60-7B-1(A)(1) by selling alcohol to a minor. Both violations arose out of sting operations conducted by the Special Investigations Division (SID) of the New Mexico Public Safety Department.

{4} The first sting operation occurred on May 13, 2008. SID agents used Justin Garrison, then nineteen years old and therefore a minor, to purchase alcohol at Town & Country's store number 248 in Clovis, New Mexico. Garrison entered the store, obtained a six-pack of beer from the cooler, and placed it on the check-out counter. The clerk did not request identification from Garrison or inquire about his age. Garrison purchased the beer, and a SID agent issued Town & Country and the clerk citations for violating the Liquor Control Act, Section 60-7B-1(A)(1), which prohibits the sale of alcohol to minors.

{5} The second sting operation took place on June 12, 2008. Again, SID agents used Garrison to purchase alcohol, this time at Town & Country's store number 241 in Clovis, New Mexico. Garrison entered the store, obtained a six-pack of beer from the cooler, and placed it on the check-out counter. The clerk requested identification from Garrison. Garrison provided the clerk with his New Mexico issued driver's license, which had a printed legend stating that Garrison was not twenty-one years old and contained his date of birth. Despite Garrison's age, the clerk sold Garrison the beer. A SID agent then issued Town & Country and the clerk citations for violating Section 60-7B-1(A)(1).

{6} Pursuant to Section 60-6C-4(F), in each case, the Department director appointed a hearing officer, who conducted an administrative hearing to address the alleged violations of Section 60-7B-1(A)(1). The hearing officer found, in each case, that Town & Country violated Section 60-7B-1(A)(1) and that the sting operation did not entrap Town & Country. The Department director adopted the findings and imposed a $1000 fine and a one-day suspension of alcohol sales pursuant to Section 60-6C-1(A)(1). Pursuant to NMSA 1978, Section 39-3-1.1 (1999) and Rule 1-074 NMRA, Town & Country appealed to the district court, arguing that the hearing officer erred (1) in finding that SID did not conduct the sting operation in a manner that amounted to entrapment of Town & Country, (2) by improperly shifting the burden of proof to Town & Country to prove that the clerk was not predisposed to sell liquor to a minor, and (3) in determining that the SID agents conducted the sting operation in a manner that violated SID rules, but that the violations were not relevant. The district court consolidated the cases and issued a decision on May 13, 2010, reversing the Department director's order.

{7} The district court did not rely on Town & Country's arguments in reversing the Department director. Instead, the district court held that the "respective servers must be found guilty of [violating Section 60-7B-1(A)(1)] in a separate criminal proceeding" under Section 60-7B-1(F) as a "condition precedent" to civil liability for Town &

Country as a licensee. The Department timely filed a petition for writ of certiorari under Rule 12-505 NMRA, which this Court granted.

STANDARD OF REVIEW

{8} Upon a grant of a petition for writ of certiorari under Rule 12-505, this Court "conduct[s] the same review of an administrative order as the district court sitting in its appellate capacity, while at the same time determining whether the district court erred in the first appeal." *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 16, 133 N.M. 97, 61 P.3d 806. In reviewing an administrative decision, "we apply a whole-record standard of review." *See Smyers v. City of Albuquerque*, 2006-NMCA-095, ¶ 5, 140 N.M. 198, 141 P.3d 542 (internal quotation marks and citation omitted). "We independently review the entire record of the administrative hearing to determine whether the . . . decision was arbitrary and capricious, not supported by substantial evidence, or otherwise not in accordance with law." *City of Albuquerque v. AFSCME Council 18 ex rel. Puccini*, 2011-NMCA-021, ¶ 8, 149 N.M. 379, 249 P.3d 510 (internal quotation marks and citation omitted). When the hearing officer's decision is based on an issue of law, such as statutory interpretation, our review is de novo. *ERICA, Inc. v. N.M. Regulation & Licensing Dep't*, 2008-NMCA-065, ¶ 11, 144 N.M. 132, 184 P.3d 444.

CRIMINAL LIABILITY AS A CONDITION PRECEDENT

{9} The Department argues that the district court erred by determining that Section 60-7B-1(A)(1) requires criminal liability as a condition precedent to the Department imposing civil liability on a licensee. This argument requires statutory construction. In engaging in statutory construction, our primary purpose is to give effect to the intent of the Legislature. *Bd. of Educ. v. N.M. State Dep't of Pub. Educ.*, 1999-NMCA-156, ¶ 16, 128 N.M. 398, 993 P.2d 112. "The first rule is that the plain language of a statute is the primary indicator of legislative intent. Courts are to give the words used in the statute their ordinary meaning unless the [L]egislature indicates a different intent. The court will not read into a statute . . . language which is not there, particularly if it makes sense as written." *Johnson v. N.M. Oil Conservation Comm'n*, 1999-NMSC-021, ¶ 27, 127 N.M. 120, 978 P.2d 327 (internal quotation marks and citations omitted). "We ascertain the intent of the [L]egislature by reading all the provisions of a statute together, along with other statutes in pari materia." *N.M. Mining Ass'n v. N.M. Water Quality Control Comm'n*, 2007-NMCA-010, ¶ 12, 141 N.M. 41, 150 P.3d 991.

{10} We begin by examining the relevant portions of the Act. The hearing officer found that Town & Country violated Section 60-7B-1(A) and, based on Section 60-6C-1, fined Town & Country and suspended its liquor license. Section 60-7B-1(A) provides that "[i]t is a violation of the [Act] for a person, including a person licensed pursuant to the provisions of the [Act], or an employee, agent or lessee of that person, if he knows or has reason to know that he is violating the provisions of this section, to . . . sell, serve or give alcoholic beverages to a minor or permit a minor to consume alcoholic beverages on the licensed premises[.]" Section 60-6C-1(A) allows the Department to impose a civil, administrative penalty to licensees for violations of Section 60-7B-1(A). In relevant part, Section 60-6C-1(A), states that:

> [t]he director may suspend or

> revoke the license or permit or fine the licensee in an amount not more than ten thousand dollars ($10,000), or both, when he finds that any licensee has:
>
> (1) violated any provision of the [Act] or any regulation or order promulgated pursuant to that [A]ct[.]

The Act, Section 60-7B-1(F), further provides that "[i]n addition to the penalties provided in Section 60-6C-1 . . . , a violation of the provisions of [Section 60-7B-1(A)] of this section is a fourth degree felony[.]" The district court concluded that, because a violation of Section 60-7B-1(A) "triggers" both criminal prosecutions under Section 60-7B-1(F) and an administrative penalty under Section 60-6C-1(A), the Department cannot impose the administrative penalty on a licensee without the server first being found guilty under Section 60-7B-1(F) as a condition precedent.

{11} However, examining the plain language of Section 60-7B-1(A), (F) and Section 60-6C-1(A), neither provision supports a reading that the Legislature intended the criminal liability of a server or any agent of the licensee to be a condition precedent to the imposition of a civil penalty on the licensee. Indeed, there is no language in either provision that conditions the administrative penalty on a criminal conviction of the server or other agent of the licensee. We decline to read such language into the Act. *See Johnson*, 1999-NMSC-021, ¶ 27 (stating that we "will not read into a statute . . . language which is not there, particularly if it makes sense as written" (internal quotation marks and citation omitted)). Further, Section 60-7B-1(F) states that criminal penalties for both the licensee and the server are "[i]n addition to," not a condition precedent to, the administrative penalties against the licensee as provided in Section 60-6C-1(A)(1). If the Legislature intended the criminal penalties authorized in Section 60-7B-1(F) to be a condition precedent to the imposition of administrative penalties, it would have used clearer language. *See Colonias Dev. Council v. Rhino Envtl. Servs., Inc.*, 2003-NMCA-141, ¶ 17, 134 N.M. 637, 81 P.3d 580 (stating that the Legislature would have provided a much "clearer indication" if it had intended a statute to a more expansive meaning), *rev'd on other grounds by Colonias Dev. Council v. Rhino Envtl. Servs. Inc.*, 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939.

{12} In addition, the portion of the Act governing the procedures for imposing a civil penalty does not require a criminal conviction based on Section 60-7B-1(F) before the administrative penalty can be imposed. Section 60-6C-4 provides the procedures for the initial complaints against a licensee, the subsequent investigation by the Department, and the manner in which the hearing officer must conduct the administrative hearing. Section 60-6C-4(B) and (C) require that the Department file an administrative charge if it has probable cause after an investigation to believe that a licensee violated the Act. Section 60-6C-4(K)(5) and (7) require that the hearing officer or Director determine the guilt or innocence of the licensee "based upon substantial, competent[,] and relevant evidence and testimony appearing in the record of hearing." The Legislature did not condition either the initial administrative charges or the ultimate determination of guilt or innocence on whether a criminal proceeding resulted in a conviction against the licensee or the server. Under the plain meaning of the Act, the district court erred in vacating the Department's decisions to suspend Town & Country's Liquor license and

fine Town & Country for violating Section 60-7B-1(A)(1).

{13} Although the plain language of the Act is clear that the Legislature did not intend criminal liability to be a condition precedent for the imposition of civil liability under Section 60-7B-1(A), we further note that a contrary conclusion would frustrate the purpose of the Act. In enacting the Act, the Legislature sought to "tighten this state's liquor control laws." *Williams v. Ashbaugh*, 120 N.M. 731, 733, 906 P.2d 263, 265 (Ct. App. 1986). "The purpose of [the Act] is to regulate and place limitations on the sale of alcohol, not to promote it [, and] we employ a liberal interpretation to give effect to [this] legislative purpose and to facilitate temperance" when interpreting the Act. *Santillo v. N.M. Dep't of Pub. Safety*, 2007-NMCA-159, ¶ 19, 143 N.M. 84, 173 P.3d 6 (internal quotation marks and citations omitted). The Legislature authorized the Department to investigate and issue civil penalties against licensees in order to enforce the Act's limitations and regulations. Construing the civil penalty provision to be subordinate to the district attorney's ability to secure a criminal conviction of the server would hamper the ability of the Department to ensure that licensees comply with the Act. For example, in this case, the district attorney dismissed charges filed against the store clerk relating to store number 241 after the clerk completed a pre-prosecution program, and the district attorney disposed of the case relating to store number 248 by a conditional discharge without an adjudication of guilt after the clerk entered a plea. *See* NMSA 1978, § 30-31-28(C) (1972) (providing that a conditional discharge for a controlled substance possession offense "shall be without court adjudication of guilt"). The district attorney's office did not attempt to secure a criminal conviction in either instance, instead electing to dispose of the criminal case by other available pre-trial means.

{14} Town & Country argues that our construction of the Act as not requiring a criminal conviction as a condition precedent to the imposition of civil liability contradicts this Court's holding in *ERICA*. The district court relied on *ERICA* for the proposition that this Court has determined that the administrative hearings to revoke or suspend liquor licenses and fine licensees under the Act are akin to criminal review and have taken a "half-step from administrative to criminal" and therefore, reasoned that a finding of guilt against a licensee must "be conditioned upon the criminal conviction of its agents." We disagree with this interpretation of *ERICA*.

{15} In relevant part, this Court in *ERICA*, 2008-NMCA-065, ¶ 2, determined that a hearing officer "erred in excluding and striking evidence that was relevant on the issue of entrapment." In *ERICA*, the licensee attempted to present defenses as to both objective entrapment and substantive due process under our Supreme Court's decision in *State v. Vallejos*, 1997-NMSC-040, 123 N.M. 739, 945 P.2d 957. The hearing officer did not allow the licensee to present evidence relating to either form of entrapment based on *Kearns v. Aragon*, 65 N.M. 119, 123-24, 333 P.2d 607, 610 (1958), which held that an entrapment defense is not available in a liquor license suspension or revocation administrative hearing because the proceedings are not criminal in nature. *ERICA*, 2008-NMCA-065, ¶¶ 9, 47. In *ERICA*, this Court declined to apply *Kearns* and remanded the case to the hearing officer to develop a full record on the entrapment issue based on the questionable viability of *Kearns*. *ERICA*, 2008-NMCA-065, ¶ 52. We noted that our Supreme Court decided *Kearns* under a different version of the Act at a time

when the Act did not require an intent element to revoke or suspend a license or fine a licensee. *ERICA*, 2008-NMCA-065, ¶ 50. We also questioned the reasoning in *Kearns* that entrapment cannot be a defense because liquor license proceedings are not criminal in nature, noting that "the roots of the entrapment doctrine lie in civil cases." *ERICA*, 2008-NMCA-065, ¶ 49 (internal quotation marks and citation omitted).

{16} *ERICA* does not stand for the proposition that liquor license suspension or revocation hearings are criminal or quasi-criminal in nature. *ERICA* recognized the civil nature of these proceedings, yet noted that since 1958 many jurisdictions have criticized the failure to allow entrapment as a defense in civil liquor license proceedings. *Id.* Further, *ERICA* does not state that liquor license proceedings are criminal in nature because intent is now required, only that the current version of Section 60-7B-1(A) has an intent element, which may therefore lend itself to recognizing entrapment as a defense in liquor license revocation proceedings. *ERICA*, 2008-NMCA-065, ¶¶ 50-51. *ERICA* therefore does not contradict or change our interpretation of Section 60-7B-1(A), (F), Section 60-6C-1, or Section 60-6C-4. The district court erred in determining that a criminal conviction of the server pursuant to Section 60-7B-1(F) is required as a condition precedent before the Department imposes civil liability on the licensee pursuant to Section 60-6C-1(A)(1).

REMAND ON REMAINING APPELLATE ISSUES

{17} Town & Country also argues that we should affirm the district court's decision because (1) the hearing officer erred in determining that the SID did not entrap Town & Country, and (2) the SID failed to abide by its department standards in conducting the sting operation. Town & Country raised these issues in the district court in its statement of appellate issues. However, because the district court determined that criminal liability is a condition precedent to imposing civil liability under Section 60-6C-1 on a licensee, the district court did not reach these issues. Because the district court considered this case as an appellate court under Rule 1-074, we remand to the district court to consider the remainder of Town & Country's appellate issues in the first instance. *See Cerrillos Gravel Prods., Inc. v. Bd. of Cnty. Comm'rs of Santa Fe Cnty.*, 2004-NMCA-096, ¶ 24, 136 N.M. 247, 96 P.3d 1167 (remanding to the district court to consider issues raised, but not reached by the district court acting in an appellate capacity), *aff'd*, 2005-NMSC-023, 138 N.M. 126, 117 P.3d 932.

CONCLUSION

{18} Because the district court erred in determining that a criminal conviction of the server under Section 60-7B-1(F) is required before the Department can impose civil liability on the licensee pursuant to Section 60-6C-1(A)(1), we reverse the decision of the district court. We remand for the district court to consider the remaining appellate issues presented to, but not reached by, the district court.

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

JAMES J. WECHSLER, Judge

WE CONCUR:

LINDA M. VANZI, Judge

TIMOTHY L. GARCIA, Judge

Certiorari Denied, April 2, 2012, No. 33,460

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-047

Filing Date: January 18, 2012

Docket No. 29,557

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

OSCAR CASTRO H.,

Child-Appellee.

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M. Victoria Wilson, Assistant Attorney General
Albuquerque, NM

for Appellant

Jacqueline L. Cooper, Chief Public Defender
Mary Barket, Assistant Appellate Defender
Santa Fe, NM

for Appellee

OPINION

SUTIN, Judge.

{1} This case was inadequately handled by the attorneys and the court in the children's court proceedings. They inexplicably failed to address critical circumstances and issues. Then, the record provided to us on appeal by the parties was incomplete, and their attempt to reconstruct what occurred at a critical hearing was inaccurate. The original appellate briefs were based on incomplete information. We required supplemental briefs. The issues on which we decide this appeal should have been but were not considered in the children's court proceedings. The critical issues that we address are: Whether the grand jury's return of a no-bill on all of the charges contained in a delinquency petition against Oscar H. (Child) acted as a dismissal of the charges without prejudice and, if so, whether, following the return of the no-bill, the children's court erred in dismissing the petition with prejudice based on "timeliness of activity." For the reasons that follow, we hold that the consequence of the no-bill was that all of the charges were dismissed without prejudice. We also hold that the children's court erred in dismissing the charges with prejudice.

BACKGROUND

{2} The issues primarily revolve around Rule 10-243(A) NMRA, which establishes a thirty-day time limit under the Children's Court Rules within which an adjudicatory hearing must be commenced. Rule 10-243(A) lists nine events, of which the latest in time triggers the thirty-day time period. Of the nine possible triggering events, two are pertinent in the children's court proceedings and in the appellate briefs. Those are:

> (1) the date the petition is served on the child [and]
>
> . . .
>
> (9) if a notice of intent has been filed alleging the child is a "youthful offender,". . . the return of an indictment or the filing of a bind over order that does not include a "youthful offender" offense.

Id.

{3} On March 16, 2009, the State filed a delinquency petition against Child, who was in detention at the time, alleging that Child had committed nine delinquent acts. Two of those delinquent acts fall within the category of "youthful offender" offenses and seven fall within the category of "delinquent offender" offenses. NMSA 1978, § 32A-2-3(I)(1)(j), (k) (2005) (amended 2009) (current version at Section 32A-2-3(J)(1)(j), (k)); § 32A-2-3(C). Child was also served with the petition on March 16, and this triggered the thirty-day time period within which to commence an adjudicatory hearing under Rule 10-243(A)(1).

{4} On March 23, 2009, the State filed a notice of intent to seek adult sanctions, stating that it was "for the crimes alleged in [the delinquency petition] as those charges fall within the definition of a 'youthful offender[,]' pursuant to NMSA 1978, Section 32A-2-3I[,] pursuant to NMSA 1978, Section 32A-2-3I(i)[,][1]" requiring the State to proceed within fifteen days, on or before April 7, 2009, with either a preliminary hearing or a grand jury hearing. *See* Rule 10-213(B) NMRA (stating that "[w]ithin fifteen . . . days after a notice of intent to invoke an adult sentence is filed, a preliminary hearing will be conducted by the court unless the case is presented to a grand jury").

{5} On April 3, 2009, the State presented all of the delinquent acts listed in the delinquency petition to a grand jury. The grand jury found no probable cause and returned a no-bill on all of the delinquent acts—that is, on the seven delinquent offender offenses, as well as on the two youthful offender offenses.

{6} Following the no-bill, on April 13, 2009, the State moved pursuant to Rule 5-604(C) NMRA, a District Court Rule rather than the applicable Children's Court Rule, for a ninety-day extension of time for commencement of trial. In its motion, the State explained that the time limit for the trial would expire on April 17, 2009, by which time the children's court would be unable to accommodate a jury trial setting. By referring to an April 17, 2009, deadline, the trial the State was referring to was clearly the adjudicatory hearing and the time limit was clearly that in Rule 10-243(A). The motion did not mention the grand jury proceeding, did not mention any particular delinquent acts, and mistakenly relied on a District Court Rule instead of a Children's Court Rule.

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[1] It would appear that the State probably did not mean to repeat the citation and that instead of "3I" the State intended "3(J)."

{7} In a responsive motion filed April 14, 2009, Child requested that the court deny the State's motion for an extension of time, pointing to the State's failure to provide any good cause basis for the extension and noting that the State's request was erroneously made pursuant to a District Court Rule rather than the Children's Court Rule that allows only a sixty-day extension. *See* Rule 10-243(D) (stating that "[f]or good cause shown, the time for commencement of an adjudicatory hearing may be extended by the children's court judge provided that the aggregate of all extensions granted by the children's court judge may not exceed sixty . . . days"). Child also calculated April 16, not April 17, to be the date on which "the case [was] set to expire[.]" In addition, Child noted other instances of mistakes or failures on the part of the State and the children's court that occurred during the proceedings. Child's response made no mention of the no-bill.

{8} The court did not hold the adjudicatory hearing on April 17, 2009, but instead entertained pending motions. At that motions hearing on April 17, Child's counsel argued a litany of mistakes and failures on the part of the prosecutor that occurred during the proceedings in the children's court. Unpersuaded by the State's arguments and explanations, the court dismissed the delinquency petition with prejudice, stating: "This matter will be dismissed with prejudice. . . . The timeliness of activity that one must pursue to facilitate compliance with the Rules of Criminal Procedure need[s] to be applicable to everyone at all times[,] not selectively." Presumably, the court's ruling was based, at least in part, on a view based on defense counsel's argument that the State failed to comply with the thirty-day time limit under Rule 10-243. Inexplicably, in the hearing, neither the lawyers nor the court discussed the no-bill, and the court did not mention the no-bill in its dismissal order.

{9} In the State's appeal of the dismissal, the State represented in its brief in chief that the grand jury was only presented with the two youthful offender offenses and that the no-bill had no effect on the delinquent offender offenses. The State expressly asserted that the issue on appeal was whether Rule 10-243(A)(9) "provides for [restarting] the time [limitation to hold the adjudicatory hearing] when the grand jury is presented only with the youthful offender offenses and, therefore, does not make any findings regarding the delinquent offender offenses alleged in the delinquency petition."

{10} In its brief in chief, the State requested this Court to reverse the children's court's dismissal of the delinquency petition and to remand for an adjudicatory hearing on the delinquent offender offenses alleged in the petition. As to the youthful offender offenses, in a footnote the State indicated that "the children's court attorney could file a new delinquency petition, a notice of intent to invoke an adult sentence, and proceed with a preliminary hearing on the youthful offender offenses[,]" citing *State v. Isaac M.*, 2001-NMCA-088, ¶¶ 1, 8, 131 N.M. 235, 34 P.3d 624.

{11} Because the State's Rule 10-243(A)(9) argument on appeal was based on only the two youthful offender offenses having been presented to, considered by, and no-billed by the grand jury, and because the documentary record presented to us by the parties did not show what delinquent acts were presented to, considered by, and no-billed by the grand jury, this Court obtained pertinent grand jury proceeding records from the district court clerk. The records revealed that the

grand jury was, in fact, presented with *all* of the delinquent acts listed in the delinquency petition, which included the delinquent offender offenses and the two youthful offender offenses. Further, the records revealed that the grand jury returned a no-bill on *all* of the delinquent acts, which included the delinquent offender offenses and the youthful offender offenses. Thus, it appeared to this Court that the State's argument on appeal may have been based on a mistake or misunderstanding as to what was presented to and determined by the grand jury.

{12} Accordingly, we issued an order for further briefing in which the parties were to show "why this Court should affirm or should not affirm the [children's] court's dismissal of the delinquency petition on the ground that the grand jury was presented with, addressed, and returned a no-bill on all of the charges alleged in the delinquency petition." In its supplemental brief, after acknowledging that the grand jury was presented with and returned a no-bill on all of the offenses charged in the delinquency petition, the State asserted that the no-bill acted as a dismissal of all of the charges without prejudice and that the no-bill "prevent[ed] the State from proceeding further in the case." The State requested that we "reverse the [children's] court's dismissal of the delinquency petition with prejudice under Rule 10-243(A) . . ., and order the court to enter dismissal without prejudice pursuant to the grand jury's [no-bill]." Because the parties' supplemental briefs did not, in our view, provide the analyses and answers we had hoped for, we held oral argument.

DISCUSSION

{13} We address (1) whether the grand jury's no-bill on all of the charges in the petition acted as a dismissal of those charges without prejudice and, if so, (2) whether, following the return of a no-bill, the children's court erred in dismissing the petition with prejudice based on its "timeliness of activity" ground. These issues are legal issues that we review de novo. *State v. Garcia*, 2005-NMCA-042, ¶ 10, 137 N.M. 315, 110 P.3d 531.

{14} Under Rule 10-243(A)(1), the thirty days within which to commence an adjudicatory hearing started to run on March 16, 2009, the date that Child was served with the delinquency petition. On April 3, 2009, well within the thirty-day time limit, the grand jury returned a no-bill on all of the charges in the delinquency petition. The State contends, and we agree, that the no-bill was tantamount to a dismissal of all of the charges without prejudice. *See Isaac M.*, 2001-NMCA-088, ¶ 1 (holding that following a no-bill by the grand jury, the prosecution may proceed by information). Thus, the delinquency petition charges are to be considered as no longer pending against Child at the time of the April 17, 2009, hearing. The children's court therefore lacked any procedural basis on which to dismiss the petition with prejudice based on Rule 10-243(A) or any other timeliness ground to which the court may have vaguely referred. There existed nothing further to try or to adjudicate in an adjudicatory hearing in the existing case. In the absence of pending charges, the Children's Court Rules, including Rule 10-243, were no longer in play.

{15} We hold that the no-bill required dismissal without prejudice of all of the charges in the delinquency petition effectively terminating the case within the thirty-day deadline in Rule 10-243(A)(1). The court lacked procedural authority to dismiss the petition with prejudice, and it erred in

dismissing on the ground that the Rule 10-243(A) time deadline was violated.[2]

CONCLUSION

{16} We reverse and remand to the children's court for entry of an order dismissing all of the charges in the delinquency petition without prejudice.

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

JONATHAN B. SUTIN, Judge

WE CONCUR:

CELIA FOY CASTILLO, Chief Judge

CYNTHIA A. FRY, Judge

Certiorari Denied, April 12, 2012, No. 33,490

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-048

Filing Date: February 6, 2012

Docket No. 30,861

ZUNI PUBLIC SCHOOL DISTRICT, #89,

Petitioner-Appellee,

v.

STATE OF NEW MEXICO PUBLIC EDUCATION DEPARTMENT and VERONICA GARCIA, SECRETARY OF EDUCATION,

Respondents-Appellants.

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for Appellants

[2] The children's court should have been aware or at least made aware of the no-bill and should have addressed its effect on the court proceedings. Were it to have done so, it should have entered an order dismissing all of the charges in the petition without prejudice pursuant to the no-bill.

OPINION

CASTILLO, Chief Judge.

{1} The sole question before us is whether sovereign immunity bars Zuni Public School District #89 (Zuni) from bringing suit against the New Mexico Public Education Department and its secretary (State) for reimbursement of funds that Zuni claims were wrongfully deducted from its portion of state funding for public schools. Deciding that such cause of action does not violate the doctrine of sovereign immunity, we affirm the district court's denial of the State's motion to dismiss on that ground.

BACKGROUND

{2} Zuni, a New Mexico Public School District as defined in NMSA 1978, Section 22-1-2(R) (2010), filed a petition for writ of mandamus, declaratory relief, and injunctive relief in district court. The petition seeks to compel the State to reimburse Zuni for funds withheld by the State before the federal-equalization certification was issued by the federal government on April 26, 2010. The State filed a motion to dismiss Zuni's complaint based on a claim of sovereign immunity and other grounds. The district court denied the motion but allowed for interlocutory appeal. This Court considered the State's application for interlocutory appeal as one for writ of error and granted the application only on the issue of sovereign immunity. Before we begin our discussion of the question regarding sovereign immunity, we provide a brief explanation of the New Mexico public school funding formula.

{3} The Public School Finance Act, NMSA 1978, §§ 22-8-1 to -48 (1967, as amended through 2011), "governs the operational funding of New Mexico's public schools." *Taos Mun. Schs. Charter Sch. v. Davis*, 2004-NMCA-129, ¶ 10, 136 N.M. 543, 102 P.3d 102, *abrogated on other grounds by Smith v. City of Santa Fe*, 2007-NMSC-055, 142 N.M. 786, 171 P.3d 300. An overview and history of funding for public schools is found in Lynn Carrillo Cruz, *No Cake for Zuni: The Constitutionality of New Mexico's Public School Capital Finance System*, 37 N.M. L. Rev. 307, 314-24 (2007). "A key feature of New Mexico's public school operational funding scheme is the state equalization guarantee distribution, which is a formula through which the [s]tate apportions federal and local revenue for schools equitably among the state's school districts." *Taos Mun. Sch. Charter Sch.*, 2004-NMCA-129, ¶ 12; *see* § 22-8-25(A).

{4} The implementation of the formula is guided by both state and federal statutes. Federal statute 20 U.S.C. § 7709 (2002) governs the provision of Federal Impact Aid to local school districts affected by federal activities that decrease the school districts' tax base. Land, such as military bases and Indian reservations, are exempt from local property taxes—the taxes that serve as the main source of school funding. To address this potential shortfall in funding, Federal Impact Aid

provides revenue to supplement the budgets of schools so affected. *Id.* However, that revenue may be offset by states when distributing state monies in order to equalize funding throughout the state and provide fairness to all local districts. 20 U.S.C. § 7709; § 22-8-25. States may offset federal revenue going to local districts as long as the state is granted certification to do so by the federal Department of Education (DOE). *Id.* This funding system, and New Mexico's implementation of it, was endorsed by the United States Supreme Court in *Zuni Public School District No. 89 v. Department of Education*, 550 U.S. 81, 100 (2007). In effect, the State guarantees each school district the funds needed to meet its operating budget; the State reduces state revenues based on state and federal law for districts that get federal funds such as the Federal Impact Aid received by Zuni.

{5} The Zuni school district receives Federal Impact Aid each year. However, 75 percent of that money is offset by a matching reduction in state revenues to Zuni, provided that the DOE Secretary grants certification to the State before the end of the fiscal year, which is June 30. In this dispute, Zuni objects to the fact that the State implemented a pro-rated 75 percent reduction in state revenues in each monthly installment starting at the beginning of the fiscal year, in July 2009, despite the fact that the State did not receive federal certification until April 26, 2010. Zuni does not challenge the State's ability to implement the 75 percent offset after receiving certification; Zuni instead argues that the State was prohibited from implementing the offset for those first ten months of the fiscal year before the April certification.

{6} The State's position is that certification may be granted at any time before the end of the fiscal year on June 30; that monthly allocations are merely estimates throughout the fiscal year; and that funding figures are not final until after certification is granted and the school districts modify their budgets. Thus, according to the State, everything evens out by the end of the fiscal year, and no district receives less money than it needs to operate. In fiscal year 2009-10, the year in question, Zuni had an operating budget of $10.5 million and was calculated to receive $6.2 million in Federal Impact Aid. The State, though, offset that latter amount by 75 percent, or $4.6 million in withheld state funding. Zuni challenges the offset and argues that it should be able to pursue its suit in New Mexico district court.

{7} On appeal, the State essentially makes two arguments. First, it contends that Zuni's claim is based on a federal statute and that, therefore, the State retains constitutional sovereign immunity from suit in its own state courts. Second, the State argues that Zuni's action for money damages is barred by the State's common law sovereign immunity. We address each argument below.

DISCUSSION

A. Standard of Review

{8} "We issue writs of error to review immunity from suit cases because we consider them collateral order[s] affecting interests that would be irretrievably lost if the case proceeded to trial." *Campos de Suenos, Ltd. v. Cnty. of Bernalillo*, 2001-NMCA-043, ¶ 15, 130 N.M. 563, 28 P.3d 1104 (alteration in original) (internal quotation marks and citation omitted). "We review de novo the validity of a claim of sovereign immunity." *State ex rel. San Miguel BCC v. Williams*, 2007-NMCA-036, ¶ 20, 141 N.M. 356, 155

P.3d 761. "Mandamus is appropriate to compel the performance of an affirmative act by another where the duty to perform the act is clearly enjoined by law and where there is no other plain, speedy[,] and adequate remedy in the ordinary course of law." *West v. San Jon Bd. of Educ.*, 2003-NMCA-130, ¶ 9, 134 N.M. 498, 79 P.3d 842 (internal quotation marks and citation omitted). A motion to dismiss pursuant to Rule 1-012(B)(6) NMRA tests the legal sufficiency of the complaint. *Howse v. Roswell Indep. Sch. Dist.*, 2008-NMCA-095, ¶ 14, 144 N.M. 502, 188 P.3d 1253. The review of an order granting or denying a motion to dismiss is a question of law that we review de novo. *Garcia v. Dorsey*, 2006-NMSC-052, ¶ 13, 140 N.M. 746, 149 P.3d 62.

B. State vs. Federal Claim

{9} Zuni asserts that its petition is based on the state funding statute. The State, on the other hand, contends that Zuni's petition is grounded in the Federal Impact Aid statute. The distinction is key to resolving whether the State is shielded from this action by sovereign immunity.

{10} The Eleventh Amendment of the United States Constitution immunizes states and their officers acting in an official capacity from claims for money damages or in equity arising under a federal question, unless the state consents to suit. U.S. Const. amend. XI. States enjoy sovereign immunity not only in suits arising from the Constitution of the United States but also from suits grounded in acts of Congress and brought in federal court. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). Congress also is barred from subjecting states to federal claims that are brought in state courts. *Alden v. Maine*, 527 U.S. 706, 716 (1999) ("The leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the [s]tates of sovereign immunity."). Our own Supreme Court has stated: "*Alden* and its progeny stand for the proposition that state constitutional sovereign immunity bars individual claims for damages that are based on legislation passed by Congress pursuant to its Article I powers." *Manning v. N.M. Energy, Minerals & Natural Res. Dep't*, 2006-NMSC-027, ¶ 24, 140 N.M. 528, 144 P.3d 87; *see Gill v. Pub. Emps. Ret. Bd.*, 2004-NMSC-016, ¶ 15, 135 N.M. 472, 90 P.3d 491; *Cockrell v. Bd. of Regents of N.M. State Univ.*, 2002-NMSC-009, ¶ 7, 132 N.M. 156, 45 P.3d 876. Thus, if this action is based on 20 U.S.C. § 7709, as the State claims, it would be barred under the doctrine of constitutional sovereign immunity.

{11} As United States Supreme Court Justice Cardozo said: "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit." *Gully v. First Nat'l Bank*, 299 U.S. 109, 115 (1936). An action brought under state statutes will not implicate original federal jurisdiction "unless it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims, or that one or the other claim is 'really' one of federal law." *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust for So. Cal.*, 463 U.S. 1, 13 (1983). A complaint otherwise based on state law might still "arise under" federal law "if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties." *Id.* An action is not converted into a federal claim merely by the exercise of a federal law defense. *See Vaden v. Discover Bank*, 556 U.S. 49, 60, 129 S. Ct. 1262, 1272 (2009); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672-73 (1950).

{12} Even if a plaintiff, in its complaint, anticipates a federal defense, that is not enough to hand jurisdiction to the federal courts under the assertion that the suit arises under the laws of the United States. *See Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908). For example, when consumers brought suit against a pharmaceutical company alleging that its drug caused birth defects, basing the complaint in part on an alleged violation of the federal Food, Drug, and Cosmetic Act, the United States Supreme Court concluded that no federal question was present. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 804-05 (1986). The Court endorsed the rule of the "well-pleaded complaint" and determined that the action in question arose under state law. *Id.* at 808. The Court in *Merrell Dow* relied on this earlier determination:

> The general rule is that, where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the [federal] [d]istrict [c]ourt has jurisdiction under this provision.

Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199 (1921). The Court in *Merrell Dow* thus concluded: "This case does not pose a federal question of the first kind; [plaintiffs] do not allege that federal law creates any of the causes of action that they have asserted." 478 U.S. at 809.

{13} It is helpful to draw parallels to the facts in the present case and those in *Franchise Tax Board*. In *Franchise Tax Board*, the California Tax Board filed suit against a welfare benefit trust in an effort to collect unpaid personal income taxes. The action raised the question of whether the federal Employee Retirement Income Security Act (ERISA) preempted the state's authority to impose taxes on those funds held in trust. *Franchise Tax Bd.*, 463 U.S. at 3-4. The United States Supreme Court held that the suit was grounded in state law and was not removable to a federal venue. California law, the Court reasoned, "establishe[d] a set of conditions, without reference to federal law, under which a tax levy may be enforced; federal law becomes relevant only by way of a defense to an obligation created entirely by state law[.]" *Id.* at 13. The court declared that

> a federal court does not have original jursdiction over a case in which the coplaint presents a state-law cause of action, but also asserts that federal law deprives the defendant of a defense he may raise, or that a federal defense the defendant may raise is not sufficient to defeat the claim[.]

Id. at 10 (citations omitted). Thus, in *Franchise Tax Board*, the state's right to enforce its tax levies was not "of central concern" to the ERISA statute, *id.* at 2, 25-26, and ERISA did not provide a cause of action that would have allowed the state to enforce that right. *See id.* at 14. Against this backdrop, we now analyze whether Zuni's claim is primarily based upon a state statute or a federal statute.

{14} In the case before us, we disagree with the State that Zuni's right to relief depends on the Federal Impact Aid statute. And we disagree that resolution of this case involves a substantial question of federal law. Zuni is asking the district court to compel the State to issue Zuni its "full share" of state

equalization guarantee (SEG) funds without reducing the amount to offset federal aid. Zuni acknowledges the Federal Impact Aid statute, which allows states to reduce state aid to school districts receiving federal aid and provides parameters by which states may do so. The language, however, mainly speaks to the certification process by which DOE gives its imprimatur for states to attempt to equalize funding among its own school districts, essentially making sure that states do not dilute the intent of the federal law. And while the Federal Impact Aid statute provides administrative remedies for local school districts to challenge a state if the state shortchanges a school district or does so before getting federal certification, 20 U.S.C. § 7709(a) and (d)(2), the federal statute provides no cause of action for a school district wishing to challenge the state's funding formula itself. Zuni has no dispute with DOE; in fact the school district received its Federal Impact Aid funding. Zuni, instead, takes issue with the State for withholding state funds that were to be distributed according to state statute.

{15} As Zuni pointed out in its original petition for writ of mandamus, declatory relief, and injunctive relief, it is through the SEG formula that New Mexico aims to equalize funding between school districts that receive federal funding and those that do not. While Congress established the Federal Impact Aid program and set guidelines for states to receive federal equalization certification, New Mexico law sets out the method for SEG distributions and establishes the formula for calculating the amount to be distributed to school districts. Section 22-8-25. The state statute begins succinctly: "The state equalization guarantee distribution is that amount of money distributed to each school district to ensure that its operating revenue, including its local and federal revenues as defined in this section, is at least equal to the school district's program cost." Section 22-8-25(A). The statute allows for a 75 percent reduction in state distributions to offset federal funds categorized as "impact aid." Section 22-8-25(C)(2). The statute also sets out a precise formula for calculating the SEG distribution: "To determine the amount of the state equalization guarantee distribution, the department *shall* . . . ," followed by eight scenarios, two of which involve taking into account federal funds received by a school district. Section 22-8-25(D)(5) and (6) (emphasis added).

{16} Zuni's complaint challenges the actions of the state under Section 22-8-25. It focuses on Section 22-8-25(A)'s general outline of SEG distribution and Section 22-8-25(D)'s eight-part formula that the state is required to follow. Zuni grounds its main argument—that offsets for Federal Impact Aid are not allowed unless authorized by 20 U.S.C. § 7701 (2003)—in Section 22-8-25(C) of the state statute. That subsection allows for the 75 percent offset in state funding, in particular for Federal Impact Aid. Section 22-8-25(C)(2). Zuni challenges the State's actions prior to the April 26, 2010 certification by DOE. Thus, while federal certification—or lack thereof—is an element of the complaint, it does not present the controlling question in this action. Rather, it is the State's adherence to the Legislature's directives and the formula set out in Section 22-8-25 that provides the fulcrum for deciding this issue.

{17} Like in *Merrell Dow* and *Franchise Tax Board*, we conclude that Zuni's petition is based on state law, with only a tangential connection to federal law. Because this petition pivots on a question of state law, it is not subject to the Eleventh Amendment bar of sovereign immunity.

C. Money Damages Against the State

{18} Zuni seeks to recover money damages in the amount of set off retained by the State for the ten-month period before the State received federal certification. Zuni also seeks interest on that amount plus costs. The State asserts that a suit for monetary damages against the state treasury offends the basic tenets of sovereign immunity. Zuni in turn relies on *State ex rel. Hanosh v. New Mexico Envtl. Improvement Bd.*, 2009-NMSC-047, ¶ 10, 147 N.M. 87, 217 P.3d 100, a recent case from our Supreme Court that reasserted New Mexico's abolition of blanket sovereign immunity, though the case did not address claims for money damages. We discuss the question of whether an entity such as Zuni may bring an action for money damages against the State in a claim based on state law.

{19} New Mexico has abolished the common law tradition of shielding the state from suit through sovereign immunity. Our Supreme Court, in the landmark decision *Hicks v. State*, 88 N.M. 588, 590, 544 P.2d 1153, 1155 (1975), *superseded by statute on other grounds as stated in Gallagher v. Albuquerque Metro. Arroyo Flood Control Auth.*, 90 N.M. 309, 563 P.2d 103 (Ct. App. 1977), abolished the court-created concept that the state was always immune from suit. While *Hicks* revolved around tort actions, "the case generally abolished the common law doctrine of sovereign immunity in all its ramifications, whether in tort or contract or otherwise, except as implemented by statute or as might otherwise be interposed by judicial decision for sound policy reasons." *Torrance Cnty. Mental Health Program, Inc. v. N.M. Health & Env't Dep't*, 113 N.M. 593, 597, 830 P.2d 145, 149 (1992). This understanding was re-enforced recently by our Supreme Court in a discussion of *Hicks*: "Although that case specifically challenged the state's common-law immunity from actions in tort, no one should doubt the broader scope of what this Court has previously described as *Hicks's* sweeping abolition of sovereign immunity." *Hanosh*, 2009-NMSC-047, ¶ 10 (internal quotation marks and citation omitted). Thus, it is up to the Legislature to specify instances in which sovereign immunity may be invoked by the State.

{20} The State argues that the Tort Claims Act bars this suit. We disagree. In response to *Hicks*, our Legislature enacted the Tort Claims Act which reinstated sovereign immunity for certain tort actions committed by governmental entities and employees, while waiving such immunity for other tortious conduct. NMSA 1978, §§ 41-4-1 through -28 (1976, as amended through 2009). Further, the Legislature has specifically not waived sovereign immunity for contract matters that do not involve valid written contracts, NMSA 1978, § 37-1-23 (1976), but has done so for causes of action brought under the Human Rights Act. NMSA 1978, § 28-1-13(D) (2005). Along this line, we observe that the Legislature has not explicitly asserted or waived sovereign immunity for causes of action brought under the Public Schools Finance Act. Further, no New Mexico case has explicitly provided that the State waives sovereign immunity in a suit for money damages against the Public Education Department. Given our Supreme Court's ruling in *Hanosh*, coupled with the Legislature's failure to assert sovereign immunity with respect to money damages, we conclude that an action involving a public accounting of funds owed by the State to another entity is permitted in New Mexico.

CONCLUSION

{21} We conclude that this action is grounded in state law and there is no statute or case law barring a suit for money damages under the facts contained in the pleadings. Therefore the State is not protected by sovereign immunity. Accordingly, we affirm the district court's denial of the State's motion to dismiss the action on those grounds. We remand the case to the district court for proceedings in accordance with this opinion.

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

CELIA FOY CASTILLO, Chief Judge

WE CONCUR:

LINDA M. VANZI, Judge

TIMOTHY L. GARCIA, Judge

Certiorari Granted, May 11, 2012, No. 33,568

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-049

Filing Date: February 9, 2012

Docket No. 30,384

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

PATRICE CHUNG,

Defendant-Appellant.

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M. Anne Kelly, Assistant Attorney General
Albuquerque, NM

for Appellee

Jacqueline L. Cooper, Chief Public Defender
B. Douglas Wood, III, Assistant Appellate Defender
Santa Fe, NM

for Appellant

OPINION

VIGIL, Judge.

{1} The memorandum opinion filed in this case on January 24, 2012, is hereby withdrawn, and this opinion is substituted in its place.

{2} Defendant was convicted of one count of distribution of marijuana. NMSA 1978, § 30-31-22(A) (2006) (amended 2011). Defendant appeals, contending that he was denied his constitutional right to confront a critical witness against him. *See* U.S. Const. amend.

VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."); N.M. Const. art. II, § 14 ("In all criminal prosecutions, the accused shall have the right . . . to be confronted with the witnesses against him."). We reverse.

DISCUSSION

{3} Trial was held in Aztec, New Mexico. Prior to trial, the State filed a motion to allow its witness from the New Mexico Scientific Laboratories Division to testify by video conference. The witness was necessary to prove an essential element of the charge, that the substance transferred was marijuana. The grounds stated in the motion were:

> (1) A Crime Lab Analyst with the New Mexico Scientific Laboratories Division has been subpoened [sic] to testify in the above matter . . .;
>
> (2) The Scientific Laboratories Division is located in Santa Fe, New Mexico;
>
> (3) The Crime Lab Analyst is a necessary witness;
>
> (4) For judicial economy the Crime Lab Analyst should be allowed to appear via video-conferencing;
>
> (5) An appearance of a witness by video-testimony does not run afoul of . . . Defendant's right to confront the witnesses against him. Unlike telephonic appearance, video-conferencing permits the jury, . . . Defendant, the Court, and Counsel for both parties to not only hear the testimony, but to also visually observe the witness' demeanor and candor. It also permits the witness to see . . . Defendant and Counsel. Because of this, the members of the jury can independently form opinions as to the veracity of the witness and the weight to give the witness' testimony.

{4} The motion also states that Defendant opposed the motion. Under the Rules of Criminal Procedure, Defendant therefore had a right to file a response within fifteen days. Rule 5-120(C) NMRA (stating that the moving party shall determine if the motion is opposed, and if it is not opposed, an order initialed by opposing counsel shall accompany the motion); Rule 5-120(E) ("Unless otherwise specifically provided in these rules, a written response shall be filed within fifteen (15) days after service of the motion."). Defendant also had the right to file a response under the district court's own local rules. LR11-104(B) ("The responding party shall have fifteen (15) days after service of the motion to answer by written brief."). However, without affording Defendant an opportunity to respond, or otherwise be heard, the district court entered its order the day after the State filed its motion, and granted the motion. In its totality, the "Order Allowing Testimony Via Video Conferencing" states:

> THIS MATTER having come before the Court this 9th day of March, 2010 on the written motion of the State and good cause appearing therefore,
>
> IT IS HEREBY ORDERED that the Crime Lab Analyst may appear via video conferencing.

{5} At trial, the analyst was allowed to testify by video conference over Defendant's

objection that it violated his constitutional right to confront the witness against him. After the analyst testified, a hearing was held outside the presence of the jury in which the analyst stated that while he was testifying, he could see the prosecutor, and sometimes defense counsel, but not Defendant, the judge, or the jury. This was contrary to the representation made in the State's motion. Defendant then moved to strike the analyst's testimony.

{6} Two days after the trial was completed, the district court filed a formal order, which denied Defendant's objection to allowing the analyst to testify by video conference, and his motion to strike the analyst's testimony. The order states that Defendant's constitutional right to confront the witness against him was not compromised by the video conference testimony because the jury was able to observe and hear the analyst's testimony "in the same manner they would have if the [a]nalyst had personally appeared at trial." Moreover, the order continues, "If the [a]nalyst was required to appear and testify in person, he would have been required to drive a total of six hours to and from the courthouse to testify," and that "The State of New Mexico is presently experiencing a financial crisis and the appearance of the [a]nalyst by video conferencing equipment saved money."

{7} The order was entered after the district court had already decided to allow the testimony by video conference, and after the analyst had already testified. Moreover, the finding relating to a "financial crisis" has no evidentiary support. And, even if the district court could take judicial notice of the state's general financial condition, the finding sheds no light on the budget resources available to the Scientific Laboratories Division for travel at the time of the trial.

No Opportunity To Be Heard

{8} The State's motion raised the issue of whether, and under what circumstances, the State may present evidence crucial to its case by video conference without violating a defendant's constitutional right to confront witnesses against him. The State's motion cited no legal authority and only made an assertion of convenience for the witness.

{9} The district court granted the motion without affording Defendant his right to respond, as provided in the Rules of Criminal Procedure and the district court's own rules. Further, the motion was granted without hearing or considering any evidence, without considering or applying applicable case law and standards, and without making pertinent findings of fact and conclusions of law. Granting the motion under these circumstances was error. *State v. Shaw*, 90 N.M. 540, 541, 565 P.2d 1057, 1058 (Ct. App. 1977).

Legal Error

{10} Our review of Defendant's Confrontation Clause Claim is de novo. *State v. Dedman*, 2004-NMSC-037, ¶ 23, 136 N.M. 561, 102 P.3d 628, *overruled on other grounds by State v. Bullcoming*, 2010-NMSC-007, 147 N.M. 487, 226 P.3d 1, *rev'd by* ___ U.S. ___, 131 S.Ct. 2705 (2011).

{11} In *State v. Almanza*, 2007-NMCA-073, ¶ 1, 141 N.M. 751, 160 P.3d 932, we considered whether a chemist from the New Mexico State Crime Lab was allowed to give testimony by telephone in the absence of a compelling need or reason for such testimony, and concluded he could not. We pointed out that United States Supreme Court authority has held that face-to-face confrontation is an element of the Sixth Amendment right of

confrontation, and that any exceptions to the general rule providing for face-to-face confrontation are "narrowly tailored" and include "only those situations where the exception is necessary to further an important public policy." *Id.* ¶ 8 (internal quotation marks and citation omitted). "Thus, there must be both an important public policy and a required necessity." *Id.* After considering other authorities, we concluded:

> [I]t is apparent that the chemist's busy schedule and the inconvenience that would be caused by either requiring his testimony or postponing the trial until he was able to testify are just the sort of considerations that do not satisfy the exceptions to the Confrontation Clause. Where there are requirements of important public policy and showing of necessity, mere inconvenience to the witness is not sufficient to dispense with face-to-face confrontation.

Id. ¶ 12.

{12} The State's motion cited to nothing more than "judicial economy" arising from allowing the analyst to testify by video conference because the analyst was located in Santa Fe, and the trial was being held in Aztec. This was merely an assertion that it would be more convenient for the witness, which *Almanza* unambiguously holds is not sufficient. On the basis of *Almanza* alone, it was error to grant the State's motion.

CONCLUSION

{13} The conviction is reversed.

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

MICHAEL E. VIGIL, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

TIMOTHY L. GARCIA, Judge

Certiorari Granted, May 11, 2012, No. 33,566; Certiorari Granted, May 11, 2012, No. 33,567

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-050

Filing Date: March 13, 2012

Docket No. 30,664

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

LETICIA T.,

Child-Appellant.

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for Appellee

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Tania Shahani, Assistant Appellate Defender
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for Appellant

OPINION

VIGIL, Judge.

{1} Pursuant to a conditional plea, Child was adjudicated delinquent for committing aggravated battery on a peace officer (deadly weapon) and aggravated assault (deadly weapon). Child reserved the right to appeal the district court's denial of her motion to suppress and motion to dismiss for an untimely trial. Child asserts that her motion to suppress was improperly denied because searching the trunk of her car without a search warrant was not warranted by either exigent circumstances or as a protective sweep. In addition, Child asserts that her motion to dismiss was improperly denied because she did not have a timely preliminary hearing or trial. Finally, Child argues that she is entitled to pre-disposition confinement credit. We reverse in part, affirm in part, and remand for further proceedings.

I. MOTION TO SUPPRESS

{2} Child filed a motion to suppress evidence obtained from a warrantless search of the trunk of her vehicle, asserting that the search violated the Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution. Following an evidentiary hearing, the district court denied Child's motion on grounds that exigent circumstances validated the warrantless search.

A. Facts

{3} There is no dispute about the material facts. An armed subject was reported to have pointed a rifle from the passenger side window of a vehicle at several persons as they were standing in a parking lot on 20th Street in Farmington, New Mexico. One of the persons called the police, and a dispatch was sent out to officers of the Farmington Police Department to locate the vehicle, which was described as a four-door, beige or light tan passenger car.

{4} Officer Coate located the vehicle within minutes of the dispatch, and he pulled it over near the Sonic on 20th Street. Because the car matched the one identified by dispatch, Officer Coate decided to conduct a felony stop and called for backup. Officer Swenk subsequently arrived at the scene. Officer Coate observed rocking and moving in the vehicle after it stopped, which in his experience, generally indicates that the passengers are changing positions within the vehicle. However, he could not see exactly

what was going on in the vehicle or how many people were inside the vehicle because it had dark, tinted windows.

{5} Child, who was sixteen years old, stepped out of the front passenger side of the vehicle, and Officer Coate ordered Child to raise her hands and move backwards toward him. While Officer Coate kept his firearm pointed at the car, Officer Swenk conducted a pat-down search of Child, handcuffed her, and directed her to the back of the patrol vehicle, out of Officer Coate's sight. When Officer Swenk started a second pat-down search, Child shouted at the officer to let her go, spun quickly to the left, and struck Officer Swenk in the face with her fist while holding the handcuffs that she had apparently slipped out of. Officer Swenk took her to the ground, regained control, handcuffed her again, and put her in Officer Coate's patrol car. The other occupants of Child's car—a boy nine to twelve years of age and a girl younger than Child—were ordered out of the vehicle according to the same protocol for a felony stop. All the children were placed in separate patrol cars in handcuffs.

{6} Officer Smith, a canine officer, whose dog is certified in all patrol activities, including finding people and apprehending combative suspects, arrived and was told that the other officers had already pulled several persons out of the vehicle, but it was unknown if anyone else was inside. Officer Smith sent the dog to see if anyone else was inside the car, and the dog searched the passenger compartment of the car but did not alert to any occupants. Officer Smith said that the dog did not search the trunk because it was distracted by the human odor of a crowd of people that had gathered across the street, and it was more interested in them than the car. Officer Smith called the dog back from the vehicle after it failed to alert. Officer Smith testified that a "secondary search" of the vehicle was necessary because dogs are not infallible, and unless the trunk was opened, the officers could not be sure if anyone was hiding inside.

{7} Officer Coate testified that once the car was cleared, the officers had a duty to check the trunk of the vehicle to check for anyone that might be hiding inside. He had prior experiences in which individuals had hidden themselves inside a trunk, and he felt that someone "could be" hiding inside the trunk because the report was that there had been a person pointing a rifle out of the window of the car, and no weapon was found inside the passenger compartment.

{8} Two additional officers, Sergeant Simmons and Officer Rahn, were also at the scene. A rifle was found when Sergeant Simmons opened the trunk of the car. Sergeant Simmons testified that after the three occupants were taken from the vehicle, standard operating procedure required the officers to visually clear the front and rear compartments of the vehicle, as well as the trunk. This is because it is not uncommon for people to be found hiding in trunks, and the officers check the trunk to prevent an ambush, which is a possibility. Officer Rahn testified that the officers opened the trunk because they are trained to do so during a felony stop, and a person can easily hide inside the trunk. He added that officers always conduct a "secondary search" even when a dog is used to detect humans because the dog is not always 100% accurate.

B. Standard of Review

{9} The parties agree that our review of whether exigent circumstances justified the warrantless search of the trunk is de novo. We agree. "[W]e review the district court's findings of historical fact under a deferential,

substantial evidence standard, and then we determine de novo if the facts, as so established, support the conclusion of exigent circumstances." *State v. Moore*, 2008-NMCA-056, ¶ 10, 144 N.M. 14, 183 P.3d 158; *see State v. Attaway*, 117 N.M. 141, 145-46, 870 P.2d 103, 107-08 (1994) ("[W]e conclude that the mixed question involved in determining exigency lies closest in proximity to a conclusion of law, and hold that such determinations are to be reviewed de novo."), *modified by State v. Lopez*, 2005-NMSC-018, ¶¶ 9, 11, 138 N.M. 9, 116 P.3d 80 (stating that while the appellate court reviews purely historical factual assessments for substantial evidence, "we review the district court's determination of exigency de novo").

C. Analysis

{10} "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" is protected by the Fourth Amendment to the United States Constitution. U.S. Const. amend IV. In addition, Article II, Section 10 of the New Mexico Constitution protects the right of the people to be "secure in their persons, papers, homes and effects, from unreasonable searches and seizures[.]" N.M. Const. art. II, § 10. A search undertaken without a search warrant is presumptively unreasonable unless it is undertaken pursuant to a valid exception to the warrant requirement. *State v. Zamora*, 2005-NMCA-039, ¶ 15, 137 N.M. 301, 110 P.3d 517 (citing *State v. Wright*, 119 N.M. 559, 562, 893 P.2d 455, 458 (Ct. App. 1995)). The burden is on the State to justify a warrantless search, and the burden is a heavy one. *Id.*

{11} Exigent circumstances is one of the recognized exceptions for conducting a search without a warrant. *State v. Garcia*, 2005-NMSC-017, ¶ 29, 138 N.M. 1, 116 P.3d 72. Our Supreme Court has given us a comprehensive description of what constitutes exigent circumstances:

> Exigent circumstances means an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence. The determination is not whether the suspect was in fact intending to harm someone, escape, damage property, or destroy evidence. Rather it is a determination of whether in a given situation a prudent, cautious, and trained officer, based on facts known, could reasonably conclude swift action was necessary. If there are exigencies, they must be known by the police prior to entry. Moreover, the presence of exigent circumstances must be supported by specific articulable facts.

State v. Duffy, 1998-NMSC-014, ¶ 70, 126 N.M. 132, 967 P.2d 807 (internal quotation marks and citations omitted), *modified on other grounds by State v. Gallegos*, 2007-NMSC-007, ¶ 17, 141 N.M. 185, 152 P.3d 828; *see Garcia*, 2005-NMSC-017, ¶ 30; *State v. Gomez*, 1997-NMSC-006, ¶ 39, 122 N.M. 777, 932 P.2d 1.

{12} Our review of the evidence is that five armed police officers were on the scene. The three children who had occupied the vehicle were taken into custody, handcuffed, and placed into separate police cars. A trained dog was sent to determine if anyone else was inside the car. After the dog failed to alert that anyone was inside the car, Officer Smith decided that the dog was being distracted and called off further searching of the trunk. Sergeant Simmons then opened the trunk

because, he said, it was required by standard operating procedure. Officer Rahn said that the officers opened the trunk because they are trained to search the trunk during a felony stop, and he also agreed with Officer Smith's testimony that a "secondary search" is always conducted even when a dog is used because dogs are not infallible.

{13} The foregoing evidence fails to establish that the trunk was searched because specific, articulable facts demonstrated the existence of an emergency situation requiring swift action to prevent imminent danger to life or to forestall the imminent destruction of evidence. Rather, it was searched because "standard operating procedure" dictated that it be searched. Our constitution requires more than "standard operating procedure" to justify the warrantless search of an automobile which the police officers have full custody and control over. "In New Mexico, exigent circumstances are not presumed; instead, our State Constitution requires a warrantless seizure of evidence from within a vehicle to be justified by a particularized showing of exigent circumstances." *State v. Weidner*, 2007-NMCA-063, ¶ 6, 141 N.M. 582, 158 P.3d 1025.

{14} The strongest testimony offered by the State was by Officer Coate. He felt that someone "could be" hiding in the trunk because the report was that someone had pointed a rifle out of the window of the car, and no weapon was seen inside the passenger compartment. However, he is not the officer who actually opened the trunk, and other officers only testified that there was a general possibility that an individual could hide inside a trunk. Aside from the possibility, neither Officer Coate nor any other officer testified about any facts which led them to suspect anyone was actually hiding in the trunk. A mere possibility that someone might be hiding in the trunk does not constitute an exigency. *See Moore*, 2008-NMCA-056, ¶ 17 (rejecting the contention that a possibility of other suspects being inside a home who could have escaped or destroyed evidence did not constitute exigent circumstances).

{15} The State argues, alternatively, that searching Child's trunk without a search warrant was permissible as a protective sweep, another recognized exception to the warrant requirement. *Zamora*, 2005-NMCA-039, ¶ 15. A protective sweep is "'a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others.'" *State v. Trudelle*, 2007-NMCA-066, ¶ 21, 142 N.M. 18, 162 P.3d 173 (quoting *Maryland v. Buie*, 494 U.S. 325, 327 (1990)). We assume, as the parties have, that the search of the trunk was incident to Child's arrest. We also assume, without deciding, that a protective sweep search can extend to the locked trunk of an automobile. However, the circumstances under which a protective sweep may be undertaken are limited and specific:

> A protective sweep may be undertaken if the searching officers possess a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrants the officer in believing that the area swept harbored an individual posing a danger to the officer or others.

Id. (alterations, internal quotation marks, citation omitted); *see Zamora*, 2005-NMCA-039, ¶16 (same). We conclude that justification to search the trunk of Child's car as a protective sweep fails for the same reasons that the search was not justified by exigent circumstances. *See State v. Sublet*,

2011-NMCA-075, ¶ 30, 150 N.M. 378, 258 P.3d 1170 (concluding that the state failed to present evidence of exigency or evidence to support a protective sweep theory).

II. MOTION TO DISMISS

{16} Child filed a motion to dismiss on grounds that she did not receive a timely preliminary hearing as required by Rule 10-213 NMRA, and because her trial was not held in accordance with the time limits set forth in Rule 10-243 NMRA. After the State responded, the district court denied Child's motion.

A. Facts

{17} Child was arrested and taken into juvenile detention on February 7, 2010. At the detention hearing the next day, Child was served with the juvenile petition and she entered a denial to its allegations. Child was denied conditions of release and remained in detention. On February 15, 2010, the State filed a notice of intent to invoke an adult sentence, by virtue of the allegation of aggravated battery upon a peace officer. *See* NMSA 1978, § 32A-2-3(J)(1)(f) (2009) (stating that a "youthful offender" includes a delinquent child subject to adult or juvenile sanctions who is fourteen to eighteen years of age at the time of the offense who is adjudicated to have committed aggravated battery upon a peace officer). The preliminary hearing was held twenty-four (24) days later, on March 11, 2010. The bind over included the youthful offense of battery upon a peace officer.

{18} The State filed the criminal information on March 16, 2010, and Child was arraigned on March 24, 2010, whereupon she entered a plea of not guilty. Child was again denied conditions of release and remained in juvenile detention. A sixty-day extension of time to commence trial until May 9, 2010, was granted over Child's objection, and the State did not seek any additional extensions to commence trial. When Child filed the motion to dismiss on June 10, 2010, the trial had not been held, and trial was scheduled for July 9, 2010. Child's motion to dismiss was denied.

B. Standard of Review

{19} When we are required to interpret rules of procedure adopted by our Supreme Court, or statutes adopted by the Legislature, our review is de novo. *State v. Stephen F.*, 2006-NMSC-030, ¶ 7, 140 N.M. 24, 139 P.3d 184 (applying de novo review to interpretation of Children's Court Rules), *aff'd on other grounds by* 2008-NMSC-037, 144 N.M. 360, 188 P.3d 84; *State v. Myers*, 2009-NMSC-016, ¶ 13, 146 N.M. 128, 207 P.3d 1105 (applying de novo review to statutory construction), *rev'd on other grounds by* 2011-NMSC-028, 150 N.M. 1, 256 P.3d 13.

C. Analysis

{20} The preliminary hearing was held twenty-four days after the State filed its notice of intent to seek an adult sentence. Accordingly, Child did not receive a timely preliminary hearing. Rule 10-213(B) requires the preliminary hearing to be held within fifteen days after the State files its notice of intent to seek an adult sentence, and NMSA 1978, Section 32A-2-20(A) (2009), requires the preliminary hearing to be held within ten working days after the state files its intent to seek an adult sentence. It is not necessary for us to decide in this case whether the rule or the statute governs because they were both violated. Neither the rule nor the statute provides a remedy, even though they are both worded in mandatory terms. Our task is to

determine whether any relief is available to Child.

{21} Rule 10-101(A)(2)(b) NMRA of the Children's Court Rules states that "[e]xcept as specifically provided by these rules, . . . the Rules of Criminal Procedure for the District Courts govern the procedure . . . in all proceedings in the Children's Court in which a notice of intent has been filed alleging the child is a 'youthful offender.'" *See State v. Michael S.*, 1998-NMCA-041, ¶¶ 2-5, 124 N.M. 732, 955 P.2d 201 (describing the general history of the procedures to be followed when the state alleges a child is a "youthful offender"). Rule 10-144 NMRA of the Children's Court Rules states:

> Error or defect in any ruling, order, act or omission by the court or by any of the parties *including failure to comply with time limits* is not grounds for granting a new hearing or for setting aside a verdict, for vacating, modifying or otherwise disturbing a judgment or order, or for dismissing an action, unless refusal to take any such action appears to the court inconsistent with substantial justice or unless these rules expressly provide otherwise.

(Emphasis added.) This is a rule which specifically applies in lieu of the Rules of Criminal Procedure, and it directs that dismissal is not appropriate, "unless refusal to take any such action appears to the court inconsistent with substantial justice," or unless the Children's Court Rules "expressly provide otherwise." *Id.* Here, there was no such finding, and we have not been directed to any Children's Court Rule which requires dismissal for the failure to hold a timely preliminary hearing. As to the statutory violation, we conclude that a child must demonstrate prejudice in order to be entitled to dismissal. *See State v. Tollardo*, 99 N.M. 115, 117, 654 P.2d 568, 570 (Ct. App. 1982) (stating that dismissal is not the proper remedy for a delay in holding a preliminary examination when prejudice to the defendant is not shown). We therefore conclude that no reversible error was committed in denying Child's motion to dismiss on grounds she was denied a timely preliminary hearing.

{22} We now address whether Child was denied her right to a speedy trial. As we have already stated, the Children's Court Rules specifically state that unless the Children's Court Rules provide otherwise, "the Rules of Criminal Procedure for the District Courts govern the procedure . . . in all proceedings in the Children's Court in which a notice of intent has been filed alleging the child is a 'youthful offender' as that term is defined in the Children's Code." Rule 10-101(A)(2)(b).

{23} When Rule 10-101 was adopted by our Supreme Court, the Rules of Criminal Procedure contained a provision in Rule 5-604 NMRA (amended 2011), known as the six-month rule which, in general, required a trial on the merits to be held within six months of a triggering event. *See Duran v. Eichwald*, 2009-NMSC-030, ¶ 2, 146 N.M. 341, 210 P.3d 238 ("Rule 5-604(B), commonly referred to as the six-month rule, requires the commencement of trial in a criminal proceeding within six months of the latest of several different triggering events."). In keeping with the plain language of the rules, we held in *Michael S.* that the six-month rule in the former Rule 5-604 applied to the adjudication of youthful offender cases. 1998-NMCA-041, ¶ 6. We also observed, "In view of the important purposes served by time limits on children's court proceedings, we cannot countenance an interpretation of the rules that would provide endless time, subject

only to constitutional constraints, in which to try cases involving serious youthful offenders." *Id.* ¶ 7. In a similar vein, our Supreme Court made the following statement in *State v. Jones*, 2010-NMSC-012, ¶ 32 n.2, 148 N.M. 1, 229 P.3d 474:

> Rule 10-101(A)(2)(b) provides that, unless the Children's Court Rules specifically provide, the Rules of Criminal Procedure for the District Courts apply to alleged youthful offenders after the State gives notice of its intent to invoke adult sanctions. We adopted the Rule shortly after the 1993 enactment of the Children's Code. Our unpublished commentary indicates that because an alleged youthful offender potentially faces an adult sanction, we chose to apply the Rules of Criminal Procedure in an effort to provide more protections than the Children's Court Rules do. Specifically, we intended to extend the right to bail, the statutory right to three telephone calls within 20 minutes after detention, and in a warrantless arrest and detention case, the right to be given a copy of the criminal complaint prior to transfer to custody of a detention facility, and the right to a prompt probable cause determination. With the exception of the right to bail, we are no longer convinced that the above-mentioned rights justify forfeiting the additional protections afforded juveniles in the Children's Court Rules. *Compare, e.g.*, Rule 10-243 NMRA (providing that the adjudicatory hearing shall commence within 30 days for a child held in detention and within 120 days for a child not in detention) *with* Rule 5-604 NMRA (providing that a trial shall commence within six months). The issue is beyond the scope of this Opinion, but we encourage the Children's Court Rules Committee to revisit the question of which rules best protect the rights and interests of children.

Later that same year, our Supreme Court withdrew the six-month provisions of Rule 5-604 for all pending cases. *State v. Savedra*, 2010-NMSC-025, ¶ 9, 148 N.M. 301, 236 P.3d 20. "In its place," our Supreme Court declared, "defendants may rely upon and assert their right to a speedy trial whenever they believe impermissible delay has occurred[.]" *Id.* However, notwithstanding our observation in *Michael S.*, and our Supreme Court's statement in *Jones*, no change was made to the Children's Court Rules to insure speedy, timely trials for cases involving serious youthful offenders. This leaves Child with no remedy except for a constitutional speedy trial violation, and Child did not argue in the district court or on appeal that she was deprived of her constitutional right to a speedy trial.

{24} Child contends that because our Supreme Court withdrew the six-month rule in Rule 5-604, our holding in *Michael S.* that the rule applies to youthful offender cases has been overruled *sub silentio*. Child further contends that we should "pay special attention to the Supreme Court's repeated assertions in *Jones* that juveniles should be afforded heightened protections to guard their liberty interests," and "[b]ecause youthful offenders fall subject to the statutory ambiguity created in the wake of *Savedra*, the Rules of Criminal Procedure should not blanketly apply to youthful offender cases until after the amenability determination. Such a decision would be consistent with *Jones*, legislative history, and public policy." To support her last assertion, Child refers us to *Jones*, 2010-

NMSC-012, ¶ 38 ("[T]he finding of non-amenability gives the court the necessary leverage to dislodge a youthful offender from the protective dispositional scheme of the Delinquency Act."). Accordingly, Child asserts that Rule 10-243 of the Children's Court Rules should apply to her case. In general, this rule directs that when a child is in detention, as Child was in this case, the adjudicatory hearing must be held within thirty days after the latest occurrence of certain specified triggering events, such as the date that the petition is served on the child and the date the child is placed in detention. When the time limit is not complied with, Subsection (F) grants the district court authority to order that the petition be "dismissed with prejudice or the court may consider other sanctions as appropriate." Rule 10-243(F).

{25} Child makes a compelling argument, and we could easily be persuaded to follow the suggestion made by our Supreme Court in *Jones* to craft a remedy for Child in this case. However, as Child observes in her briefing, we have no authority to write or rewrite rules of procedure, which lies within the exclusive domain of our Supreme Court. *See State v. Pieri*, 2009-NMSC-019, ¶ 19, 146 N.M. 155, 207 P.3d 1132 (stating that our Supreme Court has "the ultimate authority to fashion, adopt, and amend rules of procedure by virtue of the authority granted . . . in Article III, Section 1 and Article VI, Section 3 of the New Mexico Constitution"). As matters now stand, Child's exclusive protection lies in the speedy trial protections of the Sixth Amendment and Article II, Section 14 of the New Mexico Constitution, and as we have already observed, a constitutional speedy trial issue is not before us.

{26} For the reasons stated, Child's right to a speedy trial was not violated under our existing rules. Like our Supreme Court, we also encourage the Children's Court Rules Committee to revisit which time limit rules should apply to the adjudication of youthful offender cases which best protect the rights and interests of children in New Mexico.

III. CREDIT FOR PRE-SENTENCE CONFINEMENT

{27} After the incident, and prior to her commitment to the Children, Youth and Families Department for two years, Child spent approximately 160 days in detention. Child argues that as a youthful offender, she is entitled to credit for her pre-sentence detention period. The State argues that Child waived raising this argument on appeal because she only preserved for appeal the issues regarding her motion to suppress and motion to dismiss in her conditional plea. While we agree with Child's argument that this is an important issue for resolution, we do not reach it in this case. Because we have held that the district court erred in denying Child's motion to suppress, the judgment and disposition is no longer operative, and any decision we would make concerning this issue would be advisory. *See State v. Wyrostek*, 117 N.M. 514, 523, 873 P.2d 260, 269 (1994) (stating that the Court will not issue advisory opinions).

{28} We therefore decline to reach this issue or determine whether Child waived it under the terms of her conditional plea.

IV. CONCLUSION

{29} The judgment and disposition is reversed and the case is remanded for further proceedings consistent with this Opinion.

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

MICHAEL E. VIGIL, Judge

WE CONCUR:

RODERICK T. KENNEDY, Judge

J. MILES HANISEE, Judge

Certiorari Granted, May 11, 2012, No. 33,571

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-051

Filing Date: March 16, 2012

Docket No. 29,244

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ANDREW MILLER,

Defendant-Appellant.

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OPINION

BUSTAMANTE, Judge.

{1} Defendant Andrew Miller was indicted on sixty-one charges related to money he was alleged to have obtained fraudulently from Roberta Beale (Victim). He entered into a plea agreement pursuant to which both he and the State agreed to a maximum sentence of forty years. The district court accepted the plea agreement but sentenced Defendant to forty-two years imprisonment, nine of which were suspended, for an initial incarceration of thirty-three years. Because the forty-two year sentence violated his plea agreement, we reverse.

I. BACKGROUND

{2} This case comes to us from two district court cases against Defendant that were consolidated below. In the first, CR 2006-

3283, Defendant was indicted on thirty-five counts involving fraud and embezzlement. In the second, CR 2007-3827, he was indicted on twenty-six counts involving fraud and forgery. The combined basic sentences for these two cases exceeded 250 years.

{3} Defendant entered into a plea agreement in which all but six of the counts against him were dismissed. The "Sentencing Agreement" portion of the agreement stipulated that "[t]he parties agree that there shall be a minimum sentence of ten . . . years and a maximum sentence of [forty] years at initial sentencing. The remaining two years of the [forty-two] year exposure shall run concurrent with parole of two years." Similarly, the "Potential Incarceration" portion of the agreement stated that "[i]f the court accepts this agreement, the [D]efendant will be ordered to serve a minimum sentence of ten . . . years and a maximum sentence of [forty] years in the Department of Corrections at initial sentencing." The agreement also incorporated a forfeiture stipulation in which the parties agreed that all "vehicles purchased using money obtained using [Victim's] money" would be subject to forfeiture. The plea agreement was accepted by the court on August 7, 2008.

{4} After the plea was accepted but before sentencing, Defendant moved to withdraw his guilty plea. Pursuant to *Santobello v. New York*, 404 U.S. 257 (1971) and *State v. Sisneros*, 98 N.M. 279, 648 P.2d 318 (Ct. App. 1981), *rev'd on other grounds*, 98 N.M. 201, 647 P.2d 403 (1982), Defendant argued that he was entitled to withdraw his plea because the State was not fulfilling its obligations under the plea agreement. In particular, Defendant claimed that "the [S]tate promised th[at] Defendant would be allowed visits with his son and the mother." Defendant argued that failure to allow visitation "provide[d] a fair and just reason to withdraw the plea prior to sentencing."

{5} At the sentencing hearing, the State requested a sentence of forty-two years. The State contended that this was appropriate because despite the provision in his plea agreement that he would not operate any businesses from jail, Defendant was currently running a business called "Leisure Entertainment" from jail. Defendant admitted to running the business. The district court sentenced Defendant to forty-two years imprisonment followed by two years of parole and five years of probation. It then suspended nine of the years. Defendant did not sign the judgment and sentence, but instead wrote in that he "object[ed] as to pre-sentence confinement time[,] length of sentence[,] and [the] ban on conducting business in [the department of corrections]." Defendant did not file a post-sentence motion to withdraw his plea, but instead filed a notice of appeal to this court.

{6} The case was initially assigned to the summary calendar. We expressed concern that the "district court's sentence [did] not appear to be in accordance with the plea agreement." However, our review of the record led us to believe that the district court "may have simply made a clerical error in the written judgment." We therefore remanded "for clarification of the judgment and sentence," ordering that "the district court shall enter . . . findings and/or corrected judgment."

{7} On February 12, 2010, the district court held a hearing devoted to the length of the sentence, after which it filed supplemental findings of fact and conclusions of law with this Court. The district court made it clear that it understood the plea agreement to require a forty-two year sentence. The court

interpreted the forty-year maximum sentence to mean that at least two years of Defendant's sentence must be suspended. Importantly, the court entered a finding setting forth its understanding of the sentence cap.

> It is the custom and practice of the Second Judicial District Court in administering plea and disposition agreements in criminal matters to interpret the language of a minimum sentence of "[ten] years and a maximum of [forty] years at initial sentencing" to constitute a sentencing floor and cap of actual incarceration to be served in the Department of Corrections. However, by its plain meaning the cap on the term of incarceration applies only at[] "initial sentencing." Such language does not speak to the overall sentencing exposure for the required basic sentences which the court must impose for each count.

The court also entered several conclusions of law. Several of these discussed the district court's authority to sentence, essentially setting forth the provisions in NMSA 1978, Sections 31-18-13 (1993), -15 (2007), and -15.1 (2009) that require a district court to sentence a defendant to the basic sentence unless there is an aggravating or mitigating circumstance. One conclusion discussed this Court's holding in *State v. Bencomo*, 109 N.M. 724, 790 P.2d 521 (Ct. App. 1990), that a district court abuses its discretion when it does not follow the sentence recommendation in a plea agreement. However, the court concluded that it had followed the terms of the plea agreement because, in its view, the parties had "agreed that all counts would run consecutively for a total basic exposure of [forty-two] years and that [Defendant's] exposure of incarceration at initial sentencing would be no more than [forty] years." The court therefore again denied Defendant's motion to withdraw his plea agreement.

II. DISCUSSION

{8} Defendant presents four arguments on appeal: (1) that the district court abused its discretion by denying his motion to withdraw his plea after adopting a sentence outside of the plea agreement, (2) that his trial on the criminal charges at issue here violates his rights against double jeopardy because the State had already forfeited his property, (3) that the district court incorrectly calculated the restitution he owed, and (4) that the district court credited him with less pre-sentence confinement than he was due. Because we reverse the denial of Defendant's motion to withdraw his plea, we do not reach his remaining arguments.

A. Motion to Withdraw Plea

{9} Defendant argues that the district court was required to allow him to withdraw his plea due to several circumstances he alleges were outside the scope of the plea. These include (1) that the court imposed a longer sentence than contemplated in the plea agreement, (2) that the court did not include visitation rights for Defendant's girlfriend and son in its judgment and sentence, (3) that the court failed to order the return of Defendant's Mercedes, and (4) that the court's order disqualifying Defendant's first attorney impacted his decision to enter into the plea. The State contends that the forty-two year sentence with nine years suspended is consistent with the plea agreement. Because we hold that the imposition of a forty-two year sentence violated the sentence cap in the plea agreement, we do not address the additional complaints Defendant has raised regarding the plea.

{10} We review the denial of a motion to withdraw a plea for abuse of discretion. *See State v. Hunter*, 2006-NMSC-043, ¶ 11, 140 N.M. 406, 143 P.3d 168. "[T]he [district] court abuses 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.

{11} "A plea agreement is a unique form of contract whose terms must be interpreted, understood, and approved by the district court." *State v. Gomez*, 2011-NMCA-120, ¶ 9, 151 N.M. 67, 267 P.3d 831. Once a plea has been accepted, the dictates of due process require the district court to honor the agreement. *Sisneros*, 98 N.M. at 281, 648 P.2d at 320; *see also* Rule 5-304(C) NMRA (stating that, if the plea agreement is accepted, "the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement"). Failure to do so is a breach of the plea agreement and is treated as a rejection of the plea. *See Gomez*, 2011-NMCA-120, ¶ 11. "[I]f the defendant and the State have bargained for a specific sentence and the court rejects the specific sentence, the court must give the defendant an opportunity to withdraw his or her plea agreement." *State v. Pieri*, 2009-NMSC-019, ¶ 1, 146 N.M. 155, 207 P.3d 1132.

1. The Plea Agreement Was For A Specific Sentence

{12} In order to determine which law applies in this case, we must first determine whether the plea agreement in this case called for a specific sentence or whether the State merely promised to recommend a sentence. Where the parties agree to a specific sentence and the district court accepts the plea, the court must enforce the terms of the plea or allow the plea to be withdrawn. *Santobello*, 404 U.S. at 262; *Pieri*, 2009-NMSC-019, ¶¶ 30, 33. If the parties agreed only that the State would recommend a sentence, the standard that applies depends on the date of the agreement. For agreements entered into before April 23, 2009, failure of the district court to follow the recommendation acts as a rejection of the plea. *See Pieri*, 2009-NMSC-019, ¶ 34; *Eller v. State*, 92 N.M. 52, 54, 582 P.2d 824, 826 (1978), *overruled by Pieri*, 2009-NMSC-019, ¶ 36. For agreements entered into after that date, the district court may ignore the recommendation so long as the defendant had been made aware that the district court was not bound by it. *Pieri*, 2009-NMSC-019, ¶¶ 29, 33-34.

{13} The distinction between agreements for specific sentences and agreements to recommend sentences was critical in *Pieri*. There, the State agreed not to oppose a defendant's request for a suspended sentence in exchange for her promise to testify truthfully in a case against her husband. *Id.* ¶ 2. However, because the defendant was sentenced prior to her husband's trial, she did not have the chance to testify prior to sentencing. *Id.* ¶ 3. The State requested that the defendant serve time in prison and the defendant argued that she was entitled to specific performance of her plea bargain. *Id.* The district court imposed the maximum possible sentence. *Id.* On appeal, this Court reversed, concluding that the agreement not to oppose the defendant's request was an implicit promise to recommend a suspended sentence, and that under *Eller*, the district court's failure to follow the recommendation was a rejection of the plea and required the court to allow the defendant the opportunity to withdraw the plea. *See Pieri*, 2009-NMSC-019, ¶ 4.

{14} Our Supreme Court disagreed,

concluding that this Court had incorrectly characterized the State's agreement not to oppose the defendant's request for a suspended sentence as an agreement to recommend that the defendant receive a suspended sentence. *See id.* ¶¶ 9-12. Because the agreement called for a specific action—namely, the State's refraining from opposing the request for a suspended sentence—the Court concluded that *Santobello*, not *Eller*, applied. *See Pieri*, 2009-NMSC-019, ¶¶ 9-10. The Court noted that "'when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.'" *Id.* ¶ 15 (quoting *Santobello*, 404 U.S. at 262). Because the State, in violation of its promise, had opposed the request for a suspended sentence, the defendant "should have either been re[-]sentenced in front of a different judge or have been allowed to withdraw her plea." *Id.* ¶ 16.

{15} In this case, as in *Pieri*, the State made a specific promise that is enforceable not under *Eller*, but under *Santobello*. Here, the State did not agree merely to *recommend* a sentence of between ten and forty years—it agreed that Defendant's *actual sentence* would be in that range. Regardless of whether the sentencing cap could be read to include the forty-two year sentence in this case, it is clear that the plea agreement embodies a promise for a sentence within a particular range, not a promise to recommend a sentence within a range. *Pieri* and *Santobello* therefore apply, and Defendant should have the opportunity to withdraw his plea or to be sentenced under the plea agreement by a different judge if this promise was not enforced.

{16} The fact that this is a *Santobello* case had implications beyond the remedy for breach. Where a specific sentence is agreed upon, the district court must enforce it. In its supplemental findings, the district court appeared to believe that it was compelled by our sentencing laws to impose a basic sentence of forty-two years. The parties do not raise, and we do not decide, whether the district court erred in determining that our sentencing laws require the imposition of a basic sentence of forty-two years. Instead, our review is limited to whether the district court's sentence conformed to the language of the plea agreement. Here, however, it was the plea agreement, not the sentencing statutes, which the district court was bound to enforce. *See Gomez*, 2011-NMCA-120, ¶ 16 ("Once the plea is accepted, the court is bound by the dictates of due process to honor the agreement and is barred from imposing a sentence that is outside the parameters set by the plea agreement."). If the district court was unhappy with the State's choice, it should not have accepted the agreement. *See State v. Mares*, 119 N.M. 48, 51, 888 P.2d 930, 933 (1994). Because it did accept the agreement, it was bound to enforce the agreement's terms.

2. The Maximum Permissible Sentence Was Forty Years

{17} We proceed to the question of whether the forty-two year sentence with nine years suspended was inconsistent with the language in the plea agreement limiting the initial sentence to forty years. Defendant has consistently argued that the forty-two year sentence exceeds the forty-year maximum contemplated in the plea agreement. The State contends that the forty-two year sentence was in accordance with the forty-year maximum because the "at initial sentencing" language signaled that the limitation was not on the sentence, but on the initial period of incarceration.

{18} Appellate courts "construe the terms

of the plea agreement according to what [the d]efendant reasonably understood when he entered the plea." *State v. Fairbanks,* 2004-NMCA-005, ¶ 15, 134 N.M. 783, 82 P.3d 954 (internal quotation marks and citation omitted).

> When there is any ambiguity in a plea agreement and the district court resolves the ambiguity with the parties at the time of the plea, the agreement is no longer ambiguous on that point. However, if an ambiguity is not resolved by the district court and no extrinsic evidence is introduced that would resolve it, the reviewing court may rely on the rules of construction, construing any ambiguity in favor of the defendant. Under such circumstances, we review the terms of the plea agreement de novo.

Gomez, 2011-NMCA-120, ¶ 9 (internal quotation marks and citations omitted). However, courts "should turn to rules of construction only after it has used all other methods of resolving the ambiguity, and plea agreements should be construed in favor of the non-drafting party only when an ambiguity cannot be resolved by a review of the relevant direct and extrinsic evidence." *Mares,* 119 N.M. at 52, 999 P.2d at 934.

{19} We recently rejected the argument that the portion of a sentence that is initially suspended does not count as part of the sentence. In *Gomez,* a defendant entered into three plea agreements covering six cases against him. 2011-NMCA-120, ¶ 2. Each agreement specified that Gomez would serve between zero and nine years of incarceration, probation, treatment, or some combination thereof. *Id.* ¶¶ 3, 5, 6. The second and third agreements specified that the sentences in those agreements would run concurrent with the sentence in the first agreement. *Id.* ¶¶ 5, 6. Initially, the district court deferred sentencing and ordered Gomez to attend a drug treatment program. *Id.* ¶ 7. However, Gomez violated one of the conditions of his release, and the district court imposed a sentence of twenty-one years, with sixteen suspended, resulting in an initial incarceration of five years. *Id.* ¶ 8. Gomez argued that the sentence was not in conformance with his plea, but the district court disagreed, stating that a sentence of five years incarceration and five years probation was within the plea since each was less than the nine-year cap. *Id.*

{20} On appeal, this Court reversed, stating that the agreements were "unambiguous in stating that the total time [Gomez would] serve pursuant to each agreement [was] zero to nine years." *Id.* ¶ 10. "We reject[ed] the State's argument that the use of the term 'serve' in the first agreement indicate[d] an intent to allow for an actual sentence of something greater than nine years, so long as any period above the nine-year cap [was] suspended or deferred." *Id.* ¶ 11. In doing so, we reasoned that the judgment and sentence actually filed ordered Gomez to serve twenty-one years. *Id.* The fact that the court had ordered sixteen years of the sentence to be suspended did not change the length of the sentence. *Id.* ("Suspending execution of sixteen years of actual incarceration unless, and until, [the district court] orders otherwise, does not change the fact that Gomez was sentenced to a prison term of twenty-one years.").

{21} Our analysis in the present case begins with the language from the "SENTENCING AGREEMENT" portion of Defendant's plea specifying that "[t]he parties agree that there shall be a minimum sentence of ten . . . years and a maximum sentence of

[forty] years at initial sentencing." By itself, this language is unambiguous, and requires that the maximum sentence be no longer than forty years. It refers not to the initial period of incarceration, but to the "maximum sentence." Nevertheless, the State argues that the phrase "at initial sentencing" transforms this from a limit on the sentence into a limit on the initial period of incarceration.

{22} Our holding in *Gomez* dispenses with the State's argument that the "at initial sentencing" language allows for a sentence longer than forty years. *Gomez* held that the suspended portion subtracts not from the overall length of the sentence, but from the initial period of incarceration. "It is well established that a district court generally cannot increase a valid sentence once a defendant begins serving that sentence." *State v. Redhouse*, 2011-NMCA-118, ¶ 7, 269 P.3d 8 (alteration, internal quotation marks and citation omitted). The phrase "at initial sentencing" is therefore of no effect when applied to a sentence, because the sentence cannot later be increased. It could only have meaning when applied to incarceration. But the State in this case chose to apply the phrase to a limitation on the sentence. We do not believe that Defendant would have reasonably understood that this phrase could transform the clear and unambiguous word "sentence" into "initial period of incarceration."

{23} The most problematic part of the agreement is the poorly drafted, hand-written language immediately following the sentence cap. It states: "The remaining two years of the [forty-two] year exposure shall run concurrent with parole of two years." The meaning of this language is unclear. It could, as the State contends, call for a forty-two year sentence with two years suspended. Alternatively, as Defendant appears to argue, it could mean that two years of the forty-year sentence would be suspended, or that a separate two-year sentence would run concurrently with the forty years.

{24} The only thing clear about this language is that its meaning cannot be interpreted without additional evidence or resort to rules of construction. We find no indication in the record that the district court resolved the ambiguity in this language prior to accepting the plea. At the plea hearing, the district court read the language but did not comment on or otherwise interpret its meaning. The ambiguity was therefore unresolved when the plea was accepted. Subsequently, at the sentencing hearing, Defendant indicated his understanding that the "agreement was that the two [years] was going to run concurrent with the [forty]," thereby showing that he still did not understand the language of the plea to allow for a forty-two year sentence.

{25} Because the district court did not resolve the ambiguity, we address the meaning of the sentence cap de novo. Defendant's statements at the sentencing hearing indicate that his subjective belief was that a sentence of forty-two years was inconsistent with the agreement. Given the clear language of the sentencing cap, we conclude that his understanding was reasonable. Furthermore, to the extent that the sentence was ambiguous, we construe it against the State. The portion of the agreement that was concisely written clearly and unambiguously imposed a forty-year maximum sentence. The handwritten portion was drafted in such a way that it could mean anything, and the district court did nothing to clarify its meaning prior to accepting the agreement.

{26} Finally, nothing else in the agreement would have alerted Defendant that a sentence

in excess of forty years was contemplated. The agreement sets forth the maximum penalties for the charges to which Defendant pleaded guilty. These amount to forty-two years, with the potential for a one-third modification. However, this section informs Defendant of the possible sentences for the counts to which he has pleaded guilty; it does not purport to embody a sentencing agreement between Defendant and the State. The agreement also provides: "The Defendant m[a]y be given a period of probation. If the [D]efendant later violates that probation or parole, the [D]efendant may be incarcerated for the balance of the sentence." This language explains the mechanics of probation, which gives the district court the discretion to suspend part of Defendant's sentence. This statement of the well established principles of probation cannot reasonably be read to modify the forty-year cap on Defendant's sentence. It also makes it absolutely clear that the Defendant may ultimately be incarcerated for the initially suspended portion of his sentence (if any).

{27} We conclude that absent some explanation from the State or the district court, no defendant would reasonably understand that the "at initial sentencing" language could transform such a clear maximum sentence limitation into what amounts to a minimum period of suspension. Under the State and the district court's reading of the sentence cap, a 1000 year sentence, with 960 years suspended, would have complied with the forty-year cap. The district court entered a finding that the use of this language represents the "custom and practice" in the Second Judicial District. We now hold that that practice is inadequate. The meaning of the agreement is determined not by the understanding of prosecutors and judges, but by what the defendant reasonably understood when entering the plea. Had the State desired an agreement that imposed the maximum sentence—even if it also wanted to impose a minimum period of incarceration—we have no doubt that it could have easily done so in a clear, unambiguous fashion. We therefore reverse the denial of Defendant's motion to withdraw his plea.

3. Remedy

{28} Having concluded that the district court rejected the plea agreement by sentencing Defendant to two years more than the maximum contemplated by the agreement, we turn our attention to what remedy is appropriate. The rejection of the plea entitles Defendant to the relief he has requested: an opportunity to withdraw his plea. *See Pieri*, 2009-NMSC-019, ¶¶ 14-18. However, we recognize that both Defendant and the State have an interest in enforcing the agreement. *See Gomez*, 2011-NMCA-120, ¶ 18. Should both parties so desire, the district court may also re-sentence Defendant in accordance with the plea. *See Santobello*, 404 U.S. at 263; *Pieri*, 2009-NMSC-019, ¶ 5.

B. Remaining Issues

{29} Because we have reversed, the judgment and sentence setting forth the amounts of restitution and pre-sentence confinement is of no effect. We therefore do not reach Defendant's arguments on these issues.

{30} Defendant also argues that the forfeiture of one of his vehicles prior to his conviction precludes the State from imposing any further punishment on him, and that his subsequent conviction therefore violated his right against double jeopardy. However, as he candidly admits, "the record with respect to this issue may need to be further developed." In fact, there was no evidence taken nor findings made regarding this issue. The

record is silent as to which cars were seized, whether any cars have yet been sold, and which if any of these vehicles were purchased using money fraudulently obtained from Victim. Additionally, the stipulated order to forfeit was part of the plea, which we have held that Defendant may withdraw on remand. For these reasons, we believe that any attempt to undertake an analysis at this point would result in an advisory opinion, which we decline to give. *See Santa Fe S. Ry., Inc. v. Baucis Ltd. Liab. Co.*, 1998-NMCA-002, ¶ 24, 124 N.M. 430, 952 P.2d 31 ("Our concern with issuing advisory opinions stems from the waste of judicial resources used to resolve hypothetical situations which may or may not arise."). Defendant is free to develop a record on this issue, to reach a new agreement that addresses his concerns, or to raise these issues at trial.

III. CONCLUSION

{31} For the foregoing reasons, we reverse the order denying Defendant's motion to withdraw his plea, vacate the judgment and sentence, and remand for further proceedings consistent with this Opinion.

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

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

J. MILES HANISEE, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-052

Filing Date: April 6, 2012

Docket No. 30,989

STATE OF NEW MEXICO ex rel. HUMAN SERVICES DEPARTMENT,

Petitioner-Appellee,

v.

JOSEPH W. RAWLS,

Respondent-Appellant,

and

DIANA DE ALBA-GARCIA,

Respondent.

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for Appellant

OPINION

SUTIN, Judge.

{1} Joseph W. Rawls agreed to a judgment of paternity and to payment of child support. Later, through paternity testing, it was determined that he was not the child's biological father. Based on Rule 1-060(B) NMRA, Rawls sought in the district court to have accrued and continuing child support abated on that ground and on the ground that he never had any relationship with the child. The child had been cared for by the child's maternal grandmother. The child's biological parents had been deported to Mexico. The district court denied relief. We hold that, under the unique circumstances of this case, Rawls should have been granted the relief he requested. We reverse the district court.

BACKGROUND

{2} In November 2002, the New Mexico Human Services Department (HSD) sought the adjudication of Joseph W. Rawls as the father of a child (Child) and also sought an order requiring Rawls to pay child support. A district court hearing officer entered a report and decision in April 2003. This report and decision adjudicated Rawls the parent of Child, required Rawls to begin paying child support, and awarded judgment against Rawls for retroactive child support. This report and decision was entered by default because Rawls "failed to appear, answer, or otherwise plead within the time prescribe[d] by law and [was therefore] in default." We will hereinafter refer to the April 2003 report and decision as "the default judgment." In August 2004, HSD moved to reopen the case. Subsequently, a stipulated report and decision signed by the hearing officer and approved by HSD and Rawls was filed with the court. This August 2004 stipulated report and decision reiterated that Rawls was Child's parent and was obligated to pay child support. It also contained an order and judgment determining that Rawls was in contempt of court and could purge the contempt as long as he was in strict compliance with the support payment and other requirements set out in the order and judgment. In this Opinion, we refer to the stipulated report and decision as "the stipulated order."

{3} In February 2009, Rawls moved under Rule 1-060(B) to set aside the default judgment and the stipulated order on the ground that a paternity test administered in June 2008 with results acquired in September 2008, with the cooperation of the Child Support Enforcement Division of the HSD, showed that he was not Child's biological father. The court conducted a hearing on that motion in March 2010. At the hearing, Rawls' counsel explained that Rawls would testify that he signed the stipulated order because it was the only option available in order to have his driver's license reinstated, that he did not understand signing the stipulated order was an acknowledgment on his part that he was the biological father of Child, and that he understood HSD would schedule a paternity test. He states that when he later became aware, in 2008, that his driver's license

continued to be suspended for non-payment of child support he again contacted HSD, now with the assistance of counsel, and was able to schedule paternity testing. In addition, along with citing to the record of the lab results indicating that Rawls was not the biological father of Child, Rawls states that Child's mother had represented to HSD that Rawls was the father of Child, and that the mother knew the representation was false because at a hearing in April 2011, when asked for the name of the biological father, she provided a name other than that of Rawls. We see no refutation of any of these statements in HSD's answer brief. In his reply brief, Rawls states that he "requested the paternity testing from [HSD] when he was first served with the [p]etition and again when he met with [HSD] officials to discuss his driver's license suspension."

{4} In an oral ruling in March 2010, the district court denied Rawls' motion insofar as it was grounded on Rule 1-060(B)(1), (2), and (3), but indicated that testimony was necessary before the court could rule on the applicability of Rule 1-060(B)(5) and (6). In April 2010, Rawls moved pursuant to Rule 1-060(B)(5) and (6) to abate child support payments based on the grounds that the paternity test excluded him as Child's biological father and that he did not have any emotional relationship with Child. In May 2010, the court instructed counsel to prepare briefs with points and authorities on the application of Rule 1-060(B)(6) relating to the fact that Rawls was excluded as Child's biological father. In its points and authorities brief, HSD stated, among other things, that it did not foreclose the possibility, at some point in the future, of disestablishing paternity as to Rawls and prospectively setting aside a portion of the default judgment, contingent upon the cooperation of Rawls' counsel in gathering information about Child's biological father and the maternal grandmother.

{5} In November 2010, the court entered an order denying relief under Rule 1-060(B)(1), (2), and (3) and denying Rawls' motion to set aside the stipulated order. Also in November 2010, the court entered an order "denying motion to dismiss pursuant to [Rule] 1-060(B)(5)(6)." The court entered no findings of fact or conclusions of law and gave no written explanation or ground for the denial. Rawls appeals the November 2010 order entitled "Order Denying Motion to Dismiss Pursuant to [Rule] 1-060(B)(5)(6)." On appeal, Rawls asserts that the November 2010 order relating to Rule 1-060(B)(5) and (6) denied his Rule 1-060(B)(5) and (6) motions to abate ongoing child support and to set aside the default judgment and stipulated order, and was inconsistent with the law. Furthermore, he "assumes that the district court relie[d] on the undisputed fact that [he was] not the biological father of [C]hild."

{6} Rawls specifically faults the court for failing to grant the prospective relief of child support abatement requested in his motion to abate child support and for failing to set aside the default judgment and the stipulated order. He seeks "[p]rospective relief" as available under "statutes granting courts continuing jurisdiction to modify and revoke child support orders" by setting aside the default judgment and stipulated order, thereby setting aside "the determination of paternity and . . . reliev[ing him] of ongoing child support obligations[.]" And he wants to be absolved of all related accrued child support.

DISCUSSION

Standard of Review

{7} Rawls asserts that the issues on appeal are to be reviewed de novo because all pertinent

facts are undisputed, the issues are of pure law, and the district court's rulings were not consistent with the law. He also asserts that even if the standard of review is abuse of discretion, the issues turn on whether the court misapplied the law, thus calling for de novo review. HSD contends that a ruling on a motion for relief from a final judgment under Rule 1-060(B) is reviewed for an abuse of discretion.

{8} We review denials of Rule 1-060(B) motions generally for abuse of discretion, unless the issue is one of law. *Stein v. Alpine Sports, Inc.*, 1998-NMSC-040, ¶ 6, 126 N.M. 258, 968 P.2d 769. To the extent an issue requires us to determine whether the district court misapprehended the applicable law or otherwise requires us to decide a pure matter of law, we turn to de novo review. *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 7, 127 N.M. 654, 986 P.2d 450; *Kinder Morgan CO2 Co., L.P. v. State Taxation & Revenue Dep't*, 2009-NMCA-019, ¶ 9, 145 N.M. 579, 203 P.3d 110.

{9} As pertinent to the issues before us, Rule 1-060(B)(5) and (6) read:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order[,] or proceeding for the following reasons:
>
> . . .
>
> (5) . . . it is no longer equitable that the judgment should have prospective application; or
>
> (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time[.]

The Merits

{10} HSD seeks to avoid the merits with its argument that Rawls failed to move for relief within a reasonable time. *See* Rule 1-060(B)(6) ("The motion shall be made within a reasonable time[.]"); *Thompson v. Thompson*, 99 N.M. 473, 475, 660 P.2d 115, 117 (1983) (stating that "Rule 60(b)(4), (5)[,] and (6) may be presented within a 'reasonable time'"). HSD fails to point out where in the record it preserved this argument. We will not search the record for procedural events to which a party fails to cite, and we therefore will not consider HSD's timeliness point. *See Crutchfield v. N.M. Dep't of Taxation & Revenue*, 2005-NMCA-022, ¶ 14, 137 N.M. 26, 106 P.3d 1273 ("Absent [a] citation to the record or any obvious preservation, we will not consider the issue.").

{11} As we have indicated in this Opinion, Rawls seeks relief from all accrued, unpaid child support, as well as relief from any obligation for future child support. We interpret Rule 1-060(B)(5)'s reference to prospective relief to mean relief from the date the Rule 1-060(B) motion was filed, not from the time of the default judgment or stipulated order. If the grounds for relief are met, we interpret Rule 1-060(B)(6) as intended to provide relief with respect to the accrued and prospective child support. Intermixed in the Rule 1-060(B) analyses is the extent, if any, to which the notion of changed circumstances under the applicable Uniform Parentage Act, NMSA 1978, §§ 40-11-1 to -23 (1986, as amended through 2004) (current version at NMSA 1978, §§ 40-11A-101 to -903 (2009)), is to play a part.

{12} The unique circumstances of this case raise a significant issue as to the fairness of requiring a person to pay child support when he is unerringly determined not to be the

biological father of a child and found to have had no personal relationship with the child. In this case, of course, this circumstance is set against Rawls' initial agreement to paternity in a judgment; the substantial period of time that passed before he obtained a paternity test; the consequence of Child's biological parents being deported, leaving Child with the maternal grandmother; and the concern about who should have provided child support and who should continue to provide child support. Basic notions of fairness and justice strongly suggest that Rawls should not be compelled to pay the accrued and prospective child support. Nevertheless, we must balance that view with policies disfavoring vacation of judgments and arguments that abatement of child support will prejudice HSD and harm Child.

{13} The district court did not make things easy for effective appellate review. The court presumably determined under Rule 1-060(B)(5) that Rawls failed to prove that it was "no longer equitable that the judgment should have prospective application[.]" But without this Court considering credibility of witnesses, sufficiency of proof, and equitable considerations, we have no way of knowing the underlying basis for that determination. Nor do we know why the court refused to grant relief under Rule 1-060(B)(6). We are unaware whether the court denied the relief on a "reasonable time" ground or on an "extraordinary circumstance" ground. Rule 1-060(B)(6) cannot be used to circumvent the one-year time period or other requirements of Subparts (1), (2), and (3). *Resolution Trust Corp. v. Ferri*, 120 N.M. 320, 323, 901 P.2d 738, 741 (1995). We are given no reasons why the district court denied relief under Rule 1-060(B)(5) or (6), and we will not assume that its reason for doing so was based on its conclusion that the motion was made pursuant to Rule 1-060(B)(5) and (6) to circumvent the time requirements of Rule 1-060(B)(1), (2), and (3). *See State v. Thayer*, 80 N.M. 579, 582, 458 P.2d 831, 834 (Ct. App. 1969) ("We will not assume facts unsupported by the record.").

{14} That generally we apply an abuse of discretion standard of review in Rule 1-060(B)(5) and (6) determinations does not mean that every determination under that rule requires us to apply the abuse of discretion standard in a particular way or that we must blindly adhere to the discretion aspect of the standard. There are instances in which this Court can turn to de novo review to determine whether a district court has abused its discretion. This Court has held that we will determine that a district court has abused its discretion "when it applies an incorrect standard, incorrect substantive law, or its discretionary decision is premised on a misapprehension of the law." *Klinksiek v. Klinksiek*, 2005-NMCA-008, ¶ 4, 136 N.M. 693, 104 P.3d 559 (internal quotation marks and citation omitted); *see also Johnson*, 1999-NMSC-028, ¶ 7 ("[W]e may characterize as an abuse of discretion a discretionary decision that is premised on a misapprehension of the law." (alteration, internal quotation marks, and citation omitted)); *State v. Elinski*, 1997-NMCA-117, ¶ 8, 124 N.M. 261, 948 P.2d 1209 (holding that a district court abused its discretion when it exercised its discretion based on a "misapprehension of the law"). In addition, this Court has recognized that "[w]here the court's discretion is fact-based, we must look at the facts relied on by the trial court as a basis for the exercise of its discretion[] to determine if these facts are supported by substantial evidence" and that an abuse of discretion "occurs where the court's ruling is clearly against the logic and effect of the facts and circumstances before the court." *Apodaca v. AAA Gas Co.*, 2003-NMCA-085, ¶ 60, 134 N.M. 77, 73 P.3d 215 (internal quotation marks and citations omitted).

{15} Although no procedural rule requires a district court to explain its reasons or to set out findings of fact and conclusions of law in connection with its determination under Rule 1-060(B) following an evidentiary hearing, it behooves the district court to go beyond a bare ruling with no explanation or finding. We will not grant substantial, much less virtually automatic deference under such circumstances. We hold that the district court's decision is clearly against the logic and effect of the facts it considered.

{16} At the outset, Rawls may have thought he was Child's biological father. Evidence in the record indicates that Rawls wanted a paternity test early on and may have agreed to the stipulated order more out of concern for his driver's license than the consequences of his agreement. Unless circumstances exist, beyond his early stipulation, to require a different application of New Mexico's child support statutes and case law, we see no reasonable basis on which to saddle Rawls with accrued or prospective child support. The question before us is whether the circumstances of this case are of such an extraordinary nature as to relieve Rawls from the child support; and, if so, whether Rawls should nevertheless be denied relief because his conduct (his early stipulation and passive pursuit of paternity testing) may have resulted in undue prejudice to HSD or harm to Child.

{17} We hold that the determination that Rawls is not Child's biological father after his admission early on that he was Child's father is an extraordinary circumstance under Rule 1-060(B)(6). This view is supported by Child's mother's apparent misrepresentation to HSD that Rawls was the father and her later admission in court that another named man was the biological father. While this circumstance is not a "changed circumstance" in the nature, for example, of the onset of adverse financial changes that might require a change in a child support obligation, we think that the change from a mistaken admission of paternity to proof of non-paternity qualifies as an extraordinary change of circumstance sufficient to permit Rule 1-060(B)(6) relief from a child support obligation.

{18} Furthermore, HSD fails to show us where in the record Child has been harmed by Rawls' conduct or that Child will be harmed to any extent that would justify burdening Rawls with accrued and prospective child support. We have not been shown that Child has not received adequate support in the past. Nor has it been shown that Child will not receive adequate support in the future. In balancing whether Rawls instead of HSD should provide the support, we come down on Rawls' side. That HSD cannot successfully enforce the obligation against Child's deported mother and biological father does not change the balance that favors Rawls. To prove that it is or will be harmful to Child to grant relief to Rawls, HSD had the burden to present evidence of such harm resulting from Rawls' conduct. Having failed in that burden, we see no reasonable basis on which to saddle Rawls with an obligation to pay any child support. *See Atcherian v. State*, 14 P.3d 970, 972 (Alaska 2000) (affirming the district court's vacation of the default judgment of paternity and awarding a refund of child support collected after the appellant, having obtained a paternity test excluding him as the child's biological father, filed his motion to vacate the judgment); *Kilpper v. State*, 983 P.2d 729, 730, 732 (Alaska 1999) (holding that the appellant, who signed an affidavit acknowledging paternity of a child, was entitled to prospective relief from future child support payments upon a showing that he was not the biological father of the child); *MAM v. State Dep't of Family Servs.*, 99 P.3d 982,

983, 985-86 (Wyo. 2004) (holding that the court abused its discretion in denying the appellant's motion to set aside a stipulated paternity order where the appellant proved, among other facts, that he was not the child's biological father and that he did not have a relationship with the child); *Williams v. Williams*, 843 So. 2d 720, 721, 723 (Miss. 2003) (refusing "to sanction the manifest injustice of forcing a man to support a child which science has proven not to be his" and therefore terminating further child support obligations notwithstanding a divorce decree in which the appellant swore that he was the father of the child); *M.A.S. v. Miss. Dep't of Human Servs.*, 842 So. 2d 527, 528, 531 (Miss. 2003) (en banc) (holding that, notwithstanding a nine-year delay in requesting relief, and the appellant's failure to submit to DNA testing earlier, it was "profoundly unjust to require [the appellant] to continue making child support payments for a child which is known not to be his" and thereby ordering the trial court to set aside the paternity and child support order); *Wheat v. Commonwealth*, 217 S.W.3d 266, 267-69 (Ky. Ct. App. 2007) (stating that notwithstanding the fact that the appellant had acknowledged paternity of the child, there was no basis, from an equitable standpoint, to require him to continue to pay child support considering, among other factors, that he had no relationship with the child).

{19} We therefore set aside the default judgment and the stipulated order. We hold that Rawls is released from his obligation to pay prospective child support. In this context, we interpret "prospective" relief to have commenced on February 24, 2009, the filing date of Rawls' Rule 1-060(B) motion, which was accompanied by proof that Rawls is not Child's biological father.

{20} We further hold that Rawls should not be burdened with the obligation to pay any accrued child support. In *Wheat*, under circumstances similar to those of this case, the Kentucky Court of Appeals held that if the district court determined that the mother of the child, who had "apparently [failed to] disclose the name of the true biological father when she supplied the name of [the appellant] as the purported father of [the child,]" was guilty of fraud or misrepresentation, then the accrued child support should be set aside. 217 S.W.3d at 271. That case was remanded for a hearing on whether the mother had made a material representation which was false and which was either known to be false or which was made recklessly, and which was made with an inducement to be acted upon and was relied upon thereby causing the injury. *Id.* The *Wheat* court instructed the trial court that if, on remand, the factors were met, the accrued child support should be set aside. *Id.*

{21} Here, Rawls argues that "even the limited record can establish all five of the[] [*Wheat*] elements." Rawls continues:

> [Child's mother] made a material misrepresentation in that she represented [Rawls] as the father of . . . Child to [HSD]. Such a representation was false as [Rawls] is not the biological father of . . . Child. [Child's mother] knew the representation was false because at the hearing on April 14, 2011, when asked for the name of the biological father of . . . [C]hild, she provided a name other than [Rawls]. [Child's mother] made the representation so that child support could be collected from [Rawls] and [HSD] acted upon that representation to file a [p]etition to name [Rawls] as [the] father of . . . Child. The outcome of that [p]etition, the related default

> judgment and stipulated order have all caused untold injury on [Rawls]. [Rawls] has accrued over $35,000 in child support payments for a child that is not his, he has a suspended driver's license, is facing criminal repercussions for driving without a license, has lost his [c]ommercial [d]river's [l]icense . . . which was the source of income for himself and his family including three other children[] and has had to pay attorney fees and costs.

HSD does not specifically respond to this argument in its answer brief. *See Santa Fe Pac. Gold Corp. v. United Nuclear Corp.*, 2007-NMCA-133, ¶ 41, 143 N.M. 215, 175 P.3d 309 (stating that where a party declines to address an issue in its answer brief, the issue is treated as a concession). We are persuaded that, under the particular facts of this case, the most logical and consistent conclusion is that Rawls should not be liable for any support for Child, who is not his progeny, and that, pursuant to Rule 1-060(B)(6), the default judgment, as well as the stipulated order, should be set aside, leaving Rawls with no obligation as to accrued or prospective child support.

{22} In sum, we can see no reasonable basis under the circumstances here on which to hold Rawls responsible for child support for Child once it was determined that he was not the biological father of Child, after it was obvious that Child's mother either mistakenly or intentionally pointed to Rawls as the father, and absent any harm to Child.

CONCLUSION

{23} We reverse. The default judgment and stipulated order are hereby set aside to the extent they purport to establish Rawls' paternity and require Rawls to pay accrued child support, as well as any prospective child support.

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

JONATHAN B. SUTIN, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

J. MILES HANISEE, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMSC-013

Filing Date: May 7, 2012

Docket No. 31,934

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ANGEL ARRENDONDO,

Defendant-Appellant.

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OPINION

CHÁVEZ, Justice.

{1} Defendant Angel Arrendondo testified during his trial that he shot and killed Alfego "Ace" Aragon in self-defense. Arrendondo claimed that Aragon shot at him numerous times, wounding him once in the shoulder. Witnesses Gloria Rael and Emilio Quintana, Aragon's wife and son-in-law, respectively, testified that Aragon did not own a gun and was not armed. They testified that they both saw Arrendondo shooting into their house. Emilio testified that he saw Arrendondo shoot Aragon in the stomach, and then walk up to Aragon and shoot him a second time in the head, fatally wounding him. The jury found Arrendondo guilty of first-degree murder, assault with intent to commit a violent felony, negligent child abuse, tampering with evidence, and shooting at a dwelling.

{2} Arrendondo appeals his convictions, raising several issues, which we discuss in four categories. First, did the trial court abuse its discretion by (a) denying Arrendondo a fifth continuance, which was requested one week before trial to allow defense counsel an opportunity to examine an unidentified hard fragment found in the lining of the jacket Arrendondo wore on the day of the shooting, and (b) by declining to admit the fragment into evidence? Second, was there sufficient evidence to prove Arrendondo's convictions for assault with intent to commit a violent felony against Nicole Rael, Aragon's daughter; negligent child abuse; tampering with evidence; and shooting at a dwelling? Third, was defense counsel ineffective because (a) she failed to timely investigate the unidentified hard fragment in the jacket, and (b) she did not pursue a defense that Arrendondo was so intoxicated by heroin use that he could not form the specific intent to commit first-degree murder? Fourth and finally, was Arrendondo denied his right to a speedy trial under the Sixth Amendment of the United States Constitution, a claim he raises

for the first time on appeal?

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING ARRENDONDO'S FIFTH MOTION FOR A CONTINUANCE AND REFUSING TO ADMIT THE UNIDENTIFIED FRAGMENT INTO EVIDENCE.

A. The Trial Court Reasonably Denied the Motion for a Continuance Because of the Number of Previous Continuances, the Likely Length of Delay, and the Lack of an Explanation for Defense Counsel's Failure to Timely Discover and Test the Jacket Evidence.

{3} A week before trial, it came to defense counsel's attention that the State was in possession of a Nike jacket that Arrendondo had been wearing on the day of the murder. Lodged in a hole in the back shoulder of the jacket was a small unidentified lump of hard material that has been described during the trial as, among other things, a "fragment," a "hard lump," and a "fragment of something hard, a bullet, a rock, we don't know." (For the sake of convenience, we will describe the object found in the jacket as an "unidentified fragment" throughout this opinion.) Defense counsel moved for a continuance of the trial setting to test the jacket and the unidentified fragment in an attempt to bolster Arrendondo's claim of self-defense. This motion was argued on the morning of trial after a jury had been seated. The trial court denied the motion, citing the numerous prior continuances granted at Arrendondo's request, and also because the trial judge was not persuaded that the unidentified fragment was relevant to the defense.

{4} We review a trial court's denial of a motion for a continuance under an abuse of discretion standard. *See State v. Salazar*, 2007-NMSC-004, ¶ 10, 141 N.M. 148, 152 P.3d 135. An abuse of discretion is a ruling that is "clearly against the logic and effect of the facts and circumstances of the case." *State v. Moreland*, 2008-NMSC-031, ¶ 9, 144 N.M. 192, 185 P.3d 363 (internal quotation marks and citation omitted). The factors we consider when reviewing the denial of a motion for continuance include

> the length of the requested delay, the likelihood that a delay would accomplish the movant's objectives, the existence of previous continuances in the same matter, the degree of inconvenience to the parties and the court, the legitimacy of the motives in requesting the delay, the fault of the movant in causing a need for the delay, and the prejudice to the movant in denying the motion.

State v. Torres, 1999-NMSC-010, ¶ 10, 127 N.M. 20, 976 P.2d 20.

{5} Assessing the trial court's decision under the *Torres* factors, we conclude that the court did not abuse its discretion. The trial court had already continued four trial settings at Arrendondo's request. Each continuance resulted in several intervening months before the next trial setting. In addition, Arrendondo's counsel did not offer any explanation regarding why the jacket and the unidentified fragment had not been discovered sooner or tested before the day of trial.

{6} Finally, as an alternative to the continuance, defense counsel asked that the jacket be admitted into evidence and Arrendondo be permitted to argue that the hole in the jacket corroborated his testimony

that Aragon shot him in the shoulder. The trial court admitted the jacket into evidence and defense counsel argued that the hole in the jacket supported Arrendondo's claim that he shot and killed Aragon in self-defense. In light of these considerations, we affirm the trial court's denial of the motion for a continuance.

B. The Trial Court Acted Reasonably in Refusing to Admit the Unidentified Fragment into Evidence Because Arrendondo Failed to Provide Evidence that It Might Have Been a Bullet.

{7} After defense counsel examined the jacket and discovered the unidentified fragment lodged within it, counsel moved to admit both the jacket and the unidentified fragment into evidence. The trial court admitted the jacket but excluded the unidentified fragment, reasoning that an insufficient foundation had been laid to identify the unidentified fragment and how it might be relevant. Arrendondo argues that the trial court abused its discretion in failing to admit the unidentified fragment that was found in the jacket into evidence because it supported his self-defense claim. Arrendondo reasons that the fact that an unidentified fragment that could have been metal was found in the jacket that he wore on the day of the shooting is evidence that he was shot by Aragon during a gun fight.

{8} This Court reviews a trial court's decision whether to admit or deny objects into evidence for abuse of discretion. *State v. Armendariz*, 2006-NMSC-036, ¶ 6, 140 N.M. 182, 141 P.3d 526. The defendant must show that there is a reasonable possibility that the failure to admit the evidence contributed to his conviction. *State v. Garcia*, 100 N.M. 120, 123, 666 P.2d 1267, 1270 (Ct. App. 1983).

{9} We conclude that the trial court reasonably denied admission of the unidentified fragment into evidence because Arrendondo did not lay a foundation for its admissibility. Foundation goes to conditional relevancy. Under Rule 11-901(A) NMRA, "The requirement of authentication . . . as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Absent authenticating evidence, a trial court may reasonably conclude that the evidence in question is not relevant. *See State v. Kenny*, 112 N.M. 642, 650, 818 P.2d 420, 428 (Ct. App. 1991). Because Arrendondo did not present any evidence to authenticate the unidentified fragment, the trial court reasonably concluded that Arrendondo did not show how the unidentified fragment would be relevant to his self-defense claim. Thus, we affirm the trial court's exclusion of the unidentified fragment.

II. SUFFICIENCY OF THE EVIDENCE CLAIMS

{10} Arrendondo argues that the following convictions were not supported by sufficient evidence: assault with intent to commit a violent felony against Nicole, negligent child abuse of Jasmine Q. and Adrian A., tampering with evidence, and shooting at a dwelling. In reviewing for sufficiency of the evidence, this Court views the evidence in the light most favorable to the verdict. *State v. Cabezuela*, 2011-NMSC-041, ¶ 42, 150 N.M. 654, 265 P.3d 705. We must assess "whether substantial evidence of either a direct or circumstantial nature exists to support [the] verdict." *Id.* (internal quotation marks and citation omitted). Substantial evidence is evidence acceptable to a reasonable mind as adequate to support a conclusion. *State v. Mailman*, 2010-NMSC-036, ¶ 24, 148 N.M. 702, 242 P.3d 269.

A. Sufficient Evidence Supports Arrendondo's Conviction for Assault with Intent to Commit a Violent Felony Against Nicole as Instructed; However, the Jury Instruction was Erroneous.

{11} The State presented eyewitness testimony that Arrendondo fired shots into a house occupied by Nicole and others. However, Arrendondo contends that the State failed to present evidence that he "knew that Nicole was in the house, let alone had any sort of disagreement with her so to desire to maim or kill her" or that Nicole subjectively feared being hit by a bullet. Therefore, Arrendondo argues that the conviction is not supported by sufficient evidence. To support a conviction for assault with intent to commit a felony against Nicole, the State had to prove beyond a reasonable doubt that (1) Arrendondo shot a firearm into the house in which Nicole resided; (2) Arrendondo's conduct caused Nicole to believe that he was about to intrude on her bodily integrity or personal safety by touching or applying force to her in a rude, insolent or angry manner; (3) a reasonable person in the same circumstances as Nicole would have had the same belief; (4) Arrendondo's act was unlawful [because it was not justified by self-defense]; (5) Arrendondo intended to kill Nicole or commit murder on Nicole; and (6) this happened in New Mexico on or about November 22, 2003. *See* UJI 14-312 NMRA; NMSA 1978, § 30-3-3 (1963).

{12} Police Chief Jerry Stevens, Sergeant Shane Arthur, and Katerina Babcock, a forensic scientist, testified that all of the bullets from the crime scene, including those that landed in the house, came from Arrendondo's 9 mm handgun. Gloria testified that Nicole was in the house during the shooting. This testimony supports a jury finding that Arrendondo shot into the house in which Nicole resided. In addition, Sergeant Arthur testified that the trajectory of the bullets that landed in the house indicates that the shooter was aiming directly at the house. This testimony supports the fourth element: that Arrendondo acted unlawfully, rather than in self-defense. There is no dispute regarding the date of these events.

{13} The next question is whether there is sufficient evidence to support a finding that Nicole subjectively believed she would be assaulted and whether that belief was objectively reasonable. The jury was instructed, in pertinent part, that the State had to prove both that "[t]he defendant's conduct caused [the victim] to believe the defendant was about to intrude on [the victim's] bodily integrity or personal safety by touching or applying force to [the victim] in a rude, insolent or angry manner," and that "[a] reasonable person in the same circumstances as [the victim] would have had the same belief." UJI 14-312(2) & (3).

{14} The requirement that the victim must *actually believe*, and that a *reasonable person* in the victim's circumstances also *would believe*, that he or she was about to be assaulted indicates a dual subjective and objective test. We have previously contrasted a subjective standard with the objective reasonable person standard based on a person's actual perceptions. *See State v. Rudolfo*, 2008-NMSC-036, ¶ 17, 144 N.M. 305, 187 P.3d 170 (interpreting a focus on the person's actual perception as subjective and deeming an "acted reasonably" requirement as objective). Therefore, the State's evidence must satisfy both a subjective and an objective standard.

{15} Our law of assault generally requires evidence that the victim actually, subjectively comprehended that he or she was going to

receive unwelcome physical contact. *See Baca v. Velez*, 114 N.M. 13, 15, 833 P.2d 1194, 1196 (Ct. App. 1992). In prosecuting an assault charge, the State must present some evidence of the victim's actual "belie[f that] he was in danger of receiving an immediate battery." *State v. Mata*, 86 N.M. 548, 550-51, 525 P.2d 908, 910-11 (Ct. App. 1974).

{16} Arrendondo argues that because Nicole did not testify during his trial, "there is no way to know, without speculating, if she believed that [Arrendondo] was about to injure her." However, Gloria testified that Nicole was in the house with her when Arrendondo started shooting. Gloria could hear the gunshots. A reasonable jury could infer from this testimony that the shooting was audible to people in Aragon's house, including Nicole.

{17} Gloria also testified, without objection, that Nicole said that a bullet passed in front of her and Jasmine, her baby. Gloria told Nicole to hide. It is unclear which of these events happened first. After Gloria told Nicole to hide, Nicole fled to a closet in Gloria's son's bedroom. From this evidence, a reasonable jury could find that a reasonable person in Nicole's shoes, having heard the gunshots and witnessed a bullet pass next to her and her baby, would have feared for her life. Therefore, the State presented enough evidence to satisfy both the subjective and the objective prongs of this test.

{18} However, the controlling question is whether Arrendondo intended to commit murder or mayhem against Nicole. *See State v. Highfield*, 113 N.M. 606, 609, 830 P.2d 158, 161 (Ct. App. 1992) (providing that an essential element of the crime of assault with the intent to commit a violent felony is the intent to commit the violent felony against such person). We note that the jury was instructed that for it to find Arrendondo guilty of assault with intent to commit a violent felony, in addition to the other elements, it had to find that he intended to kill Nicole or *any other person* or commit murder or mayhem on Nicole *or any other person*. The State correctly argues that the "[j]ury instructions become the law of the case against which the sufficiency of the evidence is to be measured." *State v. Smith*, 104 N.M. 729, 730, 726 P.2d 883, 884 (Ct. App. 1986).

{19} There was sufficient evidence to find Arrendondo guilty under the instruction as given because there was sufficient evidence that he intended to commit murder against Aragon. Although the State asserts that there was evidence at the trial that Arrendondo knew that Nicole was in the house, our review of the record does not support this assertion. The testimony relied upon by the State established only that Arrendondo had been at the Aragon residence before the shooting, although he never entered their residence. The testimony also established that the Aragons, including Nicole, had been to Arrendondo's residence, although Nicole never entered his residence. We fail to understand how this evidence supports an inference that, at the time in question, Arrendondo knew that Nicole was in the Aragons' house.

{20} However, the instruction, to which Arrendondo did not object either at trial or on appeal, misstated the law regarding assault with intent to commit a violent felony. As a preface to discussing why the instruction is erroneous, it is important to note that a majority of the Court, excluding the author, have opted to raise the issue of the erroneous instruction sua sponte. The majority does so because of this Court's inherent authority to raise an issue sua sponte when it is necessary to protect a party's fundamental rights. *State*

v. Jade G., 2007-NMSC-010, ¶ 24, 141 N.M. 284, 154 P.3d 659.[1] Although as a general rule propositions of law not raised in the trial court should not be raised sua sponte by the appellate court, there are exceptions. One exception is when doing so is necessary to protect a party's fundamental rights. *Id.* We also have the responsibility to question sua sponte a conviction for a nonexistent crime, because otherwise fundamental error would not be corrected. *State v. Johnson*, 103 N.M. 364, 371, 707 P.2d 1174, 1181 (Ct. App. 1985). The question is whether the jury may have convicted Arrendondo of a crime that does not exist because of the way they were instructed. The majority answers this question affirmatively.

{21} When reviewing a jury instruction for fundamental error, "we seek to determine whether a reasonable juror would have been confused or misdirected by the jury instruction." *State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134 (internal quotation marks and citation omitted). An instruction that, through omission or misstatement, gives the juror an inaccurate rendition of the relevant law, may confuse or misdirect a juror. *See id.* In this case, the jury instruction as it was submitted to the jury misdirected or confused the jury, because it may have allowed the jury to conclude that whether Arrendondo intended to murder Nicole was irrelevant because he shot into the house intending to murder Aragon. Therefore, under the erroneous jury instruction, the jury may have found Arrendondo guilty of assault with intent to commit a violent felony against Nicole without finding that Arrendondo intended to murder Nicole. If the jury found Arrendondo guilty of assaulting Nicole because he had the intent to commit a violent felony against Aragon, but not Nicole, the jury would have found Arrendondo guilty of a crime that does not exist. The majority agrees with the Court of Appeals' holding in *Highfield* that an essential element of the crime of assault with the intent to commit a violent felony is the intent to commit the violent felony against such person. The jury should have been instructed to consider only whether the State proved beyond a reasonable doubt that Arrendondo assaulted Nicole with the intent to commit a violent felony against her. Having failed to do so, the jury may have convicted Arrendondo of a crime that does not exist, and we cannot let such fundamental error go uncorrected. *See State v. Maestas*, 2007-NMSC-001, ¶ 26, 140 N.M. 836, 149 P.3d 933 (a conviction for a nonexistent crime constitutes fundamental error).

{22} Although this conviction is reversed, the State is not barred from retrying Arrendondo under this count because his sufficiency of the evidence argument fails under the instruction as given. *State v. Mascareñas*, 2000-NMSC-017, ¶ 31, 129 N.M. 230, 4 P.3d 1221 (providing that retrial following an appeal is not barred if the evidence below was sufficient to support a conviction under the erroneous jury instruction).

B. Is There Sufficient Evidence to Support the Convictions for Negligent Child Abuse of Jasmine and Adrian?

[1]I decline to raise the issue sua sponte because of the concern that we may be missing important legal considerations. In this case, it may be that transferred intent can support a conviction of assault with intent to commit a violent felony. *See Culler v. State*, 594 S.E.2d 631, 635 (Ga. 2004). I prefer that an appellate court be sparing in its exercise of authority to raise issues sua sponte. Although perhaps it would be more difficult, the defendant may raise the issue in a habeas corpus proceeding.

{23} The State argued that Arrendondo fired at least two gunshots into the home where Jasmine and Adrian, both minors, were situated at the time of the shooting. The jury convicted Arrendondo of negligent child abuse of both Jasmine and Adrian. Arrendondo contends that the State failed to prove beyond a reasonable doubt that he knew of the children's presence in the house, and therefore he could not have had the requisite mens rea to endanger them. To prove negligent child abuse, the State had to prove beyond a reasonable doubt that (1) Arrendondo caused Jasmine and Adrian to be placed in a situation which endangered their lives; (2) Arrendondo acted with reckless disregard and without justification, meaning that Arrendondo "knew or should have known that [his] conduct created a substantial and foreseeable risk" to Jasmine and Adrian and he was wholly indifferent to the consequences of his conduct toward them; (3) Jasmine and Adrian were both under the age of eighteen; and (4) this happened in New Mexico on or about November 22, 2003. UJI 14-604 NMRA; NMSA 1978, § 30-6-1 (1973, as amended through 2001).

{24} The following evidence would support the elements for both counts of negligent child abuse. Regarding the endangerment element, eyewitnesses testified that they observed Arrendondo fire his weapon into the house. Chief Stevens, Sergeant Arthur, and Ms. Babcock testified that the bullets that landed in the house matched those fired from Arrendondo's handgun. This testimony supports a jury finding that Arrendondo shot into the house, thereby placing both Jasmine and Adrian in a situation that endangered their lives. Gloria and Emilio testified that Jasmine was only two or three weeks old at the time of the shooting. Adrian was eleven years old at that time. These facts support the fourth element on both counts, that both children were under the age of eighteen. Finally, there is no dispute as to when the shooting occurred. Thus, the crux of Arrendondo's argument rests upon whether there was sufficient evidence for a jury to reasonably find that Arrendondo acted with a reckless disregard with respect to the children's safety.

{25} The mens rea element requires the State to prove that Arrendondo "knew or should have known that [his] conduct created a substantial and foreseeable risk" to Jasmine and Adrian, a risk which he recklessly disregarded. UJI 14-604. This element may be proven with evidence that the defendant was or should have been aware that the child was present within the zone of danger. *State v. Gonzales*, 2011-NMCA-081, ¶¶ 1, 32, 150 N.M. 494, 263 P.3d 271, *cert. granted on unrelated issue*, 2011-NMCERT-008, ___ N.M. ___, 268 P.3d 514. In *Gonzales*, the Court of Appeals concluded that the State failed to prove negligent child abuse with respect to a drunk driver who, while driving recklessly, hit a car that was occupied by two children. *Id.* ¶¶ 4, 27. The Court of Appeals determined that although the State proved that the defendant had accidentally endangered two children while driving recklessly, this proof was insufficient to support the mens rea element of criminal negligence. *Id.* ¶¶ 15, 27. The Court of Appeals concluded that unless it read Section 30-6-1(D)(1) to require the State to prove that the defendant was aware that the child victims were present in the zone of danger, the statute would create a strict liability crime, contrary to the statutory language requiring a mental state of at least negligence. *Gonzales*, 2011-NMCA-081, ¶¶ 29-31. The Court therefore held that "it is insufficient for the State to prove a substantial and foreseeable risk by simply establishing that the possibility exists that a hypothetical child will be injured thereby . . . even though

that child was not known to be endangered at the time." *Id.* ¶ 31. Instead, the Court held that the criminal negligence "mental state requires that Defendant know, or at least should know, that her conduct is endangering a child." *Id.* ¶ 30.

{26} Therefore, the question we must answer is whether the State proved beyond a reasonable doubt that Arrendondo knew or should have known that the child victims were present in the zone of danger he created. Otherwise, the neglect of the children would be accidental or unknowing rather than negligent, and accidental conduct cannot support a conviction for negligent child abuse. *Id.* ¶ 26.

1. There Is Sufficient Evidence to Support a Conviction for Negligent Child Abuse of Jasmine.

{27} Regarding Jasmine, there is sufficient evidence to affirm the conviction for negligent child abuse. On the issue of whether Arrendondo acted with reckless disregard of Jasmine's safety, Gloria testified that she told Arrendondo before the shooting that there was a "newborn baby" in the house. This would allow a reasonable jury to have found that Arrendondo knew or should have known that his conduct created a substantial risk to Jasmine, who was approximately three weeks old at the time of the shooting. The jury could have also reasonably found that Arrendondo disregarded that risk by shooting into the house, despite having been informed of a baby's presence in the house. Therefore, the State presented sufficient evidence to support the conviction for negligent child abuse of Jasmine, and we affirm this conviction.

2. There Is Not Sufficient Evidence to Uphold the Conviction for Negligent Child Abuse of Adrian Because There Is No Evidence that Arrendondo Was Aware that Adrian Was in the House.

{28} Regarding Adrian, the record does not contain evidence from which a jury could have found that Arrendondo "knew or should have known" that Adrian was inside the house. The State did not present any evidence that Arrendondo had been made aware of Adrian's presence, that Adrian was eleven years old, or that he should have known about Adrian's presence inside the house. We have previously reversed convictions for insufficient evidence where, "[f]or the jury to have reached [the conclusions necessary to the verdict, it] had to speculate." *State v. Vigil*, 2010-NMSC-003, ¶ 20, 147 N.M. 537, 226 P.3d 636 (second alteration in original) (internal quotation marks and citation omitted). Consequently, the State failed to provide sufficient evidence to support the conviction for negligent child abuse of Adrian, and we reverse this conviction.

C. There Is Not Sufficient Evidence to Support the Conviction for Tampering with Evidence Because the State Provided No Proof that Arrendondo Hid or Disposed of His Gun.

{29} The State presented evidence that the police could not find the 9 mm handgun that Arrendondo used in the shooting when they searched his house. The jury convicted Arrendondo of tampering with this gun. Arrendondo contends that the evidence is insufficient to support the guilty verdict because the State did not present any evidence that Arrendondo actively hid or disposed of the gun. To support the conviction of tampering with evidence, the State had the burden of proving beyond a reasonable doubt that (1) Arrendondo disposed of or hid "the

9mm handgun or any other gun"; (2) Arrendondo intended to prevent the apprehension, prosecution, or conviction of himself; and (3) this happened in New Mexico on or about November 22, 2003. *See* UJI 14-2241 NMRA; NMSA 1978, § 30-22-5 (2003).

{30} The parties agree that the only evidence that Arrendondo tampered with his 9 mm handgun is that the police could not find the gun when they searched Arrendondo's house. The State contends that the simple fact that the police could not find the 9 mm handgun when they searched Arrendondo's house means that "[Arrendondo] undertook the overt act of removing the gun from the scene of the shooting and disposed of it in such a way that it took law enforcement several weeks to find it." The State concedes that "[i]t is not clear exactly how [Arrendondo] disposed of the gun." We conclude that this evidence is insufficient to support a guilty verdict of tampering with evidence.

{31} We have previously held that the State must provide some evidence, either direct or circumstantial, that the defendant committed an overt act with respect to the evidence in question with the intent to disrupt the police investigation. *See State v. Silva*, 2008-NMSC-051, ¶¶ 17-19, 144 N.M. 815, 192 P.3d 1192. In *Silva*, the State alleged that the defendant had tampered with the murder weapon because "(1) [the d]efendant had a gun at the scene of the crime; (2) a gun was used to murder [the victim]; (3) the murder weapon was removed from the scene; and (4) the murder weapon was never recovered." *Id.* ¶ 17. We held that "absent both direct evidence of a defendant's specific intent to tamper and evidence of an overt act from which the jury may infer such intent, the evidence cannot support a tampering conviction." *Id.* ¶ 18.

{32} In *Silva*, we concluded that the State had failed to meet its burden of proof because the State did not offer evidence "of an overt act on Defendant's part from which the jury could infer [the specific] intent" to disrupt the investigative process. *Id.* ¶ 19. We concluded that "the State effectively asked the jury to speculate that an overt act of . . . hiding [the murder weapon] had taken place, based solely on the fact that such evidence was never found." *Id.* (alteration in original) (internal quotation marks and citation omitted).

{33} Here, as in *Silva*, the State provided evidence that Arrendondo took the gun when he left the crime scene, but it offered no evidence that Arrendondo actively hid or disposed of it. Rather, Arrendondo claims that he left his 9 mm handgun at his house and fled the State without it. The police recovered the gun in question from someone else during a traffic stop a few weeks after the shooting. However, the State did not offer any evidence regarding how the person from whom they recovered the gun came to have it in their possession. We are left to speculate whether this person found the gun in an area that might suggest purposeful disposal, or whether he was sold the gun, loaned the gun, or was asked to help hide the gun from the authorities. In summary, just as in *Silva*, the jury was left to speculate that an overt act of hiding or disposing of the weapon took place, based solely on the fact that the gun was not found at either the crime scene or Arrendondo's home when the police searched for it. Therefore, consistent with *Silva*, Arrendondo's conviction for tampering with the gun must be reversed.

{34} At trial and on appeal, both parties have focused solely on the 9 mm handgun as the relevant evidence with respect to this conviction. Neither party has raised, and therefore it is not before this Court, whether

the tampering conviction would be valid with respect to any other evidence in question. *State v. Ferguson*, 111 N.M. 191, 196, 803 P.2d 676, 681 (Ct. App. 1990) (stating that "[c]ourts should not take it upon themselves to raise, argue, and decide legal issues overlooked by the lawyers"). Because Arrendondo's 9 mm handgun is the only gun proved to be involved in this case, and it fails as sufficient evidence to support a conviction for tampering, we reverse this conviction.

D. There Is Sufficient Evidence to Uphold the Conviction for Shooting at a Dwelling.

{35} Arrendondo contends that there is insufficient evidence that he shot intentionally into the house, and therefore his conviction for shooting at a dwelling must be reversed. We disagree. To support a conviction for shooting at a dwelling, the State had to prove beyond a reasonable doubt that (1) Arrendondo willfully shot a firearm at a dwelling; (2) Arrendondo knew that the building was a dwelling; (3) Arrendondo was not a law enforcement officer engaged in the lawful performance of duty; and (4) this happened on or about November 22, 2003 in New Mexico. *See* UJI 14-340 NMRA; NMSA 1978, § 30-3-8 (1993).

{36} We conclude that the State presented sufficient evidence to support the jury's verdict on this count. Sergeant Arthur testified that the trajectory of the bullets that landed in the house indicates that the shooter was aiming directly at the house. This evidence, combined with the testimony that Arrendondo aimed the gun downward when he shot at Aragon, provided the jury with sufficient evidence to find that Arrendondo intentionally shot at the house.

{37} There is also evidence that supports a reasonable inference that Arrendondo not only had reason to shoot into the house, but that he intentionally did so. First, there is testimony that Arrendondo was expressing hostility towards Gloria, whom he knew was inside the house. Second, there is evidence that at least two bullets entered the house. Finally, there is evidence that the trajectory of the bullets that entered the house was different from the trajectory of the bullets that entered Aragon's body. The jury, in considering all of this evidence in the aggregate, could have reasonably inferred that Arrendondo intentionally shot into the house. We conclude that there was sufficient evidence to support Arrendondo's conviction for shooting at a dwelling, and therefore affirm his conviction.

III. MR. ARRENDONDO HAS NOT SHOWN THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

{38} Arrendondo contends that his counsel was ineffective because she (1) failed to timely investigate both the jacket and the small unidentified fragment, which was key evidence necessary to support his claim of self-defense, and (2) failed to pursue the defense of voluntary intoxication, which provides a defense to specific-intent crimes such as first-degree murder. "For a successful ineffective assistance of counsel claim, a defendant must first demonstrate error on the part of counsel, and then show that the error resulted in prejudice." *State v. Bernal*, 2006-NMSC-050, ¶ 32, 140 N.M. 644, 146 P.3d 289. The record is frequently insufficient to establish whether an action taken by defense counsel was reasonable or if it caused prejudice. *Id.* ¶ 33. Thus, instead of remanding the matter to the trial court, this Court prefers that these claims be brought under habeas corpus proceedings so that the defendant may actually develop the record with respect to defense counsel's actions. *See*

Duncan v. Kerby, 115 N.M. 344, 346-47, 851 P.2d 466, 468-69 (1993). For this Court to remand to the trial court on this issue, the defendant must present a prima facie case of ineffective assistance of counsel. *State v. Roybal*, 2002-NMSC-027, ¶ 19, 132 N.M. 657, 54 P.3d 61. Without such prima facie evidence, the Court presumes that defense counsel's performance fell within the range of reasonable representation. *Id.* ¶ 21.

{39} In this case, Arrendondo has failed to establish a prima facie case of ineffective assistance of counsel with either claim. Regarding the first claim, Arrendondo contends that his counsel was ineffective because she failed to timely investigate the source of the unidentified fragment to establish that it was a bullet from a gun, which would have supported his claim of self-defense. It is unreasonable for counsel not to investigate a significant issue raised by the client. *State v. Hunter*, 2006-NMSC-043, ¶ 14, 140 N.M. 406, 143 P.3d 168. In this case, the record does not contain any evidence that counsel either intentionally or negligently failed to investigate the unidentified fragment in the jacket. The record reflects the fact that defense counsel only became aware of the jacket itself one week before commencement of trial. Therefore, we would have to speculate about the reason for her delay in learning about the jacket's existence.

{40} We would also have to speculate about the cause of any prejudice to Arrendondo as a result of his counsel's alleged failure to timely investigate the unidentified fragment found in the jacket's lining. Defense counsel was given latitude to argue that the jacket, which was in evidence, was circumstantial evidence that Aragon shot at Arrendondo and Arrendondo shot back in self-defense. The record also suggests that despite Arrendondo's claims to the contrary, Aragon may not have shot at Arrendondo; eyewitnesses testified that Aragon did not have a gun. In addition, the record reveals that during her interview with police, Arrendondo's girlfriend, Erin Gillespie, told Officer Arthur Mike Cruz that Arrendondo had been shot in the back by Aragon. She told police that there was a large amount of blood on the t-shirt Arrendondo was wearing, and that she had taken out the bullet lodged in his back with a butter knife. Officer Cruz testified that the investigation team attempted to locate the bullet, the butter knife, and the bloody t-shirt, but they were unsuccessful in their attempts. Moreover, during the testimony of Officer Cruz, defense counsel objected to the officer's testimony regarding Gillespie's statement on hearsay grounds, informing the trial court that Gillespie's "statement ha[d] been discredited . . . she was lying trying to protect [my client]."

{41} We note that the jury may have been more likely to credit Arrendondo's theory of self-defense if the unidentified fragment found in Arrendondo's jacket was in fact a bullet that came from a gun owned by Aragon. Without a more developed record, however, we are unable to determine whether Arrendondo can present evidence to support the theory that there was an ineffective assistance of counsel error resulting in prejudice toward him.

{42} Arrendondo's second claim is that defense counsel was ineffective for not raising the defense of voluntary intoxication, which provides a defense to specific-intent crimes such as first-degree murder. *State v. Hernandez*, 2003-NMCA-131, ¶ 20, 134 N.M. 510, 79 P.3d 1118. The State maintains that defense counsel's decision not to present a voluntary intoxication defense was not error, but rather a rational defense theory, because voluntary intoxication is inconsistent with a self-defense theory, which requires an intent to

kill the victim. *See State v. Garcia*, 2011-NMSC-003, ¶ 37, 149 N.M. 185, 246 P.3d 1057 (holding that counsel acts reasonably in not seeking a voluntary intoxication instruction when it could undermine a defendant's credibility with the jury). However, because the record is void of any testimony from defense counsel regarding the reason for her decision, we do not know her motivation, and thus we cannot speculate regarding the reasonableness of that decision.

{43} Moreover, Arrendondo has not established that he was prejudiced by the lack of a voluntary intoxication instruction. Arrendondo testified that he consumed heroin twice during the day before Aragon's murder. However, for a defendant to be entitled to a voluntary intoxication instruction, the defendant must present evidence that (1) he or she consumed intoxicants, (2) he or she was actually intoxicated, and (3) the degree of intoxication interfered with his or her ability to develop the requisite intent to commit the charged crime. *See Garcia*, 2011-NMSC-003, ¶ 35. There is no evidence in the record that Arrendondo was intoxicated to such a degree that he was unable to form the intent necessary to commit murder, and therefore there was no evidence suggesting that he was prejudiced. *See Roybal*, 2002-NMSC-027, ¶ 25 (holding that prejudice requires defendant to show that there was a reasonable probability that, absent the errors, the jury would have reached a different result).

{44} Because we do not have enough evidence to properly address either of these two claims, we affirm the trial court's denial of Arrendondo's motion for a new trial. However, Arrendondo is free to pursue habeas corpus proceedings where he may actually develop the record with respect to these issues. *See Duncan*, 115 N.M. at 346-47, 851 P.2d at 468-69 (discussing that a defendant who raises an ineffective assistance of counsel claim on direct appeal is not precluded from raising such a claim in a habeas proceeding).

IV. REVERSAL BASED ON ARRENDONDO'S UNPRESERVED SPEEDY TRIAL CLAIM IS NOT WARRANTED BECAUSE THE DELAY DOES NOT AMOUNT TO FUNDAMENTAL ERROR.

{45} The grand jury indicted Arrendondo on October 27, 2004, almost a year after the shooting, at which time he was in custody in California. Arrendondo's trial did not occur until October 27, 2008, exactly four years after he was indicted. Arrendondo claims for the first time on appeal that his Sixth Amendment right to a speedy trial was violated by this delay, and that this violation thereby denied him the opportunity to serve his New Mexico and California sentences concurrently.

{46} When analyzing a speedy trial violation, the court must review four factors: "(1) the length of delay, (2) the reasons for the delay, (3) the defendant's assertion of his right, and (4) the actual prejudice to the defendant . . . ." *State v. Maddox*, 2008-NMSC-062, ¶ 7, 145 N.M. 242, 195 P.3d 1254 (citation omitted). First, the defendant must show that the length of delay is presumptively prejudicial. *See State v. Garza*, 2009-NMSC-038, ¶¶ 15-22, 146 N.M. 499, 212 P.3d 387 (holding "that a 'presumptively prejudicial' length of delay is simply a triggering mechanism, requiring further inquiry into the *Barker* factors"). In this case, the four-year delay is both presumptively prejudicial and sufficient to trigger examination of the other factors. *Id.* ¶¶ 48-49 (recognizing that even the most complex cases are only given eighteen months before further

inquiry into a speedy trial violation claim is warranted).

{47} Regarding the second factor, Arrendondo stipulated that the delay in bringing the case to trial was not the State's fault. Although defense counsel stated on the record that she was not waiving her client's right to a speedy trial, Arrendondo's stipulation still controls. *See State v. Collins*, 2007-NMCA-106, ¶ 27, 142 N.M. 419, 166 P.3d 480 (allowing a party "to invite error and to subsequently complain about that very error would subvert the orderly and equitable administration of justice" (internal quotation marks and citation omitted)). Because Arrendondo stipulated below that the delay in bringing the case to trial was not the State's fault, he is estopped from now claiming that "[t]he majority of [the] delay is attributable solely to the state."

{48} The third factor acts as a preservation mechanism by requiring a defendant to assert his right to a speedy trial throughout the process. The only time that Arrendondo asserted his right to a speedy trial was in the standard demand filed with the trial court when defense counsel entered her appearance. Arrendondo never raised the issue again. He never filed a motion to dismiss due to a speedy trial violation. He never insisted on an early trial date so that, if he were found guilty, he could pursue serving any sentence imposed in New Mexico concurrent with his sentence in California. Indeed, we have already noted the four continuances in which Arrendondo asked the trial court to continue trial settings. Therefore, the trial court never had an opportunity to make a ruling on the issue, and it was not preserved for appellate review.

{49} Given the history of this case, Arrendondo's stipulation, his failure to assert his right to a speedy trial, and his failure to preserve the issue in this case, we do not find any fundamental error with respect to the speedy trial claim. *See State v. Rojo*, 1999-NMSC-001, ¶ 53, 126 N.M. 438, 971 P.2d 829 ("nothing in the record suggests such a striking violation of the constitutional right to a speedy trial that it would be appropriate to consider that issue for the first time on appeal" (internal quotation marks and citation omitted)); *see also* Rule 12-216(B)(2) NMRA (an appellate court, in its discretion, may consider questions involving fundamental error).

V. CONCLUSION

{50} Because the State failed to provide sufficient evidence to support Arrendondo's conviction for negligent child abuse of Adrian and his conviction for tampering with evidence, we reverse these two convictions. We reverse his conviction for assault with intent to commit a felony against Nicole and remand for a new trial consistent with this opinion. We affirm Arrendondo's remaining convictions. With respect to the convictions that are affirmed, we remand to the trial court to amend the judgment and sentence consistent with this opinion.

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

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

PATRICIO M. SERNA, Justice

RICHARD C. BOSSON, Justice

CHARLES W. DANIELS, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMSC-014

Filing Date: May 10, 2012

Docket No. 31,973

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

GRACIELA GUERRA,

Defendant-Appellant.

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for Appellant

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for Appellee

OPINION

DANIELS, Justice.

{1} A jury found Defendant Graciela Guerra guilty of first-degree murder for the stabbing death of her daughter-in-law, Brenda Guerra, in an Alamogordo motel room. The district court sentenced Defendant to a mandatory term of life imprisonment, giving this Court exclusive jurisdiction to hear her direct appeal. *See* N.M. Const. art. VI, § 2 ("Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the supreme court."); *accord* Rule 12-102(A)(1) NMRA.

{2} We address Defendant's arguments that the district court: (1) erred by denying Defendant's self-defense instruction; (2) abused its discretion when it excluded, for lack of notice under Rule 5-602(F) NMRA, expert testimony about Defendant's incapacity to form specific intent; (3) abused its discretion when it excluded expert testimony related to whether the victim's wounds would

have been fatal if treated; (4) abused its discretion when it excluded letters Defendant wrote while in prison; (5) and abused its discretion when it denied Defendant's motion for a new trial. Defendant also makes a claim of cumulative error. We affirm her conviction.

I. BACKGROUND

{3} Defendant's son Christian and Christian's wife, the victim, were going through a divorce at the time of the killing. Throughout the divorce proceeding, Christian and the victim vacillated about whether to reconcile. On May 13, 2008, Christian and the victim attended a divorce hearing in Alamogordo. Christian had expected the victim's attorney to withdraw from the case at that hearing to allow both parties to proceed in the divorce without representation, but the victim changed her mind about giving up her lawyer. The couple argued for much of the afternoon following the hearing.

{4} After the hearing, Christian dropped off the victim at her motel, went to his house, and told Defendant, who was living with Christian and the children, about what happened at the hearing. Later in the day, after Christian had dropped off the children at the victim's motel, he told Defendant that he and the victim had agreed to reconcile and that Defendant could either stay and help them with the children or move out. Defendant replied to Christian that she would "fix it for [him]." Christian indicated that he did not want Defendant talking to the victim; he wanted Defendant to stay home and "cool down." After this exchange, Christian drove to the victim's motel.

{5} Defendant followed Christian to the motel. Christian saw Defendant in her car behind him and called her cellular phone to tell her not to follow him. Christian eventually lost sight of Defendant's car and continued driving to the motel. After Christian entered the room and while he was seated on the bed, Defendant knocked on the door. The victim opened the door and asked, in Spanish, "what is *that* doing here?" A hair-pulling fight then broke out between the two women.

{6} Christian rose from the bed to break up the fight but stopped when he saw that Defendant was armed with a large knife and that the victim was falling to the floor, bleeding. Christian grabbed his older son, covered the boy's eyes, and ran to put the child in his car. When he returned to the room to get his younger son, the door was locked. Christian could hear Defendant saying "bad" things in Spanish and could hear the victim screaming "God, God, God!" Eventually Defendant, covered in blood and holding a knife, opened the door and told Christian "take [your] kids, [you're] free." Christian took his younger son, drove home with the children, and called 911.

{7} A motel guest saw Defendant enter the victim's room and saw Christian leave with the children about ten minutes later. The witness was able to see Defendant inside the room with blood on her hands and the victim lying on the floor. As the witness entered the room, Defendant was shouting obscenities and kicking the victim's body. Defendant told the witness not to call the police. The witness went to the motel office, asked an employee to call the police, and returned to his own room to call the police.

{8} When the police arrived, they found Defendant standing in the open doorway of the victim's room, covered in blood. The police took Defendant into custody. They found the victim lying on the floor and exhibiting no

signs of life. While they investigated the scene, Defendant repeatedly said in Spanish, "I killed her!" On the way to the police station, Defendant made a number of additional volunteered admissions. She said that she told Christian she intended to kill the victim, but Christian did not believe her. She claimed that she and the victim "had some words," that she told Christian to take the children and leave, that a scuffle ensued, and that she stabbed the victim several times. She told the police that she was tired of the way the victim treated Christian and the children.

{9} In the motel room, investigators found two knives covered with blood, a kitchen knife with a bent four-inch blade and a butcher's knife with a bent seven-inch blade. DNA analyses confirmed that the blood came from the victim. In the kitchen of Christian's residence, where Defendant had been living, investigators found a knife block with one of the matching steak-knives missing.

{10} An autopsy of the victim revealed forty-one injuries, thirty-one of which were stab wounds. The knives found at the scene were consistent with these wounds. One of the stab wounds in the back of the victim's neck cut her jugular vein. The victim had four stab wounds in her right back, two of which punctured her right lung. She also had many stab wounds in her chest, five of which punctured her left lung. The forensic pathologist who conducted the autopsy testified that the cause of death was multiple stab wounds and the manner of death was homicide.

{11} The State introduced three letters Defendant wrote while in custody awaiting trial. In one, Defendant acknowledged attacking the victim. In another, she admitted killing the victim, whom she described as sick and obsessed, and wrote that on the day of the killing, she entered the motel room, told Christian to take the children and leave, and "pulled [out] the knife and . . . did what [she] did." In a third letter, Defendant indicated she felt no remorse for what she did, describing the victim as "trash."

II. DISCUSSION

A. The District Court Properly Refused a Self-Defense Instruction.

{12} Defendant argues that the district court erred in denying her requested self-defense instruction. Although there appears to have been no evidence that the victim had previously threatened Defendant, the defense presented evidence that the victim had a "short temper," that the victim once said she would rather see Christian dead than with another woman, and that the victim once told Christian she could easily buy a gun and shoot him. Defendant testified that she did not intend to kill the victim when she came to the motel room and only brought the two knives from her house in case she needed to defend herself. She also testified that when the hair-pulling fight started, she was afraid the victim would strangle or hit her, although she acknowledged that she expected Christian would not have allowed the victim to really harm her. She claimed that she did not know how she came to stab the victim the first time but admitted that after she first stabbed the victim in the stomach, the victim let go of Defendant's hair and asked if they could "talk." Defendant testified that upon hearing the victim's request to "talk," Defendant lost control of herself. The next thing Defendant claimed she remembered was kneeling over the victim, her hands covered in blood.

{13} "The propriety of denying a jury instruction is a mixed question of law and fact that we review de novo." *State v. Gaines*,

2001-NMSC-036, ¶ 4, 131 N.M. 347, 36 P.2d 438. The applicable standards have been addressed thoroughly in our case law.

> A defendant is not entitled to a self-defense instruction unless it is justified by sufficient evidence on every element of self-defense. Those elements are that (1) the defendant was put in fear by an apparent danger of immediate death or great bodily harm, (2) the killing resulted from that fear, and (3) the defendant acted reasonably when he or she killed. The first two requirements, the appearance of immediate danger and actual fear, are subjective in that they focus on the perception of the defendant at the time of the incident. By contrast, the third requirement is objective in that it focuses on the hypothetical behavior of a reasonable person acting under the same circumstances as the defendant.

State v. Rudolfo, 2008-NMSC-036, ¶ 17, 144 N.M. 305, 187 P.3d 170 (internal quotation marks and citations omitted). A self-defense instruction is warranted only when the evidence is "sufficient to allow reasonable minds to differ as to all [three] elements of the defense." *State v. Lopez*, 2000-NMSC-003, ¶ 23, 128 N.M. 410, 993 P.2d 727 (internal quotation marks and citation omitted).

{14} In determining whether a jury should be permitted to consider the issue of self-defense, it is essential for both trial and appellate courts to honor the constitutional rights of the accused to have the jury decide whether the prosecution has proven legal guilt in accordance with the reasonable doubt and unanimity requirements that are fundamental to our system of justice. *See Rudolfo*, 2008-NMSC-036, ¶ 22. The test is not how the judge would weigh the self-defense evidence as a factfinder; the true test is whether any juror could be justified in having a reasonable doubt about whether the accused acted in self-defense. *See id.* ¶ 27. "For a court to issue a self-defense instruction, there need be only enough evidence to raise a reasonable doubt in the mind of a juror about whether the defendant lawfully acted in self-defense. If any reasonable minds could differ, the instruction should be given." *State v. Sandoval*, 2011-NMSC-022, ¶ 17, 150 N.M. 224, 258 P.3d 1016 (internal quotation marks and citation omitted). If the jury's role as factfinder is not respected, the consequences include reversals and retrials. *See, e.g.*, *State v. Hill*, 2001-NMCA-094, ¶¶ 10-11, 31, 131 N.M. 195, 34 P.3d 139 (reversing a conviction for battery on a peace officer because whether the defendant was the instigator was a question that should have been left to the jury); *State v. Cooper*, 1999-NMCA-159, ¶¶ 18, 24, 128 N.M. 428, 993 P.2d 745 (reversing a conviction because conflicts in a defendant's testimony regarding his fear of the victim presented "a classic issue for the jury to decide"); *State v. Branchal*, 101 N.M. 498, 504, 684 P.2d 1163, 1169 (Ct. App. 1984) (holding that the judge's belief that the defendant was "under no threat of imminent harm" did not justify denial of jury resolution of the contested issue).

{15} In *Rudolfo*, the defendant shot and killed an occupant of a vehicle driving away from a house where there had been a violent struggle over a gun. 2008-NMSC-036, ¶¶ 5-6. We upheld the district court's rejection of a self-defense instruction because "[n]one of the three required components of self-defense [were] present." *Id.* ¶¶ 18, 26. We reach the same conclusion in this case. As in *Rudolfo*, there was no appearance in this case that Defendant was threatened with death or great bodily harm at the time of the killing.

Necessarily, if the first element is not present, Defendant could not have killed as a result of that threat. And finally, as in *Rudolfo*, even viewing the evidence in the light most favorable to the defendant, the circumstances of this case presented "no basis for the jury to have any doubt that a reasonable person would have found the [killing] to be unnecessary." *Id.* ¶ 26.

{16} The facts of this case are similar to those in *Lopez*, in which we rejected a defendant's claim to a self-defense instruction because the defendant's act of killing was not objectively reasonable. 2000-NMSC-003, ¶ 26. In that case, the victim pulled a knife on the defendant after the defendant told the victim to leave the premises. *See id.* ¶ 3. In response, the defendant grabbed a knife from the kitchen and inflicted twenty-one stab wounds on the victim's neck and head, seventeen stab wounds on the victim's hands and arms, and sixteen stab wounds on his torso. *Id.* The defendant then crushed the victim's skull with a rock. *Id.* This Court held that the number of stab wounds and the crushing of the victim's skull exhibited, as in this case, "conduct fueled by hatred or by rage or other strong emotion, but not by fear," and that there was no jury issue as to whether the defendant killed in fear or acted reasonably in killing. *Id.* ¶ 26.

{17} Defendant's act of repeatedly stabbing an unarmed woman who was lying on the ground and pleading for an opportunity to talk is the kind of attack that no reasoning juror could doubt was objectively unreasonable. "The law simply does not recognize any right to an acquittal based on a wholly unreasonable claim of a self-defense justification for taking the life of another." *Rudolfo*, 2008-NMSC-036, ¶ 20; *see also State v. Sutphin*, 2007-NMSC-045, ¶ 24, 142 N.M. 191, 164 P.3d 72 (concluding that the defendant's actions were not reasonable and did not support a self-defense instruction when he beat an initial attacker to death after rendering him unconscious). "If at any point Defendant was put in fear by an appearance of immediate death or great bodily harm, that fear could not have been present when the [fatal injuries were inflicted]." *State v. Jacob Gonzales*, 2007-NMSC-059, ¶ 22, 143 N.M. 25, 172 P.3d 162.

{18} In this case, as in *Lopez*, *Rudolfo*, and *Jacob Gonzales*, the response of the accused to any potential threat was indisputably unreasonable. Accordingly, we hold that Defendant was not entitled to a self-defense instruction.

B. The District Court Did Not Abuse Its Discretion in Denying Admission of Untimely-Noticed Psychologist's Testimony.

{19} Defendant was indicted on an open count of murder on May 28, 2008, and arraigned two weeks later. On May 8, 2009, just one month before trial, Defendant filed and gave the court and the prosecution notice of a trial witness list that included a previously undisclosed forensic psychologist. At the same time, the defense disclosed the expert's written report, dated March 2009 but based on a November 2008 evaluation of Defendant, concluding that Defendant had the capacity to form specific intent to kill. But when the State was finally able to interview the expert on June 2, 2009, nine days before trial, the expert told the prosecutor that he had changed his opinion from what was in the written report and would testify at trial that because of cultural issues and a diminished capacity to form intent to kill, Defendant was not able to commit deliberate first-degree murder. When the prosecutor asked why the expert had not disclosed this opinion in his report, the expert

explained that at the time of the 2008 evaluation and report, the Defendant was claiming her son did the stabbing, so the expert did not consider Defendant's ability to form a specific intent to kill to be important.

{20} The day after interviewing the expert, the State moved to exclude the testimony, arguing that the defense had not filed a notice in June 2008 that it was raising the defense of incapacity to form specific intent, as would have been required by Rule 5-602(F) NMRA, and that it was too late to do so the week before trial. Two days later, Defendant filed her first and only notice of her intention to present testimony on the lack of specific intent. The notice indicated that she preserved her argument that disclosure of the expert testimony is not required in murder cases in which extreme emotion may have played a part. The district court granted the State's motion to exclude the expert testimony because (1) the filing of Defendant's notice was outside the time limits required by Rule 5-602(F), (2) no good cause was shown for the noncompliant notice, and (3) the state was unable to prepare for or meet the expert testimony at such a late stage in the case.

{21} Defendant now argues that the expert was to testify about Defendant's ability to form *deliberate* intent instead of *specific* intent and that the fair and timely notice provisions of Rule 5-602(F) apply only to the latter and not to the former. Defendant does not address any of the New Mexico precedents which have consistently held that deliberate intent to kill is the specific intent which distinguishes first-degree from second-degree murder. *See State v. Coffin*, 1999-NMSC-038, ¶ 25, 128 N.M. 192, 991 P.2d 477 (reaffirming that "the Legislature intended to distinguish first degree murder from second degree murder by the element of a deliberate intent to kill"). And Defendant does not develop her unprecedented construction of Rule 5-602(F) with any principled analysis. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶15, 137 N.M. 339, 110 P.3d 1076 (explaining that the appellate court does not review unclear or undeveloped arguments). Defendant also cites no authority from any jurisdiction supporting her argument, so we may conclude that no such authority exists. *See Lee v. Lee (In re Adoption of Doe)*, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) ("We assume where arguments in briefs are unsupported by cited authority [that] counsel . . . was unable to find any supporting authority."). Finally, Defendant never articulated or preserved this argument below. *See* Rule 12-216(A) NMRA (requiring an appellant to raise an issue below with sufficient specificity to invoke the trial court's ruling before the appellate court will address the issue).

{22} Accordingly, we address only Defendant's arguments that constructive notice to the prosecution constituted good cause under the rule for dispensing with the formal notice requirement, because intent is always an element of first-degree murder and because enlisting "a well-known forensic psychologist gave the State notice that Defendant's exact mental state would be in issue at trial."

{23} A trial court's decision to admit or exclude evidence for failure to comply with notice and disclosure requirements is reviewed on appeal for an abuse of discretion. *See State v. Harper*, 2011-NMSC-044, ¶¶9, 15-16, 150 N.M. 745, 266 P.3d 25 (reviewing for an abuse of discretion the district court's exclusion of prosecution witnesses for failure to comply with witness interview deadlines); *McCarty v. State*, 107 N.M. 651, 655, 763 P.2d 360, 364 (1988) (reviewing for an abuse of discretion the district court's exclusion of

defense witnesses for failure to comply with alibi notice deadlines).

{24} Rule 5-602(F) reads,

> If the defense intends to call an expert witness on the issue of whether the defendant was incapable of forming the specific intent required as an element of the crime charged, notice of such intention shall be given at the time of arraignment or within twenty (20) days thereafter, unless upon good cause shown, the court waives the time requirement of this rule.

{25} This rule is clear. Defendant was required to notify the State of her intention to call an expert on the issue of specific intent either at the time of her arraignment or within twenty days after her arraignment. Defendant did not provide such notice until a year after her arraignment and approximately a week before trial, and then only after the State discovered a planned specific intent defense that was disclosed neither by a Rule 5-602(F) notice nor by the misleading written report supplied with the defense's witness disclosure.

{26} Defendant's novel contention that she should be excused from the Rule 5-602(F) notice requirements because intent is always an issue in a murder prosecution is inconsistent with the very purpose of the rule. While the nature of a defendant's intent is always at issue in a homicide case, whether a defendant had the mental capacity to form that intent is not. This difference is precisely why Rule 5-602(F) is in place—to give notice to the State that a defendant will be raising a complex psychological issue so that the State may take the steps necessary to prepare to meet and counter it. Defendant asks us to hold, in essence, that Rule 5-602(F) is meaningless in murder cases. We will not do so.

{27} Defendant's second argument of good cause for late disclosure is also an argument of constructive notice. She suggests that because she listed a forensic psychologist as a possible witness one month before trial, the State should have figured out that Defendant's ability to form specific intent would be the subject of the witness's testimony, excusing Defendant from filing the specific notice required by Rule 5-602(F).

{28} Although there is no New Mexico case addressing a constructive notice excuse for failing to comply with Rule 5-602(F) in particular, our Court of Appeals has rejected similar arguments in applying the counterpart insanity defense notice provisions of Rule 5-602(A) in *State v. Silva*, 88 N.M. 631, 631, 545 P.2d 490, 490 (Ct. App. 1976), and *State v. Young*, 91 N.M. 647, 650, 579 P.2d 179, 182 (Ct. App. 1978). Rule 5-602(A) governs notice of an intent to present a defense of "not guilty by reason of insanity," and Rule 5-602(F) governs notice of an intent to present a defense that "defendant was incapable of forming the specific intent required as an element of the crime charged," but in all other respects they are identical in requiring that notice to the prosecution must be "given at . . . arraignment or within twenty (20) days thereafter, unless upon good cause shown, the court waives the time requirement of this rule."

{29} In *Silva*, the defendant argued explicit notice was not necessary under former Rule 35(a)(1)—the predecessor to Rule 5-602(A)—because he filed a motion nine days after his arraignment requesting a psychiatric examination. *See Silva*, 88 N.M. at 631, 545 P.2d at 490. The motion indicated that counsel did not know whether the defendant

was sane when he committed the alleged criminal acts; the psychiatric examination was sought to find that out. *See id.* *Silva* rejected the defendant's argument that filing a request for a psychiatric examination constituted constructive notice that excused providing the required notice of intent to raise an insanity defense under the rule. *See id.* at 631-32, 545 P.2d at 490-91.

{30} *Young* rejected another attempt to substitute constructive notice for the requirements of the rule. 91 N.M. at 650, 579 P.2d at 182. Defense counsel argued that the state was on notice a month before trial because a report filed after a court-ordered mental examination "suggested a possible insanity defense," and that he had good cause for the late notice because he could not contact the psychologist who issued the report until the day before trial, when he first learned of the psychologist's intended testimony. *Id.* Defense counsel did not notify the prosecution, even at that late date, and withheld the information until after the prosecution rested its case-in-chief. *Id.* The court held that "[n]otice of the [insanity] defense came too late for the prosecution to prepare to meet it" and that in those circumstances "[t]here was no abuse of discretion in excluding the tendered testimony" of the expert. *Id.*

{31} The record in this case indicates that two months after her June 9, 2008, arraignment, Defendant filed a motion related to her scheduled psychological examination by the forensic psychologist who later appeared on the pretrial witness list. Like the defendant in *Silva*, Defendant gave no explicit timely notice of her intention to raise any issue of her capacity to form intent. As in *Young*, notice of the psychological defense came too late for the prosecution to prepare to meet it, despite the fact Defendant knew about the possible psychological defense well before trial but did not provide the timely notice required by Rule 5-602.

{32} "A defendant's right to present evidence on [her] own behalf is subject to [her] compliance with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *State v. Sanders*, 117 N.M. 452, 459-60, 872 P.2d 870, 877-78 (1994) (internal quotation marks and citation omitted).

{33} Courts should apply the extreme sanction of exclusion of a party's evidence sparingly. The decision to exclude evidence calls on judicial discretion to weigh all the circumstances, including willfulness in violating the discovery rule, the resulting prejudice to the opposing party, and the materiality of the precluded testimony. *See McCarty*, 107 N.M. at 655, 763 P.2d at 364. "Before resorting to preclusion, a trial judge should weigh not only the prejudicial effect of noncompliance on the immediate case, but also the necessity to enforce the rule to preserve the integrity of the trial process." *Id.* *McCarty* found an abuse of discretion in a trial court's exclusion of alibi witnesses where (1) the rule violation was not willful, (2) the state was able to interview and prepare for the testimony and was not prejudiced by the late notice, and (3) the precluded testimony was critical to the defense's ability to confront and cross-examine the state's key witness. *Id.* Accordingly, this Court held that "[n]o harm is done to the integrity of the notice-of-alibi rule by prohibiting the preclusion of witness testimony as a sanction under such circumstances." *Id.; see also Harper*, 2011-NMSC-044, ¶¶ 22, 25, 27-28 (reversing exclusion of the state's witnesses where failure to comply with discovery requirements was not willful or in bad faith and where the

defendant was not prejudiced).

{34} In this case, the district court held a hearing on the State's motion to exclude and entered an order granting the motion. The order recited that Defendant made no attempt to comply with Rule 5-602(F) until two days after the State filed its motion; that the expert's written report misled the State, which had neither actual nor constructive notice of the diminished capacity defense; that Defendant showed no good cause for the late notice; and that the inability to meet or prepare for the undisclosed defense at such a late stage prejudiced the State. Because Defendant has provided us with no record of the motion hearing to support any argument that the court abused its discretion in making those findings, we must affirm the exclusion of the expert testimony. *See State v. Rojo*, 1999-NMSC-001, ¶ 53, 126 N.M. 438, 971 P.2d 829 (holding that where there is a "deficient record, every presumption must be indulged by the reviewing court in favor of the correctness" of the district court's judgment (internal quotation marks and citation omitted)); *Barnett v. Cal M, Inc.*, 79 N.M. 553, 556, 445 P.2d 974, 977 (1968) (holding that a party "desiring review of a ruling of the trial court has a duty to see that a record is made of the proceedings he desires reviewed; otherwise the correctness of such ruling cannot be questioned").

C. The District Court Did Not Abuse Its Discretion in Excluding Expert Testimony That the Victim's Wounds Were Not Immediately Fatal.

{35} Defendant also argues that the court abused its discretion in refusing admission of medical testimony that the victim's "wounds were not inevitably fatal and that no vital organ was irreparably injured" as evidence that Defendant lacked the deliberate intent to kill the victim. The district court granted the State's pretrial motion to exclude on the grounds that the medical testimony was not relevant under Rule 11-402 NMRA and that the danger of unfair prejudice and potential to confuse the issues or mislead the jury would substantially outweigh any probative value and call for exclusion under Rule 11-403.

{36} We review the district court's decision to admit or exclude evidence for an abuse of discretion. *See State v. Downey*, 2008-NMSC-061, ¶ 24, 145 N.M. 232, 195 P.3d 1244 ("An abuse of discretion arises when the evidentiary ruling is clearly contrary to logic and the facts and circumstances of the case." (quoting *State v. Armendariz*, 2006-NMSC-036, ¶ 6, 140 N.M. 182, 141 P.3d 526)). In particular, rulings on matters of doubtful relevance under Rule 11-402 and the counterbalances to relevant evidence under Rule 11-403 are left to the broad discretion of the district court. *See State v. Chamberlain*, 112 N.M. 723, 726, 819 P.2d 673, 676 (1991) (recognizing great discretion vested in the district court in applying Rule 11-403); *see also State v. Wesson*, 83 N.M. 480, 482, 493 P.2d 965, 967 (Ct. App. 1972) (stating that "[w]here the materiality of the evidence is doubtful, the admission of such evidence is within the discretion of the [district] court").

{37} The excluded evidence had very little, if any, probative value. The victim died quickly, before police or paramedics arrived, as a result of the thirty-one stab wounds Defendant inflicted on her, piercing her lungs repeatedly from the front and the back and severing her jugular vein. The wounds were inflicted with such force that both knives were bent. The fact that the victim may have survived for a short time after Defendant's deadly attack sheds little, if any, light on Defendant's state of mind. *See State v. Garcia*, 114 N.M. 269, 275, 837 P.2d 862, 868 (1992) (explaining that evidence of what

happened after the defendant stabbed the victim did not give rise to an inference as to the defendant's state of mind before the stabbing). Because the testimony lacked significant probative value, it was not an abuse of discretion for the district court to exclude it. *See State v. Blea*, 101 N.M. 323, 326, 681 P.2d 1100, 1103 (1984) ("No error occurs when the judge excludes expert testimony where the probative value of that testimony is slight.").

{38} Even if the evidence had any slight relevance, the danger that the jury might be confused by testimony related to whether the victim could have survived the wounds in different circumstances would have outweighed its limited probative value. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues or misleading the jury." Rule 11-403 NMRA. Evidence suggesting that the victim's wounds would not inevitably cause death could have led the jury to speculate whether the victim died because she did not receive immediate medical attention for those wounds. This gives rise to complicated disputes that did not need to be addressed in this case and would not have been relevant to Defendant's guilt or innocence. *See State v. Montoya*, 2003-NMSC-004, ¶¶ 11-12, 19, 133 N.M. 84, 61 P.3d 793 (explaining the differences between a "but for" and a "proximate" cause analysis under our homicide jury instructions and holding that "an individual may be a legal cause of death even though other significant causes significantly contributed to the cause of death"); *see also State v. Jose Ray Gonzales*, 95 N.M. 636, 639, 624 P.2d 1033, 1036 (Ct. App. 1981) (upholding the exclusion of confusing evidence in an aggravated battery case because "[e]vidence as to who was the aggressor in later incidents would only confuse the issue of who was the aggressor when [the victim] was shot"), *overruled on other grounds by Buzbee v. Donnelly*, 96 N.M. 692, 701, 634 P.2d 1244, 1253 (1981). Because the district court reasonably viewed the expert's testimony as having little relevance and as being likely to confuse the issues or mislead the jury, we hold that the district court did not abuse its discretion when it excluded the evidence.

D. The District Court Did Not Abuse Its Discretion in Denying Admission of Letters Defendant Wrote While Incarcerated.

{39} The State introduced at trial three letters Defendant wrote from jail which tended to prove that Defendant killed the victim and had no remorse for doing so. The district court accepted the evidence as admissions of a party-opponent under Rule 11-801(D)(2) NMRA. Defendant introduced five other letters of the more than fifty Defendant had written from jail, which arguably indicated that at times she had expressed remorse for the killing and made claims to have acted in self-defense. Defendant argued that the letters the State introduced, which the court admitted, were taken out of context and that the rule of completeness, Rule 11-106 NMRA, allowed the admission of the letters Defendant introduced in order to provide context and show Defendant's true state of mind during the killing.

{40} Rule 11-106 provides in its entirety: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

{41} "The primary purpose behind the rule

of completeness is to eliminate misleading or deceptive impressions created by creative excerpting." *State v. Barr*, 2009-NMSC-024, ¶ 34, 146 N.M. 301, 210 P.3d 198, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 37, 275 P.3d 110. The principle behind the rule of completeness is that "the whole of a [communication] must be taken together." *Id.* (internal quotation marks and citation omitted). "The classic illustration of a violation of the rule of completeness is quoting 'there is no God' from the biblical phrase '[t]he fool hath said in his heart, there is no God.'" *Id.* (citation omitted).

{42} The rule of completeness did not apply to the letters Defendant tried to admit. This is not a case in which creative excerpting of a writing leads to deceptive or misleading impressions of the actual statement. The State admitted the entirety of three letters Defendant wrote. The fact that other letters Defendant wrote were not also admitted does not distort the context of the particular letters that were admitted. If the rule functioned the way Defendant suggests, then admission of any oral or written statement of a party-opponent would automatically require the admission of all self-serving hearsay statements of the party on the same topic. Defendant cites no authority which stands for that proposition, and we know of none. In *Barr*, we held that allowing the state to use the rule of completeness to introduce the entirety of a hearsay videotape was an abuse of discretion where the state failed to show any contents of the previously admitted portions that it alleged were taken out of context. 2009-NMSC-024, ¶¶ 29, 37, 45; *see also State v. Sanders*, 117 N.M. 452, 458, 872 P.2d 870, 876 (1994) (holding that the court did not err in denying admission of the remainder of a twenty-two-page statement of the defendant on which the prosecution had cross-examined the defendant about two particular passages).

{43} Accordingly, we hold that the district court did not abuse its discretion when it determined that the rule of completeness did not require the admission of Defendant's other letters.

E. The District Court Did Not Abuse Its Discretion in Denying Defendant's Motion for a New Trial.

{44} After she was convicted, Defendant unsuccessfully moved for a new trial under Rule 5-614 NMRA. She argued that the district court erred when it excluded her expert testimony related to her capacity to form murderous intent and when it excluded the letters she wrote from jail, both arguments that we have separately addressed and rejected.

{45} Rule 5-614(A) gives a district court authority to determine whether justice requires relief from a conviction in the circumstances of a particular case. ("When the defendant has been found guilty, the court on motion of the defendant, or on its own motion, may grant a new trial if required in the interest of justice.") In recognition of that broad discretion, an appellate court will reverse the district court's decision only on a showing of abuse of discretion. *See State v. Chavez*, 98 N.M. 682, 683, 652 P.2d 232, 233 (1982).

{46} Because nothing Defendant complains about amounted to an error at trial, the interest of justice did not require a new trial. Accordingly, the district court did not abuse its discretion when it denied Defendant's motion for a new trial.

F. There Is No Cumulative Error Because There Was No Error.

{47} Defendant argues that the cumulative

effect of the various alleged errors outlined above denied her a fair trial. "The doctrine of cumulative error requires reversal when a series of lesser improprieties throughout a trial are found, in aggregate, to be so prejudicial that the defendant was deprived of the constitutional right to a fair trial." *State v. Duffy*, 1998-NMSC-014, ¶ 29, 126 N.M. 132, 967 P.2d 807, *modified on other grounds by State v. Gallegos*, 2007-NMSC-007, ¶ 17, 141 N.M. 185, 152 P.3d 828. The cumulative error doctrine is strictly applied and may not be successfully invoked if "the record as a whole demonstrates that the defendant received a fair trial." *State v. Trujillo*, 2002-NMSC-005, ¶ 63, 131 N.M. 709, 42 P.3d 814 (internal quotation marks and citation omitted). Cumulative error has no application if the district court committed no errors and if the defendant received a fair trial. *See State v. Seaton*, 86 N.M. 498, 501, 525 P.2d 858, 861 (1974). Because the district court committed no error in this case, there is no cumulative error. *See State v. Salas*, 2010-NMSC-028, ¶ 40, 148 N.M. 313, 236 P.3d 32.

III. CONCLUSION

{48} Finding no error, we affirm Defendant's conviction.

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

CHARLES W. DANIELS, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

PATRICIO M. SERNA, Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMSC-015

Filing Date: May 21, 2012

Docket No. 32,055

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

HARRISON LARGO,

Defendant-Appellant.

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Santa Fe, NM

for Appellant

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for Appellee

OPINION

MAES, Chief Justice

{1} In this case we apply the context-specific inquiry established by the United States Supreme Court in *Michigan v. Bryant*, 562 U.S. ___, 131 S.Ct. 1143 (2011), to evaluate whether an out-of-court statement is testimonial. Defendant Harrison Largo's main issues concern the admission into evidence of Victim Freida Smith's out-of-court statements: portions of the 911 tape in which Victim communicated to the 911 operator that Defendant shot her, and a sheriff's deputy's testimony that Victim identified Defendant as her shooter. For the reasons that follow, we affirm Defendant's convictions.

FACTS AND PROCEDURAL HISTORY

{2} Defendant and Victim had been in an on-again, off-again relationship for twenty years, during which they had two children. On the morning of May 20, 2008, Defendant, still drunk from the day before, showed up at Victim's trailer. Victim let him inside and Defendant told Victim that he wanted to reconcile their relationship. Victim told Defendant she was not open to reconciliation. The two then went outside the trailer where an altercation ensued, and Defendant shot Victim, who later died of her gunshot wounds.

{3} Victim's neighbor, Stevic Jim (Stevic), witnessed the altercation and the shooting from his home. After Defendant drove away, Stevic went outside to help Victim, who was lying on the ground bleeding, while his mother, Shirleen Jim (Shirleen), called 911. Shirleen then gave the phone to Stevic and the 911 operator asked who shot Victim. With Stevic acting as a relay, Victim told the 911 operator that it was Defendant.

{4} Victim was still lying on the ground bleeding when McKinley County Sheriff's Deputy Ed Marble (Deputy Marble) arrived. Victim also told Deputy Marble that Defendant shot her. Significantly, she also told the deputy that Defendant "was headed to the school to shoot the kids." Thoreau High School was subsequently locked down.

{5} Victim was transported to a hospital in Albuquerque, where she died around six hours after being shot. Defendant was charged with one count of deliberate first-degree murder, contrary to NMSA 1978, Section 30-2-1(A) (1994), and one count of tampering with evidence, contrary to NMSA 1978, Section 30-22-5 (2003).

{6} At trial, the district court admitted Victim's out-of-court statements in two forms. First, the district court admitted into evidence portions of the 911 tape where Victim communicated to the 911 operator, through Stevic, that Defendant had shot her. Second, the district court allowed Deputy Marble to testify regarding Victim's out-of-court statement in which she identified Defendant as her shooter. Deputy Marble testified: "I asked [Victim], 'What happened?' and she said, 'Harrison shot me.'" The district court

ruled that any evidence regarding Victim's fear that Defendant was headed to Thoreau High School, however, was too prejudicial, and therefore was not presented at trial.

{7} Defendant was convicted of both counts and was given a life sentence for the murder count and three years for the tampering with evidence count. Defendant appeals his conviction directly to this Court. *See* N.M. Const. art. VI, § 2; *see also* Rule 12-102(A)(1) NMRA (providing that an appeal from a sentence of life imprisonment is taken directly to the Supreme Court).

{8} Defendant raises three issues on appeal: (1) whether Victim's out-of-court statements identifying Defendant as her assailant were testimonial in nature, thereby violating Defendant's confrontation rights under the federal constitution; (2) whether Victim's out-of-court statements identifying Defendant as her assailant were inadmissible hearsay; and (3) whether there was sufficient evidence to support a conviction for deliberate first-degree murder.

DISCUSSION

I. Defendant's confrontation rights were not violated by the admission of Victim's out-of-court statements identifying Defendant as her shooter because the statements were nontestimonial.

{9} The question whether out-of-court statements are admissible under the Confrontation Clause is a question of law, subject to de novo review. *State v. Aragon*, 2010-NMSC-008, ¶ 6, 147 N.M. 474, 225 P.3d 1280. The Confrontation Clause of the Sixth Amendment ensures that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; *see* N.M. Const. art. II, §14. The Confrontation Clause bars "[o]ut-of-court *testimonial* statements . . . unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness . . . ." *State v. Zamarripa*, 2009-NMSC-001, ¶23, 145 N.M. 402, 199 P.3d 846 (emphasis added) (citing *Crawford v. Washington*, 541 U.S. 36, 68 (2004)). In *Davis v. Washington*, 547 U.S. 813 (2006), the United States Supreme Court clarified the rule it laid down in *Crawford*, regarding when statements are testimonial, and provided:

> [S]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to [a] later criminal prosecution.

Davis, 547 U.S. at 822.

{10} Defendant asserts that Victim's out-of-court statements were testimonial in nature and therefore inadmissible. In response, the State argues that, because Victim's out-of-court statements identifying Defendant as her shooter had a primary purpose of addressing an ongoing emergency, their admission into evidence did not violate Defendant's confrontation rights. Because there is no dispute that Defendant did not have a prior opportunity to cross-examine Victim, this dispute centers on whether her out-of-court statements were testimonial.

{11} More recently in *Bryant*, the

Supreme Court addressed whether statements made by a shooting victim to police while he was lying on the ground in severe distress waiting for medical attention were testimonial and should be barred from use at trial by the Confrontation Clause. In *Bryant*, police responded to a 911 call reporting that a man had been shot. 131 S.Ct. at 1150. When police arrived at the scene they found the victim with a gunshot wound in his abdomen, in great pain, and speaking with much difficulty. *Id.* The "police asked [the victim] 'what happened, who had shot him, and where the shooting had occurred.'" *Id.* The victim responded by identifying his shooter and explaining that he had been shot at another location before driving to the gas station for help. *Id.* The victim's conversation with police lasted approximately five to ten minutes. *Id.* The victim was transported to a nearby hospital where he later died. *Id.*

{12} In *Bryant*, the Court reaffirmed that "the basic objective of the Confrontation Clause . . . is to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements *taken for use at trial.*"*Id.* at 1155 (emphasis added). The Court concluded that "when a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the 'primary purpose of the interrogation' by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs." *Id.* at 1162 (quoting *Davis*, 547 U.S. at 814); *accord People v. Blacksher*, 259 P.3d 370, 408 (Cal. 2011)). While the Court acknowledged that there may be other circumstances "when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony," *Bryant*, 131 S.Ct. at 1155, "[t]he existence of an emergency or the parties' perception that an emergency is ongoing is among the most important circumstances that courts must take into account." *Id.* at 1162; *see also Blacksher*, 259 P.3d at 408. Accordingly, the Court first looked to the circumstances surrounding the interrogation to determine if there was an ongoing emergency, then viewed the conduct of the interrogators and the declarant in light of that determination. *See Bryant*, 131 S.Ct. at 1163-66. This is a "highly context-dependent inquiry," *id.* at 1158; *accord Blacksher*, 259 P.3d at 409, and requires courts to objectively evaluate *all* of the circumstances surrounding the interrogation, as well as the statements and actions of the parties to the encounter, *see Bryant*, 131 S.Ct. at 1162.

{13} In *Bryant*, the Court looked to the type and scope of the danger posed to the victim, to the public, and the police to determine the existence of an ongoing emergency. *Id.* The Court noted that "[n]othing . . . said to the police indicated that the cause of the shooting was a purely private dispute or that the threat from the shooter had ended," indicating that the scope of the danger to the general public could be high. *Id.* at 1163. The record did not reveal much about the motive of the shooter, leaving police to wonder about the scope of the danger to the public. *Id.* In addition, the fact that a gun was used further increased the scope of the danger, not only to the victim, but to the police and the general public as well. *Id.* at 1164. The Court noted that a slight physical separation, sufficient in prior cases to end an emergency such as an unarmed domestic dispute, does not create the same level of safety in a case where a gun was used, especially when the police do not know where the assailant is. *Id.* Based on these facts—"an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded [a victim] within a few blocks and a few minutes of the location where the police found [the

victim]"—the Court concluded "there was an ongoing emergency." *Id.*

{14} The circumstances surrounding the interrogation in *Bryant* are very close to those in the present case. In both cases, the victims were shot and the location of the shooter was unknown. In addition, both interrogations lacked the formality involved in an interrogation conducted at a police station, another important consideration of the *Bryant* Court. *Id.* at 1160 (providing "formality suggests the absence of an emergency"); *Blacksher*, 259 P.3d at 409. In both cases the interrogations were quick, unstructured, and conducted at the location where the victim was found. In fact, the entire conversation between Victim and Deputy Marble lasted approximately 30 to 45 seconds. These types of circumstances suggest the existence of an ongoing emergency.

{15} The major difference in the circumstances of the two cases is that the present case involved a domestic dispute, while *Bryant* did not. Generally, "[d]omestic violence cases . . . often have a narrower zone of potential victims than cases involving threats to the general public." *Bryant*, 131 S.Ct. at 1158. Such is not the case here, however. Victim told Deputy Marble that Defendant "was headed to the school to shoot [their] kids." Rather than a speculative threat to the public based on a shooter with an unknown motive on the loose as in *Bryant*, we have, at least, an allegation of a direct threat against specific individuals. The local high school was subsequently locked down, outwardly indicating that Deputy Marble considered the threat to the public to be very real. The threat to the public and police in this case was further compounded by the fact that Defendant was a former SWAT team member, so much so that Deputy Marble urged his fellow officers to use caution with Defendant. In light of these circumstances and their similarity to those in *Bryant*, we have no difficulty concluding that there was an ongoing emergency in this case.

{16} However, "the existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry; rather, the ultimate inquiry is whether the primary purpose of the interrogation was to enable police assistance to meet the ongoing emergency." *Id.* at 1165 (internal quotation omitted). Even in the face of an ongoing emergency, an interrogation's primary purpose "can evolve into testimonial statements." *Id.* at 1159 (internal quotation marks and citation omitted); *accord Blacksher*, 259 P.3d at 409. The actions and statements of both the interrogator and the declarant may illuminate the *primary* purpose of the interrogation.

{17} The *Bryant* Court emphasized that looking at the conduct of both the interrogator and declarant, helps to "ameliorate[ ] problems that could arise from looking solely to one participant. Predominant among these is the problem of mixed motives on the part of both interrogators and declarants." *Id.* at 1161; *accord Blacksher*, 259 P.3d at 408. The Court recognized that police officers serve both as first responders and criminal investigators and that they may act with different motives in quick succession. *Bryant*, 131 S.Ct. at 1161; *Blacksher*, 259 P.3d at 408. A victim could also have mixed motives, such as wanting the immediate threat to end while not wishing the assailant be prosecuted. *Bryant*, 131 S.Ct. at 1161; *Blacksher*, 259 P.3d at 408. Accordingly, in addition to the circumstances in which an encounter occurs, a court must objectively look at the statements and actions of both the declarant and interrogators to make the primary purpose determination. *Id.*

{18} The *Bryant* Court noted that when police first arrived at the gas station where the victim was lying on the ground

> they did not know why, where, or when the shooting had occurred. Nor did they know the location of the shooter or anything else about the circumstances [of the shooting]. The questions they asked–what had happened, who had shot him, and where the shooting occurred,–were the exact type of questions necessary to allow the police to assess the situation, the threat to their own safety, and possible danger to the potential victim and to the public.

Bryant, 131 S.Ct. at 1165-66 (internal quotation marks and citation omitted). The Court then concluded that the police officers "solicited the information necessary to enable them to meet an ongoing emergency." *Id.* at 1166 (internal quotation marks and citations omitted).

{19} Even though the present case involves two separate interrogators, the 911 operator and Deputy Marble, the same can be said about each of them. Shirleen initially told the 911 operator that a "guy had shot a lady." In response, the 911 operator asked a series of questions, similar to the questions posed by the police officers in *Bryant*, that were targeted to assess the seriousness of the ongoing emergency. The 911 operator asked questions regarding where the shooter went, the type of vehicle he was using, the name of the victim, the type of gun used, who the shooter was, and Victim's medical condition. Similarly, when Deputy Marble arrived he asked Victim "What happened?" These are precisely the types of questions the *Bryant* Court concluded, in light of the surrounding circumstances, "solicit[] the information necessary to enable [first responders] to meet an ongoing emergency." *Id.*

{20} Finally, in this case, the conduct of Victim, similar to the conduct of the victim in *Bryant*, indicates that the statements Victim made were nontestimonial. In each case, the victim was in considerable pain, bleeding from a mortal gunshot wound to the abdomen, and had considerable difficulty breathing and talking. *See id.* at 1165. In this case, Victim was found on the ground in a pool of her own blood and urine, and at one point was crying out for her mother. Such a severely injured victim suggests that the answers to the questions were merely reflexive, with no purpose at all, much less a testimonial one. *See id.* at 1161; *Blacksher*, 259 P.3d at 409. Just as the victim in *Bryant* interspersed questions about when medical services would arrive with his answers to police questions, here Victim repeatedly expressed fear for her children's safety during her questioning—indicating in each instance that the victim's primary concern was not the future prosecution of the assailant. Therefore, as the Court concluded in *Bryant*, "we cannot say that a person in [Victim's] situation would have had a primary purpose to establish or prove past events potentially relevant to later criminal prosecution." *Bryant*, 131 S.Ct. at 1165.

{21} We find the relevant circumstances in this case nearly identical to those in *Bryant*. Accordingly, we hold Victim's statements to Deputy Marble and the 911 operator were nontestimonial, and did not violate Defendant's right to confrontation.

II. Victim's out-of-court statements identifying defendant as the individual who shot her were properly admitted as a dying declaration exception under hearsay Rule 11-804(B)(2).

{22} Because we concluded that the admission of Victim's out-of-court statements did not violate Defendant's confrontation rights, we must now determine whether her out-of-court statements were properly admitted under Rule 11-804(B)(2). We review the admission of evidence pursuant to an exception or an exclusion to the hearsay rule under an abuse of discretion standard by which deference is given to the district court's ruling. *State v. Lopez*, 2011-NMSC-035, ¶ 4, 150 N.M. 179, 258 P.3d 458 (citing *State v. McClaugherty*, 2003-NMSC-006, ¶ 17, 133 N.M. 459, 64 P.3d 486). We will not conclude that the district court abused its discretion in admitting evidence pursuant to an exception or an exclusion to the hearsay rule unless "the ruling is clearly against the logic and effect of the facts and circumstances of the case." *State v. Flores*, 2010-NMSC-002, ¶ 25, 147 N.M. 542, 226 P.3d 641 (internal quotation marks and citation omitted).

{23} Defendant contends that Victim's out-of-court statement in which she identified Defendant as her shooter to Deputy Marble and the 911 operator did not fall within any of the exceptions to the hearsay rule. In response, the State asserts that Victim's out-of-court statements qualified as dying declarations.

{24} Hearsay "consists of an out-of-court statement offered to prove the truth of the matter asserted, and is inadmissible as substantive evidence unless it falls within an exclusion or exception to the hearsay rule." *Lopez*, 2011-NMSC-035, ¶ 5 (internal quotation marks and citation omitted); *see* Rule 11-801(C) NMRA (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"); Rule 11-802 NMRA (providing "[h]earsay is not admissible except as provided by these rules or by other rules adopted by the supreme court or by statute").

{25} Victim's out-of-court statements identifying Defendant as her shooter were clearly hearsay as defined by Rule 11-801(C) as she was not present to testify at trial, and the out-of-court statements identifying Defendant as her shooter were offered to prove that Defendant shot her. Therefore, in order for Victim's out-of-court statements to have been properly admitted at trial, the statements must have fallen within an exception or exclusion to the hearsay rule. *See, e.g.,* Rules 11-803(A), (B), & (C) NMRA; Rule 11-804(B)(2).

{26} We will first address whether Victim's out-of-court statements identifying Defendant as her shooter were "dying declaration[s]." Rule 11-804(A) & (B)(2)(3) ("[S]tatement[s] made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death" are not excluded by the hearsay rule if the declarant is unavailable as a witness.). A dying declaration, or "statement under [the] belief of impending death," is admissible when there is a showing that the declarant made the statement while conscious and under the realization that death was approaching. *State v. Quintana*, 98 N.M. 17, 19, 644 P.2d 531, 533 (1982). Therefore,"[i]f it can reasonably be inferred from the state of the wound or the state of the illness that the dying person was aware of his [or her] danger, then the requirement of impending death is met." *Id.* at 20, 644 P.2d at 534.

{27} Here, the district court considered the circumstances surrounding Victim's statements and reasonably inferred that she was aware of her current state and believed

that her death was imminent. Victim was shot multiple times. She was lying on the ground in a near fetal position, bleeding, complaining of pain in the abdominal area, and experiencing shallow breaths. She had urinated on herself and there appeared to be blood in her urine. She tried to hold her torso up with her forearms but was unable. She expressed concern for her children, and called out for her mother. She died around six hours later. Accordingly, we hold that the district court did not abuse its discretion by admitting Victim's out-of-court statements into evidence as a dying declaration under Rule 11-804(B)(2).

{28} Because we conclude that the district court did not abuse its discretion in admitting Victim's out-of-court statements under Rule 11-804(B)(2), we do not address the parties' arguments concerning the other hearsay exceptions. *See State v. Combs*, 2011-NMCA-107, ¶ 6, 150 N.M. 766, 266 P.3d 635 (providing when a reviewing court's conclusion on one point resolves an issue, the reviewing court need not address the parties' additional arguments).

III. Sufficient evidence supports Defendant's deliberate intent to commit first-degree murder.

{29} Defendant argues that this Court should reverse his conviction because there was insufficient evidence to support his conviction of deliberate, first-degree murder and asserts that, at most, the evidence established an "undeliberated crime of passion," which could be either manslaughter or second-degree murder. The State counters that Defendant's "decision to aim the gun at [Victim] three separate times, overcoming some degree of physical resistance the second and third times," indicates that Defendant did not act impulsively, but rather acted with a deliberate intent to kill.

{30} "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Riley*, 2010-NMSC-005, ¶ 12, 147 N.M. 557, 226 P.3d 656 (internal quotation marks and citation omitted). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. In reviewing whether there was sufficient evidence to support a conviction, "we resolve all disputed facts in favor of the State, indulge all reasonable inferences in support of the verdict, and disregard all evidence and inferences to the contrary." *Id.* (internal quotation marks and citation omitted). "[D]etermining the sufficiency of [the] evidence does require appellate court scrutiny of the evidence and supervision of the jury's fact-finding function to ensure that, indeed, a rational jury *could* have found beyond a reasonable doubt the essential facts required for a conviction." *Id.* (internal quotation marks and citation omitted).

{31} The requisite state of mind for first-degree murder is a "willful, deliberate and premeditated" intention to kill. NMSA 1978, § 30-2-1(A)(1) (1994); *see State v. Duran*, 2006-NMSC-035, ¶ 6, 140 N.M. 94, 140 P.3d 515. New Mexico's Uniform Jury Instruction 14-201 NMRA, defines the term deliberate as a "means arrived at or determined upon as a result of careful thought and the weighing of the consideration for and against the proposed course of action." Although deliberate intent requires a "calculated judgment" to kill, the weighing required for deliberate intent "may be arrived at in a short period of time." UJI

14-201. In determining whether the defendant made a calculated judgment to kill, the jury may infer intent from circumstantial evidence because direct evidence of the defendant's state of mind is not required. *Duran*, 2006-NMSC-035, ¶ 7.

{32} The jury was instructed that in order to find Defendant guilty of deliberate, first-degree murder, the State needed to prove beyond a reasonable doubt that

1. The [D]efendant killed [Victim];

2. The killing was with the deliberate intention to take away the life of [Victim];

3. The [D]efendant was not suffering from intoxication at the time the offense was committed to the extent of being incapable of forming an intent to take away the life of another;

4. This happened in New Mexico on or about the 20th day of May, 2008.

The jury was also instructed on the definition of "deliberate intention." The instruction provided:

> A deliberate intention refers to the state of mind of the defendant. A deliberate intention may be inferred from all of the facts and circumstances of the killing. The word deliberate means arrived at or determined upon as a result of careful thought and the weighing of the consideration for and against the proposed course of actions. A calculated judgment and decision may be arrived at in a short period of time. A mere unconsidered and rash impulse, even though it includes an intent to kill, is not a deliberate intention to kill. To constitute a deliberate killing, the slayer must weigh and consider the question of killing and his reason for and against such choice.

{33} Victim's neighbor, Stevic, testified that from his living room window he heard a commotion and witnessed Victim kneeling on the ground as Defendant stood over her pointing a rifle at her head. Stevic reported that Victim attempted to push the rifle away from her face twice, and that after both attempts Defendant repositioned the rifle so that it was pointing directly back at her face. Stevic further testified that as Defendant was pointing the rifle at Victim's face, he observed her pleading with Defendant. Stevic testified that Defendant fired four close range shots directly at Victim. The State's medical investigator also testified that the autopsy revealed five wounds on her body. Four wounds were penetrating. The fifth was a graze wound from one of the bullets before entering her body. Such evidence indicates that a reasonable jury could have concluded that Defendant weighed and considered his decision to kill, before shooting Victim four times.

{34} The jury also heard testimony from Richard Johnson (Johnson), the owner of the Frontier Trading Post in Milan, who interacted with Defendant within an hour after Defendant had left the trailer park. In response to questions regarding whether Defendant appeared intoxicated, Johnson testified that Defendant was "rather loud and obnoxious" but did not appear to be intoxicated. Johnson further testified that Defendant asked to use the phone, and that during the conversation he overheard Defendant tell someone that he

"wouldn't be in to work for a week." The State also called Debbie Olivar (Olivar), a woman Defendant called from the Frontier Trading Post, to testify regarding what was said during the phone call. Olivar testified that Defendant stated he needed a week's vacation, and that he was in a "heap of trouble."

{35} Accordingly, reviewing the evidence in the light must favorable to the verdict, there was sufficient evidence for the jury to find that Defendant acted with deliberate intent when he killed Victim.

CONCLUSION

{36} We hold that Victim's out-of-court statements were nontestimonial and therefore did not violate Defendant's confrontation rights; that the district court did not abuse its discretion in admitting Victim's out-of-court statements under Rule 11-804(B)(2); and that there was sufficient evidence to support Defendant's conviction for first-degree murder.

{37} Accordingly, we affirm Defendant's convictions.

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

PETRA JIMENEZ MAES, Chief Justice

WE CONCUR:

PATRICIO M. SERNA, Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

Certiorari Granted, February 13, 2012, No. 33,382; Certiorari Granted, March 30, 2012, No. 33,383; Certiorari Granted, March 30, 2012, No. 33,384

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-053

Filing Date: December 15, 2011

Docket No. 27,992 consolidated with Docket No. 29,016

STARKO, INC., d/b/a MEDICINE CHEST #1, and JERRY JACOBS, d/b/a PILL BOX PHARMACY #4, for and on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants/Cross-Appellees,

v.

PRESBYTERIAN HEALTH PLAN, INC., a New Mexico corporation, d/b/a PRESBYTERIAN SALUD,

Defendant-Appellee,

and

CIMARRON HEALTH PLAN, INC., a New Mexico corporation, d/b/a CIMARRON HEALTH MAINTENANCE ORGANIZATION, a/k/a CIMARRON HMO,

Defendant-Appellee/Cross-Appellant,

consolidated with

STARKO, INC., d/b/a MEDICINE CHEST #1, and JERRY JACOBS, d/b/a PILL BOX PHARMACY #4, for and on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

NEW MEXICO HUMAN SERVICES DEPARTMENT,

Defendant-Appellee.

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OPINION

KENNEDY, Judge.

{1} Today, we update a continuing saga of Medicaid-related litigation spanning more than eleven years.[1] Starko, Inc. and Jerry Jacobs are representatives of a certified class of pharmacists (collectively, Plaintiffs), who contend they were not properly reimbursed for their services under Medicaid. They argue that the New Mexico Human Services Department (HSD) and managed care organizations, namely, Presbyterian Health Plan, Inc. and Cimarron Health Maintenance Corporation (collectively, the MCOs), which administered Medicaid for the State of New Mexico, were required to pay Plaintiffs in accordance with NMSA 1978, Section 27-2-16(B) (1984), but refused to do so. In two consolidated appeals, Plaintiffs appeal four district court orders dismissing their claims against the MCOs and HSD for violation of Section 27-2-16(B), breach of contract, breach of contract on a third-party beneficiary theory, unjust enrichment, declaratory relief, and injunctive relief.

{2} We hold that Section 27-2-16(B) confers upon participating Medicaid pharmacists an implied cause of action to enforce the statute directly against the MCOs. Furthermore, (1) the district court properly dismissed Plaintiffs' claim concerning HSD's reduction of reimbursement without federal approval for a six-month period; (2) Plaintiffs' breach of contract claim, third-party beneficiary contract, and unjust enrichment claims may proceed; (3) the district court properly concluded that Section 27-2-16(B) conferred non-waivable rights; (4) the district court did not abuse its discretion in denying Plaintiffs' demands for injunctive and declaratory relief; and (5) the district court properly certified Plaintiffs' class in these cases.

{3} Consequently, we affirm in part, reverse in part, and remand to the district court for proceedings consistent with this Opinion.

I. BACKGROUND

{4} Congress created the Medicaid program in 1965 to supplement the Social Security Act. *Atkins v. Rivera*, 477 U.S. 154, 156 (1986); *see* 42 U.S.C. § 1396w-2 (2009). The program provides "medical assistance to persons whose income and resources are insufficient to meet the costs of necessary care" and compels participating states to share the costs of administering the program with the federal government. *Atkins*, 477 U.S. at 156-57. New Mexico is a participant state. Initially, New Mexico's Medicaid program operated on a fee-for-service model, in which Medicaid services were provided directly to recipients by HSD. More recently, in the interest of cutting costs, the state has significantly curtailed the fee-for-service model. Now, like most states, the greatest number of New Mexico's Medicaid recipients receive their treatment via a managed care program, in which the state contracts with the MCOs to provide services. *Starko II*, 2006-NMCA-085, ¶ 3. The MCOs then contract

[1]This appeal is the third and fourth we have decided in this case since 2005. *See Starko, Inc. v. Cimarron Health Plan, Inc.* (*Starko I*), 2005-NMCA-040, 137 N.M. 310, 110 P.3d 526 (holding that Rule 1-023(F) NMRA was inapplicable to the issue of class certification); *Starko, Inc. v. Gallegos* (*Starko II*), 2006-NMCA-085, 140 N.M. 136, 140 P.3d 1085 (granting qualified immunity under 42 U.S.C § 1983 (1996) to individual defendants who were state executives during the transition from a fee-for-service model to a managed care model).

with pharmacists, either directly or through intermediaries called "Pharmacy Benefits Managers" (PBMs), and pharmacists, in turn, provide prescription medication to Medicaid recipients.[2] *Id.*

{5} Section 27-2-16(B) governs how New Mexico's Medicaid program pays participating pharmacists. It was modified to its current form in 1984 and remains unchanged to the present day. Section 27-2-16(B) thus bridges New Mexico's transition from the original fee-for-service model to today's managed care and provides as follows:

> If drug product selection is permitted by [NMSA 1978, Section 26-3-3 (2005)], reimbursement by the [M]edicaid program shall be limited to the wholesale cost of the lesser expensive[,] therapeutic equivalent drug generally available in New Mexico plus a reasonable dispensing fee of at least three dollars [and] sixty-five cents ($3.65).[3]

Section 26-3-3, referenced in Section 27-2-16(B), allows Medicaid pharmacists in their professional discretion to substitute any "therapeutically equivalent" drug for the drug actually prescribed as long as the substitution conforms with federal guidelines. Section 26-3-3. Under fee-for-service Medicaid, HSD followed this requirement and paid pharmacists the wholesale cost of the lesser expensive drug plus an additional $3.65 for each transaction.

{6} That began to change in 1994. At that time, the Legislature authorized HSD to transition from a fee-for-service to a managed care program and, in 1997, HSD implemented SALUD!, a managed care program, in which it entered into competitively bid contracts with the MCOs to provide care to Medicaid recipients. The contracts, known as Medicaid Managed Care Service (MMCS) Agreements required the MCOs to provide medical care and pharmacy services to all qualified

[2]Under managed care, Presbyterian has chosen to contract with pharmacists directly, while Cimarron uses PBMs as intermediaries. In Cimarron's case, it contracts with PBMs and requires PBMs to subcontract with pharmacists, who then provide services to Medicaid recipients on behalf of Cimarron. Though pharmacists do not contract directly with Cimarron, it is somewhat unclear from the record whether Cimarron, the PBMs, or both, truly exercise control over pharmacists. For instance, the contracts between Cimarron and PBMs impose a variety of conditions on pharmacists, while the contracts between PBMs and pharmacists provide that pharmacists will be paid by PBMs.

[3]Since the advent of managed care, Section 27-2-16(B) has been challenged twice in both the House and the Senate without success, once in 2002 and again in 2004. Both bills sought to restrict payments to pharmacists. *See* H.B. 400, 45th Leg., 2d Sess. (N.M. 2002) (not passed) (seeking to revise Section 27-2-16(B) by replacing the phrase "wholesale cost" with "lowest price available" and deleting the phrase "of at least three dollars sixty[-]five cents ($3.65)" (emphasis omitted)); *see also* S.B. 183, 46th Leg., 2d Sess. (N.M. 2004) (not passed) (seeking to declare "an emergency[,]" rewriting Section 27-2-16(B) to allow pharmaceutical payments to be set "by negotiation," and by "regulations adopted by the [HSD]" (emphasis omitted)).

Medicaid recipients. These contracts explicitly incorporated "[a]ll applicable statutes, regulations and rules implemented by the [f]ederal [g]overnment, the State of New Mexico . . . , and [HSD], concerning Medicaid services[.]" Shortly after the adoption of SALUD!, HSD notified pharmacists that, in order to continue to provide services under Medicaid, pharmacists would be required to contract with the MCOs instead of HSD. Under the new MCO-pharmacist contracts, pharmacists would be reimbursed by the MCOs at the "current and applicable Medicaid reimbursement rates" which, Plaintiffs allege, had the potential to be significantly lower than the statutory reimbursement rates guaranteed by Section 27-2-16(B). Yet, pharmacists wishing to participate in the program had no choice. Anyone who refused the new contracts would be "terminated from the active provider list" by HSD.

{7} Under SALUD!, pharmaceutical costs were negotiated directly between HSD and the MCOs, and Plaintiffs allege that, under the new regime, the MCOs were sufficiently paid by HSD to comply with Section 27-2-16(B). Fearing that their rights under Section 27-2-16(B) would be waived by agreeing to contracts with the MCOs, Plaintiffs filed suit against HSD and obtained a temporary restraining order from the district court. In essence, the district court gave HSD an ultimatum: either withdraw the requirement that pharmacists contract with the MCOs, or agree that the new contracts would not waive pharmacists' right to sue pursuant to Section 27-2-16(B). HSD chose the latter and, with other aspects of the litigation still pending against HSD, pharmacists entered into new contracts, either with the MCOs themselves or with the MCOs' intermediary, the PBMs. Plaintiffs claim that the reimbursable amounts ultimately paid under these contracts were often substantially lower than the amounts required by Section 27-2-16(B).[4] Likewise, they claim that HSD, by instituting this new regime, circumvented its obligations under the statute by using the MCOs as intermediaries.

{8} Over HSD's protests, Plaintiffs were certified as a class in October 1999. At that time, the MCOs had not yet been added as Defendants. In 2000, Plaintiffs moved for summary judgment, and the district court ruled that HSD was affirmatively required to comply with Section 27-2-16(B). It found that HSD could not "delegate or contract away" its responsibilities under the statute. Then, after winning on their summary judgment motion against HSD, Plaintiffs argued that the MCOs were indispensable parties. In October 2000, the district court allowed them to be added and held that, like HSD, the MCOs were required to comply with Section 27-2-16(B).

{9} The MCOs attacked the class certification. They filed briefs asking the court to decertify the class and included a number of supporting exhibits. As a result, the district court allowed discovery into "whether the class should be decertified." The MCOs never requested an evidentiary hearing on their motions, but oral arguments were heard in September 2002. After this second consideration of the class certification issue, the district court denied the MCOs' motions to decertify the class and found that the requirements of Rule 1-023 NMRA continued to be met. The MCOs appealed to this Court pursuant to Rule 1-023(F). We refused to consider the merits of their claim and held that an appeal under Rule 1-023(F) was unavailable. *See Starko I*, 2005-NMCA-040,

[4]The present appeal does not deal with any claims by Plaintiffs against the MCOs on breach of the contracts between Plaintiffs and the MCOs.

¶¶ 2, 18 (discussing the applicability of Rule 1-023(F)).

{10} It appears that such wrangling through the years has directly influenced the language of contracts between the parties. Most notably, contracts between HSD and the MCOs have taken several forms. The first contracts in 1997 simply required the MCOs to pay pharmacists in a manner consistent with "current and applicable . . . reimbursement rates." Then, in 2001, following the district court's order that HSD and the MCOs comply with Section 27-2-16(B), the contracts were changed to include what the parties now refer to as "the *Starko* [C]lause." That language provides that "[t]he subcontract for pharmacy providers shall include a payment provision consistent with [Section 27-2-16(B)] unless the subcontractor provides a voluntary waiver to any rights under" the statute. The contracts were again revised in 2005 when they took their current form. Those contracts alter the *Starko* Clause to require that "subcontracts for pharmacy providers shall include a payment provision consistent with [Section 27-2-16(B)] *unless there is a change in law or regulation*." (Emphasis added.) We emphasize that Section 27-2-16(B) has not changed since 1984.

{11} As these cases have progressed since the last appeal, three separate district court judges have issued a variety of orders. We review four.

{12} First, in 2006, Presbyterian filed a motion for judgment on the pleadings. Following the hearing, the district court affirmed its earlier ruling that HSD's affirmative duty to Plaintiffs under Section 27-2-16(B) was non-delegable. As such, any right of action under the statute would be most properly pursued against HSD, not the MCOs. Thus, the court held that any private right of action against the MCOs under the statute must fail. Likewise, the court held in favor of the MCOs on the issue of unjust enrichment. It found that Plaintiffs' contracts with the MCOs provided an "adequate remedy at law" against the MCOs, which precluded a cause of action in equity.

{13} Second, in 2007, Presbyterian filed a second motion for judgment on the pleadings, which Cimarron joined. Together, the MCOs sought rulings on Plaintiffs' claim for breach of the contracts between the MCOs and HSD. Following argument, the district court held that the claims were unfounded because Plaintiffs were not intended third-party beneficiaries of the contracts between the MCOs and HSD. Further, the court found that a third-party beneficiary claim would not lie against the MCOs even if Plaintiffs had been intended beneficiaries. The district court reasoned that "[t]o allow an action against the MCOs on a third-party beneficiary theory would be inconsistent with th[is c]ourt's previous ruling that Plaintiffs have no private right of action."

{14} Third, in 2008, Plaintiffs filed a motion for summary judgment on the issue of when Section 27-2-16(B) applies. The court entered partial summary judgment, stating that the statute only applies when a pharmacist actually substitutes a lower cost, therapeutic equivalent drug for the prescribed drug.

{15} Fourth, in 2008, Plaintiffs submitted a motion for partial summary judgment on several issues with regard to their case against HSD. HSD responded with its own motion for summary judgment on the issues. The district court issued a memorandum opinion and order on the cross-motions for summary judgment. In it, the court held that (1) HSD had no obligation to pay Plaintiffs for the alleged shortfall, (2) HSD could not be held

liable for past non-compliance with Section 27-2-16(B), (3) Plaintiffs did not have a breach of contract claim concerning HSD's reduction of reimbursement without federal approval for a six-month period, and (4) the $3.65 dispensing fee was reasonable.

{16} On appeal from these orders, Plaintiffs argue several points of error. First, they assert that Section 27-2-16(B) creates a private right of action enforceable against the MCOs and HSD. Furthermore, they argue the district court erroneously dismissed their claims for breach of contract, third-party beneficiary breach of contract theory, unjust enrichment, declaratory relief, and injunctive relief.

{17} Against any extent to which we reverse any portion of the district court's rulings in this matter, Cimarron asks us to consider its conditional cross-appeal. In it, Cimarron argues, first, that the district court's class certification in this case was both constitutionally and statutorily defective and, second, presuming Section 27-2-16(B) confers any rights at all, those rights have been waived.

II. STANDARD OF REVIEW

{18} When reviewing judgments on the pleadings, we "accept as true all facts well pleaded and question only whether the plaintiffs might prevail under any state of facts provable under the claim." *Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*, 106 N.M. 757, 760, 750 P.2d 118, 121 (1988). All interpretations of law made by the district court are reviewed de novo. *Klinksiek v. Klinksiek*, 2005-NMCA-008, ¶ 4, 136 N.M. 693, 104 P.3d 559.

{19} We review orders granting or denying summary judgment de novo. *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280. "Summary judgment is proper when the material facts are undisputed and the only remaining issues are questions of law." *Farmers Ins. Co. of Ariz. v. Sandoval*, 2011-NMCA-051, ¶ 6, 149 N.M. 654, 253 P.3d 944 (internal quotation marks and citation omitted).

{20} We likewise apply a de novo standard when engaging in statutory interpretation. *State v. Smith*, 2009-NMCA-028, ¶ 8, 145 N.M. 757, 204 P.3d 1267; *see Sedillo v. N.M. Dep't of Pub. Safety*, 2007-NMCA-002, ¶ 7, 140 N.M. 858, 149 P.3d 955 ("The question of whether statutes create or imply a private right of action is a question of law . . . reviewed de novo."). In doing so, we strive to effectuate the intent and policies of the Legislature, looking "first to the words chosen . . . and the plain meaning of the . . . language." *Smith*, 2009-NMCA-028, ¶ 8 (internal quotation marks and citation omitted). When a statute's language "is clear and unambiguous, we give effect to that language and refrain from further statutory interpretation." *Id.* (internal quotation marks and citation omitted). Where ambiguity arises, we go outside the plain language and engage in further statutory interpretation. *N.M. Bd. of Veterinary Med. v. Riegger*, 2007-NMSC-044, ¶ 11, 142 N.M. 248, 164 P.3d 947. We "construe the entire statute . . . so that all . . . provisions [are] considered in relation to one another." *Id.* (internal quotation marks and citation omitted). "In ascertaining legislative intent, we look not only to the language used in the statute, but also to the object sought to be accomplished and the wrong to be remedied." *Patterson v. Globe Am. Cas. Co.*, 101 N.M. 541, 543, 685 P.2d 396, 398 (Ct. App. 1984), *superseded by statute on other grounds as stated in Journal Publ'g Co. v. Am. Home Assurance Co.*, 771 F. Supp. 632, 635 (S.D.N.Y. 1991).

III. DISCUSSION

A. Plaintiffs Have Not Waived Claims Regarding Section 27-2-16(B)

{21} As a threshold issue, Defendants assert that Plaintiffs waived any claim they had regarding Section 27-2-16(B). Specifically, the MCOs argue that because Plaintiffs have entered into contracts for an amount less than the requirement in Section 27-2-16(B), Plaintiffs have waived any cause of action based upon Section 27-2-16(B). The MCOs contend that the district court, when it concluded that no waiver occurred, violated the principle of freedom of contract. Citing *United Wholesale Liquor Co. v. Brown-Forman Distillers Corp.*, 108 N.M. 467, 471, 775 P.2d 233, 237 (1989), Presbyterian supports its waiver argument with the principle that "[t]he voluntary relinquishment of a statutory protection is consistent with our policy favoring the right to contract." For reasons explained in this Opinion, we conclude that any semblance of a relinquishment was not voluntary in this case.

{22} In addition, HSD argues that, in the provider agreements it made with Plaintiffs, Plaintiffs agreed "[t]o accept as payment in full the amount paid in accordance with the reimbursement structure in effect for the period during which such services were provided as per 42 [C.F.R. §] 447.15." The Medicaid Payment for Services Rule, 42 C.F.R. § 447.15, provides that participation in the Medicaid program is limited to providers that "accept, as payment in full, the amounts paid by the agency plus any deductible, coinsurance or copayment required by the plan to be paid by the individual." Thus, HSD contends that Plaintiffs cannot seek additional payments from HSD under the fee-for-service program because, "by agreeing to become Medicaid providers[, Plaintiffs] have agreed not to seek reimbursement from HSD beyond what is paid to them by HSD pursuant to its drug reimbursement regulations as then in effect." HSD further argues that as to SALUD!, "HSD included a provision in the MMCS Agreements[, stating that Plaintiffs] must accept payment from the MCO[s] as payment for any services included in the benefit package, and cannot request payment from HSD or from Medicaid members . . . for services performed under the subcontract." (Internal quotation marks omitted.)

{23} We disagree with the contentions of both the MCOs and HSD that Plaintiffs' claims have been waived. In 1997, as stated above, Plaintiffs sought a temporary restraining order from the court to determine the effect of entering into new contracts with the MCOs. The court issued the order and required HSD to either allow Plaintiffs to refuse the new contracts, or agree that such contracts would not waive any rights under Section 27-2-16(B). HSD chose the latter, and Plaintiffs signed with the MCOs.

{24} This Court has explained in the past,

> a valid waiver requires a known legal right, relinquished for consideration, where such legal right is intended for the waivor's sole benefit and does not infringe on the rights of others. . . . In no case will a waiver be presumed or implied, contrary to the intention of the party whose rights would be injuriously affected thereby, unless, by his conduct, the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to. Absent proof of an express agreement, in order to establish waiver[,] there must be a showing of *unequivocal* acts or

> conduct on the part of the person against whom waiver is asserted showing an intent to waive.

McCurry v. McCurry, 117 N.M. 564, 567, 874 P.2d 25, 28 (Ct. App. 1994) (internal quotation marks and citations omitted). When we consider the actions taken by Plaintiffs to preserve their statutory rights through a court order and the change in position chosen at the time by HSD, we do not see these contracts they entered into with Defendants as *unequivocal* acts showing an intent to waive statutory rights.

{25} HSD's argument that Plaintiffs contractually waived their right to seek further compensation from HSD is inconsistent with HSD's agreement that Plaintiffs would not waive their statutory rights by engaging in contracts with the MCOs. Furthermore, entering into contracts with the MCOs can hardly be said to constitute an unequivocal intent to waive rights under Section 27-2-16(B), especially given Plaintiffs' refusal to enter the contracts without HSD's agreement and a court order that their rights would be preserved. Moreover, the contracts, which we discuss in further detail below, continue to require compliance with the Section 27-2-16(B) absent waiver or change of law.

{26} In addition, we will not imply waiver unless Defendants were misled by Plaintiffs' conduct to their prejudice, while honestly believing that Plaintiffs actually intended to waive their rights. *Brown v. Jimerson*, 95 N.M. 191, 192-93, 619 P.2d 1235, 1236-37 (1980); *see Ed Black's Chevrolet Ctr., Inc. v. Melichar*, 81 N.M. 602, 604, 471 P.2d 172, 174 (1970) ("In no case will a waiver be presumed or implied, contrary to the intention of the party whose rights would be injuriously affected thereby, unless, by his conduct, the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to."); *see also Brown v. Taylor*, 120 N.M. 302, 305, 901 P.2d 720, 723 (1995) (holding that a theory of implied waiver must be supported by evidence that the aggrieved party acted in reliance on the waiver to his detriment). Here, the MCOs have presented no evidence that they were misled by Plaintiffs or that they entered into these contracts in reliance on Plaintiffs' alleged waiver. Neither has HSD demonstrated such reliance, and Plaintiffs have certainly demonstrated no such intent.

{27} Thus, we hold that the district court was correct when it concluded that Plaintiffs did not waive their rights under Section 27-2-16(B). We also note that the case before us involves a unique set of facts and, as the district court stated, "[n]one of the cases cited by [the MCOs] . . . deals with this unique situation in which a [s]tate program and [s]tate actors, who themselves must comply with the statute, can, by their own contracts with third parties, allow the statute to be ignored or violated." Having determined that Plaintiffs did not waive their right to sue under the statute itself or under contracts that incorporated the statute, we now discuss Section 27-2-16(B)'s role in the Medicaid program.

B. Section 27-2-16(B)

{28} New Mexico's Medicaid program falls under the Public Assistance Act. *See* NMSA 1978, §§ 27-2-1 to -34 (1972, as amended through 2007). Under the Act, the HSD is charged with administering Medicaid and maintaining a "statewide, managed care system to provide cost-efficient, preventive, primary and acute care for [M]edicaid recipients." Section 27-2-12.6(A). In administering the Medicaid program, HSD must ensure that recipients are provided

prescription medication. Section 27-2-12.11. Section 27-2-16(B) provides that "[i]f drug product selection is permitted by Section 26-3-3 . . . , reimbursement by the [M]edicaid program shall be limited to the wholesale cost of the lesser expensive[,] therapeutic equivalent drug generally available in New Mexico plus a reasonable dispensing fee of at least three dollars sixty-five cents ($3.65)." Titled "Compliance with federal law[,]" Section 27-2-16(B) most clearly effectuates the federal requirement that state medical assistance plans

> provide such methods and procedures . . . as may be necessary to . . . assure that payments are consistent with efficiency, economy, and quality of care and are *sufficient to enlist enough providers so that care and services are available* under the plan at least to the extent that such care and services are available to the general population in the geographic area[.]

42 U.S.C. § 1396a(a)(30)(A) (1999, as amended through 2010) (emphasis added). Indeed, as Presbyterian recognizes in its answer brief, the statute is a response to Section 1396(a)(30)(A) and seeks "a balance between paying providers enough to assure patient accessibility and keeping Medicaid expenditures as low as possible."

1. Section 27-2-16(B) Survived the Transition to Managed Care

{29} The MCOs argue that Section 27-2-16(B) did not survive New Mexico's transition to managed care. Even if it did, they claim the statute does not provide a remedy and is therefore unenforceable. As to whether Section 27-2-16(B) survived the transition to managed care, the most apparent manifestation of our Legislature's intent to pay Plaintiffs for their stock and labor is the inescapable fact that the statute, setting the requirements for doing so, remains on the statute books despite the 2002 and 2004 attempts to change it. The requirement was first enacted in 1974 and has existed in its current form since 1984, predating the advent of managed care in New Mexico by more than a decade and surviving more than a decade past. *See* § 27-2-16(B); § 27-2-12.6(A). Yet, the MCOs argue that the requirement is inconsistent with managed care as implemented in 1997 because it sets an absolute amount for payment; whereas, managed care is premised upon periodic renegotiations between the MCOs and their subcontractors.

{30} The MCOs fail to demonstrate that the Legislature intended for Section 27-2-16(B) to be superseded by managed care. The Legislature twice rejected amendments that specifically would have either lowered payments or required periodic renegotiation. *See* H.B. 400, 45th Leg., 2d Sess. (N.M. 2002) (not passed); S.B. 183, 46th Leg., 2d Sess. (N.M. 2004) (not passed). It seems that the evidence is clearly contrary to the MCOs' argument.

{31} Nor are we persuaded by Cimarron's argument that the statute's very language demonstrates its inapplicability to managed care. Essentially, Cimarron claims that because Section 27-2-16(B) requires "reimbursement by the [M]edicaid program[,]" it cannot apply to them because they are not the Medicaid program. Cimarron's brief assumes that the Medicaid program is another way of saying "New Mexico Human Services Department." In conjunction with this argument, Presbyterian contends that nowhere do Plaintiffs cite case law standing for the proposition that when a statute imposes a non-delegable duty on a government agency, any implied right of

action by the aggrieved party against that agency includes a right to sue other entities with which the agency has a contractual or regulatory relationship.

{32} These arguments are misplaced. We agree with the district court's holding that the MCOs "are not [health plans], and they are not third[-]party insurers. Rather, they are part of the Medicaid program." The Medicaid program begins at the government level, upstream of the MCOs, and continues through the provision of care and services to recipients downstream of the MCOs. Had our Legislature intended reimbursements to come directly and only from HSD, it could have easily used the term "department" in Section 27-2-16(B). *See* § 27-2-2(A) (defining "department" as the "[H]uman [S]ervices [D]epartment"). Rather, the Legislature chose a broader term, "Medicaid program," which we interpret to encompass the entire Medicaid apparatus by which patients are served by Medicaid funds through HSD's agents. In other words, the statute tells pharmacists that, under a certain set of circumstances by legislative enactment, the money appropriated by the state and federal government and passed through several layers of bureaucracy, agents, and contractors will be paid to them in a predetermined manner on which they may rely. This is true regardless of whether the program operates under fee-for-service, managed care, or some other method. Under managed care, the MCOs were contracted by HSD to be the conduits for Medicaid funds, succeeding HSD itself. We hold that the statute applies to the MCOs and the managed care program regardless of additional layers of bureaucracy and administrative control.

2. Section 27-2-16(B) Creates a Private Right of Enforcement

{33} Plaintiffs contend that the district court erred in finding that there was no implied private cause of action under Section 27-2-16(B).[5] When a party seeks to enforce a statute that provides no express mechanism for its enforcement, we examine whether a cause of action may be implied through the common law based on an interpretation of legislative intent or public policy. *Nat'l Trust for Historic Pres. v. City of Albuquerque*, 117 N.M. 590, 594, 874 P.2d 798, 802 (Ct. App. 1994); *see Hovet v. Allstate Ins. Co.*, 2004-NMSC-010, ¶¶ 9-10, 135 N.M. 397, 89 P.3d 69 (holding that legislative intent and public policy supported the conclusion that third parties may bring a cause of action against insurers for unfair practices where the statute at issue provided a cause of action generally). "[A] state court, because it possesses common-law authority, has significantly greater power than a federal court to recognize a cause of action not explicitly expressed in a statute." *Nat'l Trust*, 117 N.M. at 593, 874 P.2d at 801. In determining whether to recognize whether there is a cause of action, we examine three non-exclusive factors: "(1) Was the statute enacted for the special benefit of a class of which the plaintiff is a member?[;] (2) Is there any indication of legislative intent, explicit or implicit, to create or deny a private remedy?[;] and (3) Would a private remedy either frustrate or assist the

[5]We distinguish the present appeal from a previous appeal in this same case regarding Plaintiffs' attempt to bring a § 1983 suit for HSD's supposed violation of Section 27-2-16(B). In *Starko II*, we held that Plaintiffs could not bring a § 1983 claim for a procedural due process violation with regard to Section 27-2-16(B). *Starko II*, 2006-NMCA-085, ¶ 29. This previous appeal determined "only the discrete question of whether Plaintiffs may proceed against Defendants under § 1983[] and not whether Plaintiffs can proceed against HSD under other state law remedies." *Starko II*, 2006-NMCA-085, ¶ 29.

underlying purpose of the legislative scheme?" *Nat'l Trust*, 117 N.M. at 593, 874 P.2d at 801. In addition, "[a] state's public policy, independent of [these] factors, may be determinative in deciding whether to recognize a cause of action." *Id.* at 594, 874 P.2d at 802.

a. Implied Cause of Action Based Upon Legislative Intent

{34} First, we address the three factors that may contribute to the recognition of a private cause of action based upon legislative intent. We first analyze whether the statute was enacted for the special benefit of a class of which Plaintiffs are members. Section 27-2-16(B) states that, "[i]f drug product selection is permitted . . . , reimbursement by the [M]edicaid program shall be limited to the wholesale cost of the lesser expensive[,] therapeutic equivalent drug generally available in New Mexico plus a reasonable dispensing fee of at least three dollars sixty-five cents ($3.65)." Section 27-2-16(B) benefits individuals or entities that dispense drugs to Medicaid participants, ensuring that each receives a reasonable dispensing fee and payment for the drug dispensed. Plaintiffs, being pharmacists, clearly fall within a class sought to be benefitted by the statute.

{35} Next, we examine whether there is any indication in the statute of legislative intent, explicit or implicit, to create or deny a private remedy. "The guiding principle of statutory construction is that a statute should be interpreted in a manner consistent with legislative intent. . . . [W]e look not only to the language used in the statute, but also to the purpose to be achieved and the wrong to be remedied." *Hovet*, 2004-NMSC-010, ¶ 10. Here, we utilize factors developed by the United States Supreme Court in evaluating legislative intent, including (1) whether the statute contains "rights-creating language"; (2) whether it has an "aggregate, not individual, focus"; and (3) the purpose of the statute. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284, 290 (2002); *see Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997); *Nat'l Trust*, 117 N.M. at 593, 874 P.2d at 801. The Supreme Court typically applies these questions regarding legislative intent within the context of a § 1983 action. However, this particular legislative intent inquiry is the same in our context because, in both situations, a court has the task of analyzing whether the Legislature intended to create or deny a private remedy.

{36} In *Gonzaga University*, the Supreme Court held that the Family Educational Rights and Privacy Act's (FERPA) non-disclosure provisions failed to confer enforceable rights as the provisions "entirely lack the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights." 536 U.S. at 287. There, a student sought to sue the university by bringing a § 1983 action for violating non-disclosure provisions of FERPA that prohibited federal funding of educational institutions that had a policy or practice of releasing education records to unauthorized persons. *Gonzaga Univ.*, 536 U.S. at 276-77. The Supreme Court concluded that the provisions were only addressed to the Secretary of Education to direct the expenditure of funds and that the statute did not address "the interests of individual students and parents." *Id* at 287. The Supreme Court also determined that "FERPA's non[-]disclosure provisions further speak only in terms of institutional policy and practice, not individual instances of disclosure. Therefore, . . . they have an 'aggregate' focus, they are not concerned with whether the needs of any particular person have been satisfied, and they cannot give rise to individual rights[.]" *Id.* at 288 (internal quotation marks and citations omitted). Thus,

the *Gonzaga University* Court held that the student did not have a private cause of action under FERPA. *Id.* at 290.

{37} In contrast, the United States Supreme Court held that there was legislative intent to create a private cause of action under the Boren Amendment. *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 512 (1990). There, an association of hospitals brought a § 1983 action, challenging the administration of the state's Medicaid program on the ground that it violated the Boren Amendment. *Wilder*, 496 U.S. at 501-02. The Boren Amendment required states to reimburse Medicaid providers in an amount that was "reasonable and adequate" to meet the costs "incurred by efficiently and economically operated facilities[.]" *Id.* (internal quotation marks and citation omitted). The Supreme Court concluded that the Boren Amendment created a substantive right for health care providers in reasonable and adequate reimbursement rates. *Id.* at 509-10. The Supreme Court explained:

> There can be little doubt that health care providers are the intended beneficiaries of the Boren Amendment. The provision establishes a system for reimbursement of providers and is phrased in terms benefit[t]ing health care providers: It requires a state plan to provide for payment . . . of the hospital services, nursing facility services, and services in an intermediate care facility for the mentally retarded provided under the plan.

Id. at 510 (internal quotation marks and citation omitted). The Supreme Court concluded that this right was enforceable because the Boren Amendment was cast in mandatory, rather than precatory, terms since it required the state to "provide for payment . . . of hospital[s] according to rates the [s]tate finds are reasonable and adequate." *Id.* at 512 (first alteration in original). The Court described this language as a "congressional command, . . . wholly uncharacteristic of a mere suggestion or nudge" and held that the hospital association had a right to bring the action. *Id.* (internal quotation marks and citation omitted).

{38} The case at bar more resembles *Wilder* rather than *Gonzaga University*, and the facts here, as in *Wilder*, weigh in favor of finding legislative intent to create a private cause of action under Section 27-2-16(B). The present case and *Wilder* deal with mandatory reasonable reimbursement of Medicaid providers. Like the statute in *Wilder*, Section 27-2-16(B)'s language is mandatory, stating that "[i]f drug product selection is permitted by Section 26-3-3 . . . , reimbursement by the [M]edicaid program shall be limited to the wholesale cost of the lesser expensive[,] therapeutic equivalent drug generally available in New Mexico plus a reasonable dispensing fee of at least three dollars sixty-five cents ($3.65)." We have stated in the past that "[t]he word 'shall' as used in a statute is generally construed to be mandatory." *State v. Guerra*, 2001-NMCA-031, ¶ 14, 130 N.M. 302, 24 P.3d 334. Thus, in the present case, reimbursement for filling prescriptions as intended by the Legislature in accordance with the statute is a mandatory legislative "command" very similar to that in *Wilder*. Plainly, the Legislature intended pharmacists to fill prescriptions in a certain way under Section 26-3-3 and be paid in a certain way for doing so under Section 27-2-16(B). This certainty reinforces our conclusion.

{39} Furthermore, Section 27-2-16(B) contains rights-creating language that gives

Plaintiffs a protected property right in the reasonable dispensing fee and average wholesale price (AWP) of the lesser-expensive, therapeutic equivalent drug when Plaintiffs can dispense a drug within this category to a Medicaid patient. "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 577 (1972); *see Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) ("The hallmark of property, the [Supreme] Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except for cause." (internal quotation marks and citation omitted)). "The definition of property centers on the concept of entitlement; therefore, interests in government benefits will be recognized as constitutional property if the person can be deemed entitled to them." *Bd. of Educ. of Carlsbad Mun. Sch. v. Harrell*, 118 N.M. 470, 477, 882 P.2d 511, 518 (1994) (internal quotation marks and citation omitted). Section 27-2-16(B) entitles Plaintiffs to a specific monetary payment for drugs already dispensed. We suggested in response to a previous appeal from this case that "Section 27-2-16(B) confers upon pharmacists a protected property interest in a dispensing fee of $3.65, particularly where they have already filled prescriptions and are awaiting reimbursement." *Starko II*, 2006-NMCA-085, ¶ 19. We now abandon previous assumptions and suggestions to decide that this is true. Unlike the statute in *Gonzaga University*, Section 27-2-16(B) specifies the particular right attributable to Plaintiffs, an amount of money that is clearly defined within the statute and a direction from the Legislature that it be paid. This legislative command is not just an institutional policy and practice.

{40} Like *Wilder*, the payment provision of Section 27-2-16(B) speaks directly to the "Medicaid program," ordering it to pay the plaintiffs a specific fee for dispensing drugs to Medicaid recipients. Section 27-2-16(B) is pointedly concerned with whether the needs of this particular group have been satisfied, giving each pharmacist dispensing drugs to Medicaid patients an individual right to a particular amount of reimbursement. Thus, the purpose of Section 27-2-16(B) is directed to the reimbursement of individual providers, and the wrong to be remedied by the statute is the insufficient reimbursement of individual Medicaid providers. The provisions speak not only to the expenditure of funds but, more specifically, guarantee a property right in the dispensing fee and cost of the drug to dispensing pharmacists. Therefore, there is implicit legislative intent to create an enforceable right for Medicaid providers, like Plaintiffs, through Section 27-2-16(B).

{41} Last, we determine whether a private remedy would either frustrate or assist the underlying purpose of the legislative scheme. The purpose of Section 27-2-16(B) is to set a reasonable rate of reimbursement for Medicaid providers as part of a larger legislative scheme dealing with the administration of Medicaid in New Mexico. This statute requires the appropriate reimbursement of Medicaid providers and also confers a protected property right. Unlike other statutes[6] within this legislative scheme dealing with payments to providers, the Legislature never repealed or exempted the MCOs from Section 27-2-16(B) following the

[6]The Legislature exempted the managed care system from the equal pay provision affecting physicians, dentists, optometrists, podiatrists, and psychologists. § 27-2-12.3.

Medicaid program's transition into managed care. Thus, we conclude that providing a private remedy would assist and further the underlying purpose of the legislative scheme.

{42} For the reasons we have discussed, we hold that the Legislature intended to provide an implied cause of action under the statute.

b. Application of the Private Cause of Action to the Parties

{43} As explained above, Section 27-2-16(B) creates an implied private cause of action. Plaintiffs may seek their remedy directly from the MCOs because the MCOs are part and parcel with the Medicaid program and a conduit for all of the state's Medicaid managed care funding.

{44} In addition, Plaintiffs argue on appeal that "the district court erred in concluding that [Section] 27-2-16(B) [did] not create a private right of action against [HSD]." Yet, the district court never made a ruling in its memorandum opinion on the issue of whether HSD can be subject to the private cause of action derived from Section 27-2-16(B). After reviewing Plaintiffs' motion for summary judgment on the pleadings as to HSD, we are unable to locate any argument regarding an implied cause of action against HSD. Moreover, Plaintiffs fail to provide citation to an argument in the motions regarding the implied cause of action. Instead, they argue that the issue was preserved because "the district court explicitly relied on its prior rulings [that Section 27-2-16(B) did not create a private cause of action] in granting [HSD]'s motions for summary judgment." We are unpersuaded by this argument, especially because Plaintiffs even failed to assert an implied cause of action against HSD in their fourth amended complaint. Within Count Two of the fourth amended complaint, Plaintiffs raise state law violations, specifically the violation of Section 27-2-16(B). There, Plaintiffs state that "[t]he MCOs have violated [Section] 27-2-16(B). . . . The actions of the MCOs in failing to comply with state law were done intentionally and in a reckless and willful disregard of the rights of Plaintiffs for which they are entitled to punitive damages." Not once is HSD mentioned in Count Two as a party violating the statute, nor is an implied cause of action against HSD discussed elsewhere in the complaint.

{45} For the above reasons, we hold that the issue of an implied cause of action against HSD has not been preserved. *Woolwine v. Furr's, Inc.*, 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987) ("To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court."); *see State v. Wyman*, 2008-NMCA-113, ¶ 10, 144 N.M. 701, 191 P.3d 559. We will not address issues that were not preserved and are now raised for the first time on appeal. *State v. Ware*, 118 N.M. 703, 705, 884 P.2d 1182, 1184 (Ct. App. 1994). Thus, upon remand, the implied cause of action under Section 27-2-16(B) may be tried against the MCOs because such arguments were preserved, but not against HSD.

3. Section 27-2-16(B) Applies Whenever a Substitution is Possible, Even if the Substitution Was Not Made

{46} Plaintiffs also appeal the district court's holding that the statute "applies whenever a pharmacist dispenses a multiple source drug to a Medicaid recipient at a lower cost than the drug listed in the prescription; and . . . whenever a pharmacist dispenses a therapeutically equivalent drug to a Medicaid

recipient which is lower in cost than the drug listed in the prescription." This issue was briefed and preserved by Plaintiffs in the second of the two appeals at issue in this Opinion to which HSD was a party. Though the MCOs have not briefed the matter, it was properly raised, and we consider our resolution of this legal issue applicable to all of the parties.

{47} Plaintiffs contend that based upon its plain language, Section 27-2-16(B) should apply "anytime a pharmacist is *permitted* to select among multiple source drug[s] or therapeutically equivalent drugs in providing a prescription to a Medicaid recipient." We agree with Plaintiffs that the plain language requires that the dispensing fee apply whenever a substitution of a lesser expensive, therapeutic equivalent drug can be made, not only when it is actually made. In analyzing how to apply Section 27-2-16(B), we give effect to the statute's clear and unambiguous language. *Smith*, 2009-NMCA-028, ¶ 8. We will not read into a statute "language which is not there, especially when it makes sense as it is written." *Reule Sun Corp. v. Valles*, 2010-NMSC-004, ¶ 15, 147 N.M. 512, 226 P.3d 611 (internal quotation marks and citation omitted). In addition, "the practical implications, as well as the statute's object and purpose are considered." *Id.*

{48} Before we begin our analysis, we reiterate that Section 27-2-16(B) states that "[i]f drug product selection is permitted by Section 26-3-3 . . . , reimbursement by the [M]edicaid program shall be limited to the wholesale cost of the lesser expensive[,] therapeutic equivalent drug generally available in New Mexico plus a reasonable dispensing fee of at least three dollars sixty-five cents ($3.65)." Section 27-2-16(B). As explained previously, reimbursement according to this statute is mandatory because of the Legislature's use of "shall." We now address when and how Section 27-2-16(B) would be applicable.

{49} The crucial phrase of the statute is "[i]f drug product selection is *permitted* by Section 26-3-3." Section 27-2-16(B) (emphasis added). Here, the plain language conditions the applicability of the statute on whether drug product selection is allowed. This precondition must be fulfilled before the Medicaid program is required to pay the reasonable dispensing fee and AWP of the lesser expensive drug. The statute specifies that it applies when the substitution is "permitted" and does not require the substitution to actually occur. If the Legislature wanted to condition the applicability of this payment scheme on the dispensing of the lesser expensive, therapeutic equivalent drug, it would have included those terms within the statute.

{50} Furthermore, this reading of the statute is consistent with the practical implications, objective, and purpose of Section 27-2-16(B). As HSD asserts, "[t]he Legislature intended this section to save money to the purchaser of prescription drugs regardless of whether the purchaser is an individual or the Medicaid program." This statute seems to proceed from the federal mandate that New Mexico's Medicaid system should spend its money as wisely as possible. Thus, when a lesser expensive, therapeutic equivalent drug is available, the government should not pay for a more expensive one. The program seeks to save money by limiting reimbursement to the wholesale cost of the lesser expensive drug, while paying pharmacists a predetermined "reasonable dispensing fee." Section 27-2-16(B). This reading promotes consistency and predictability. It also gives an incentive to pharmacists to save the Medicaid program

money by refusing to dispense name brand drugs when lesser expensive, therapeutic equivalent drugs are available. Our reading also comports best with the statute's title, "Compliance with federal law[,]" by ensuring that payments to Medicaid pharmacists are "consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available." 42 U.S.C. § 1396a(a)(30)(A).

{51} In contrast, the district court's interpretation of Section 27-2-16(B) limits the statute's application to those instances when there is actual proof that the drug dispensed differed from the original prescription. HSD supports the district court's conclusion with an argument based upon Section 26-3-3, which provides the circumstances under which a prescription can be filled with a lesser expensive, therapeutic equivalent drug. HSD argues that the district court's interpretation is correct because "[t]hat is precisely what [Section] 26-3-3 requires[.]" HSD goes on to discuss the requirements of Section 26-3-3, not just the types of permissible substitution, but also what a pharmacist must do when dispensing the lesser expensive, therapeutic equivalent drug under Subsection (D) of Section 26-3-3. HSD contends that because "[t]he Legislature required that the proof of product selection appear on the label of the drug dispensed [under Subsection D]," there must be proof that the substitution occurred for Section 27-2-16(B) to apply.

{52} HSD places too much emphasis on the role of Section 26-3-3 in interpreting Section 27-2-16(B), essentially contending that every aspect of Section 26-3-3 must be fulfilled and a lesser expensive, therapeutic equivalent drug issued in accordance with it for Section 27-2-16(B) to apply. This is not the case. Section 27-2-16(B) only requires that "drug product selection [be] permitted by Section 26-3-3" for the statute to apply. Section 26-3-3(A) and (B) set forth the two instances where a pharmacist may dispense a lesser expensive, therapeutic equivalent drug: (1) when "the drug[] . . . satisfies the final determinations so recognized and listed by the [F]ederal [D]epartment of [H]ealth and [H]uman [S]ervices" and (2) when the "drug . . . appears on the [F]ederal [F]ood and [D]rug [A]dministration's approved prescription drug products with therapeutic equivalence evaluation list as supplemented[.]" Section 26-3-3(C) explicitly states that "[d]rug product selection shall be permitted only under circumstances and conditions set forth in Subsections A and B of this section[.]" Therefore, if the prescribed drug falls under one of the two categories stated in Section 26-3-3(A) and (B), then the drug product selection is permissible and the pharmacists must be reimbursed with the AWP of the equivalent drug plus a reasonable dispensing fee. Whether the drug label includes the fact that a substitution has occurred is not relevant to the criteria for determining whether a substitution is permissible.

{53} Furthermore, Plaintiffs assert that "the district court's decision does not adequately take into account that drug product selection occurs not only in the case of brand[]name/generic substitution, but also in the case of choosing among non-pioneer versions of multiple source drugs." Plaintiffs contend that there are three reasons for which this distinction must be accounted, all of which are related to the FDA distinguishing between multiple source drugs as separate and unique drugs with or without the same active ingredients. We do not see that the district court ruled that Section 27-2-16(B) only applied when generic drugs were substituted for brand name drugs. As stated above, the district court held that the statute "applies

whenever a pharmacist dispenses a multiple source drug to a Medicaid recipient at a lower cost than the drug listed in the prescription; and . . . whenever a pharmacist dispenses a [therapeutic] equivalent drug to a Medicaid recipient which is lower in cost than the drug listed in the prescription."

{54} The district court appears to draw no distinction between substitutions where the prescribed drug is a brand name drug and substitutions where the prescribed drug is a multiple source generic version. Based upon the plain language of the statute, we hold that the statute requires no distinction between prescribed drugs that are generic and those that are brand name, as long as the pharmacist is authorized to use his or her discretion to dispense a lesser expensive drug than the prescribed drug, and the substitution meets the requirements set out in Section 26-3-3(A) and (B).

{55} Thus, we reverse the district court's determination that Section 27-2-16(B) applies only when a substitution actually occurs. Moreover, Section 27-2-16(B) applies to both brand name and generic prescribed drugs, so long as a substitution of a lesser expensive, therapeutic equivalent drug would be permissible. We therefore hold that Section 27-2-16(B) applies whenever a pharmacist may use his or her discretion to issue a lesser expensive drug that is the therapeutic equivalent to the prescribed drug even if that substitution does not occur.

4. Amount of Payment Required by Section 27-2-16(B)—The District Court Failed to Determine Whether $3.65 Was a Reasonable Dispensing Fee

{56} Plaintiffs appeal the district court's finding that a base dispensing fee of $3.65 is reasonable, arguing that there are contested issues of material fact with regard to the reasonableness of the dispensing fee. Reasonableness is a question of fact when the court is required to weigh evidence. *Rio Grande Kennel Club v. City of Albuquerque*, 2008-NMCA-093, ¶ 18, 144 N.M. 636, 190 P.3d 1131 ("The issue regarding the reasonableness of [a statute's license and permit] fees presented a question of fact requiring the district court to weigh evidence. . . . Facts may exist to prove that the fee provisions in [the statute] are excessive or unreasonable with respect to the cost of regulation.").

{57} In granting HSD's motion for summary judgment, the district court based its holding that $3.65 was a reasonable dispensing fee on two grounds. First, it gave deference to HSD's interpretation of Section 27-2-16(B). Second, the court stated that Plaintiffs did not provide the court with "any information that would cast doubt on [HSD's] assertion . . . that the amount New Mexico pays its providers is higher than that paid by private insurers in the private sector [to pharmacists] in New Mexico."

{58} Plaintiffs contend that they presented evidence below that created a dispute regarding the reasonableness of the $3.65 dispensing fee, a material fact. First, Plaintiffs argue that the numerous studies they presented about dispensing costs demonstrated that those costs exceeded $3.65. Second, Plaintiffs assert that the reasonableness of the $3.65 fee is questionable because there is evidence that HSD paid Medicaid pharmacists a dispensing fee of $4.00 between 1991 and 2002. Third, Plaintiffs contend that the reasonableness of the dispensing fee is put into question by the former Director of the Medical Assistance Division's admission that the $3.65 dispensing fee was well below the average pharmacy's dispensing cost. We agree with Plaintiffs and

conclude that this information bears on the reasonableness of the fee as it would inform and influence the fact finder's decision.

{59} Further, HSD directs this Court to other information that raises additional factual questions regarding the reasonableness of a $3.65 dispensing fee. HSD asserts that "the actual cost to dispense prescription drugs varies dramatically with the volume of the dispensing pharmacy. . . . [Some smaller pharmacies] count[] out pills by hand[,] while large pharmacies have machines that can do it faster [and] have non-pharmacist technicians to fill prescriptions who get paid less than a licensed pharmacist." Thus, a base fee of $3.65 may be reasonable for larger pharmacies, where it may not be reasonable for smaller pharmacies.

{60} Moreover, HSD's contention that the $3.65 dispensing fee is greater than that paid in the private health insurance sector is not determinative of reasonableness itself and raises further factual questions. We do not know how the private sector reimburses pharmacists for the ingredient cost of the drug, or whether they reimburse for more or less than the AWP, minus fourteen percent, as the Medicaid program does. HSD even admits in its reply brief regarding this motion for summary judgment that dispensing fees can vary greatly, depending upon how much the pharmacists are reimbursed for the drug ingredient costs. In that brief, HSD argued that "New Mexico's dispensing fee is reasonable when compared with the fees paid under Medicaid by other [s]tates. . . . Other [s]tates pay a dispensing fee ranging from $2.00 to more than $10." HSD then explained that "some [s]tates with a higher dispensing fee pay a lower ingredient cost." Thus, the standard insurance companies use to reimburse for the ingredient cost plays a significant role in how much the companies will then reimburse for the dispensing fee. We are not provided with information regarding how the private sector reimburses pharmacists for the ingredient cost. Without such information, we will not assume that the private sector's ingredient cost reimbursement schemes are similar to Medicaid's.

{61} Because the district court was required to weigh the evidence regarding this issue, we hold that reasonableness of the dispensing fee was a question of fact in this case. Facts exist in the record that may prove that the $3.65 fee was unreasonable. Thus, summary judgment on the reasonableness of the dispensing fee was inappropriate. We remand for a factual determination about what a reasonable dispensing fee is for each pharmacy.

C. The District Court Properly Dismissed Plaintiffs' Claim Regarding HSD's Reduction of Reimbursement Without Federal Approval During a Six-Month Gap Period

{62} Plaintiffs argue that the district court erred in denying their motion for summary judgment on HSD's violation of Section 27-2-16(B) for failure to reimburse Plaintiffs in accordance with Medicaid legislation for the drug ingredient costs. From January 1, 1991 through June 30, 1997, HSD reimbursed fee-for-service Medicaid pharmacy providers for drug ingredient costs at the rate of the AWP, minus ten and one-half percent. HSD's regulations were amended, effective and implemented on June 30, 1997, reducing the ingredient cost to the AWP, minus twelve and one-half percent. Federal approval of the reduction was given by the Federal Health Care Financing Agency in April 1998, retroactive to January 1, 1998. Plaintiffs contend they are owed $960,000 by HSD due to the reduction during the six-month gap

between when the reduction was implemented by HSD (July 1, 1997) and when federal approval was given (January 1, 1998).

{63} Although all parties agree that approval is necessary, they disagree about whether approval can be retroactive. Plaintiffs contend that "they are entitled to this amount because Defendants did not have approval for the rate change when they began to reimburse at the new amount." HSD argues that retroactive approval is sufficient. The district court held that HSD was not liable for implementing an amendment to the state Medicaid program prior to approval by the federal government. We affirm the district court's ruling and hold that retroactive approval is sufficient.

{64} Two federal statutes of the Social Security Act provide guidance in this matter. Under Title XIX of the Social Security Act, 42 U.S.C.A. § 1396-1 (1984), "[t]he sums made available under [Medicaid legislation] shall be used for making payments to [s]tates which have submitted, and had approved by the Secretary [of the Federal Department of Health and Human Services], [s]tate plans for medical assistance." Furthermore, under 42 U.S.C.A. § 1396c (1965),

> [i]f the Secretary, after reasonable notice and opportunity for hearing to the [s]tate agency administering or supervising the administration of the [s]tate plan approved under this subchapter, finds--
>
> > (1) that the plan has been so changed that it no longer complies with the provisions of section 1396a of this title; or
> >
> > (2) that in the administration of the plan there is a failure to comply substantially with any such provision;
>
> the Secretary shall notify such [s]tate agency that further payments will not be made to the [s]tate (or, in his discretion, that payments will be limited to categories under or parts of the [s]tate plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply. Until he is so satisfied he shall make no further payments to such [s]tate (or shall limit payments to categories under or parts of the [s]tate plan not affected by such failure).

{65} The statutes quoted above are the current versions of the Act. Prior to 1981, the Act contained different language that required preapproval of state plans before they were implemented. Specifically, 42 U.S.C. § 1396a(a)(13)(D) (1980) required that the state Medicaid program provide "for payment of the reasonable cost of inpatient hospital services provided under the plan, as determined in accordance with methods and standards . . . which shall be developed by the state and reviewed and approved by the Secretary, and (after notice of approval by the Secretary) included in the plan[.]" *Magee-Womens Hosp. v. Heckler*, 562 F. Supp. 483, 485 (W.D. Pa. 1983) (citing 42 U.S.C. § 1396a(a)(13)(D) (internal quotation marks omitted)). This previous version of the Act required that the state obtain notice of approval from the Secretary before the changes were included in the state's Medicaid program. The amended statutes in place today do not facially require prior approval. The absence of such language in the amended version of Title XIX is compelling evidence that Congress intended to abandon the requirement of prior approval.

{66} Furthermore, as the district court highlighted in its memorandum opinion, persuasive case law supports this position. In *Charleston Mem'l Hosp. v. Conrad*, 693 F.2d 324, 325-26 (4th Cir. 1982), the plaintiff argued that the state illegally implemented reductions in Medicaid coverage because implementation took place before the federal government approved the changes. After analyzing 42 U.S.C. § 1396 (1974), the court held for the defendants, stating that the Act does not require prior approval. The court reasoned that "[t]he Act does not expressly provide that a plan may not be modified without prior approval by the Secretary. Congress easily could have given the Secretary such approval authority. Instead, the Secretary is authorized only to impose sanctions when modifications do not comport with the Act." *Charleston Mem'l. Hosp.*, 693 F.2d at 332-33. Similarly, in *Jennings v. Alexander*, 518 F. Supp. 877 (M.D. Tenn. 1981), Medicaid recipients sued to enjoin the state's reduction of funding for inpatient hospital care. In addressing the plaintiffs' argument that the reduction was invalid without prior approval of the Secretary, the court held that prior approval was unnecessary. *Id.* at 888. "Such a requirement [of prior approval] would effectively hamstring the ability of state administrators to respond to changing demands on the Medicaid program or to respond to fiscal crises such as the one currently facing the [s]tate." *Id.* The *Jennings* court also reasoned that the prior approval requirement would be inconsistent with 42 U.S.C. § 1396c, which, as explained above, requires the Secretary to review state Medicaid programs and changes to such plans and to cut off federal payments to the state when its plan fails to comply with federal law. *Jennings*, 518 F. Supp. at 888; *see Ill. Council on Long Term Care v. Miller*, 579 F. Supp. 1140, 1147 (N.D. Ill. 1983) ("This court holds . . . that implementation of the state's amendment to its reimbursement plan before acceptance by the Secretary was not in violation of federal law."). We agree with the above holdings. Statutory construction of the Act reveals that preapproval is not required, and such a requirement would weaken New Mexico's ability to react to fiscal exigencies.

{67} Plaintiffs cite two cases in support of their appeal of this issue: *AMISUB (PSL), Inc. v. Colorado Dep't. of Soc. Servs.*, 879 F.2d 789 (10th Cir. 1989) and *Oregon Ass'n. of Homes for Aging, Inc. v. Oregon*, 5 F.3d 1239 (9th Cir. 1993). In *AMISUB*, the court held that when the state amended its Medicaid inpatient reimbursement rates, such an amendment was void because it violated procedural and substantive requirements of the Federal Medicaid Act. 879 F.2d at 801. However, the violations at issue had nothing to do with implementing reimbursement rates without prior authorization. *Id.* Likewise, *Oregon Ass'n.* does not deal with an amended plan submitted for HCFA approval. 5 F.3d at 1241. There, nursing homes challenged the state's reclassification of nursing services into rate categories, causing the nursing homes to receive less reimbursement from the Medicaid program. *Id.* at 1240. The court found that "[a] law that effects a change in payment methods or standards without HCFA approval is invalid." *Id.* at 1241. Nonetheless, the state in that case never submitted an amendment to HCFA for approval even after the reclassification of nursing services was implemented. Because neither of these cases deals with the issue of implementing changes in reimbursement prior to HCFA approval, we do not find them persuasive.

{68} We agree with the district court that "[t]he cases cited by Defendants [in their motion], the fact that prior approval would hamstring [s]tate officials trying to anticipate . . . and react to changing demands on the

Medicaid program, as well as the history of the statute[,] make a strong case against prior approval." Thus, we affirm the district court's holding that Plaintiffs do not have a cause of action against HSD for reimbursement during the period the amendment to the Medicaid payment structure was not yet approved.

D. Plaintiffs May Bring a Breach of Contract Claim Against HSD Under the Provider Agreements

{69} Before the Medicaid program in New Mexico transitioned to managed care, Plaintiffs signed provider agreements with HSD "in order to qualify for reimbursement from the Medicaid program." Through the agreements, HSD required providers to agree to terms regarding record keeping, payment, compliance with state and federal law, reimbursement by third parties, and other issues. Plaintiffs argue that the district court improperly held that no obligation could arise from Plaintiffs' provider contracts that incorporate the guarantees of Section 27-2-16(B). Plaintiffs contend that the provider "agreements expressly and impliedly require [HSD] to pay any shortfall in pharmacist reimbursement and create an actionable claim against [HSD] for the shortfall between what the MCOs paid and what [Section] 27-2-16(B) requires." Plaintiffs make two specific arguments regarding a third-party liability clause in the contract and the incorporation of Section 27-2-16(B) into the contracts.

{70} First, Plaintiffs argue that the third-party liability provisions of the provider agreements require HSD to make up any shortfall arising out of the MCOs' failure to abide by Section 27-2-16(B). The 1990 provider agreements contain a section called "Third[-]Party Liability" that requires Plaintiffs to seek payment from third-party insurers prior to seeking payment from the Medicaid program. The section further states that "[t]he provider understands that in those instances where the provider receives payment from a liable third party for a Medicaid covered service, the Medicaid agency can pay only to the extent that the Medicaid allowed amount exceeds the amount paid by the third party." Plaintiffs contend that the MCOs are third-party insurers or health plans, and since the MCOs have failed to pay the proper dispensing fee, "[HSD] is responsible for the difference."

{71} We reiterate here, applying the same reasoning as we did above, that the MCOs are part of the Medicaid program. They are not third-party insurers or health plans when they pay providers for the services and drugs provided to Medicaid participants. In this context, they are conduits for Medicaid funds. Thus, we hold that Plaintiffs' contention that HSD is responsible for the difference under the "Third[-]Party Liability" section of the provider agreements lacks merit. Thus, the district court properly dismissed the contract claim on this ground.

{72} Second, Plaintiffs argue that the provider agreements incorporate Section 27-2-16(B) because all relevant statutes are incorporated into contracts. Plaintiffs argue that, under this agreement, HSD should have ensured that Plaintiffs were paid in accordance with Section 27-2-16(B) and, by failing to do so, they breached the provider contracts.

{73} "A contract incorporates the relevant law, whether or not it is referred to in the agreement." *State ex rel. Udall v. Colonial Penn Ins. Co.*, 112 N.M. 123, 130, 812 P.2d 777, 784 (1991); *Durham v. Sw. Developers Joint Venture*, 2000-NMCA-010, ¶ 18, 128 N.M. 648, 996 P.2d 911 ("The provisions of applicable statutes are part of every contractual commitment."). We agree that the

provider agreements incorporated Section 27-2-16(B) as the statute is relevant and applicable to the contractual commitments involved in the provider agreements, namely, Plaintiffs' commitment to provide services and HSD's commitment to reimburse Plaintiffs. Moreover, the provider agreements specifically reference New Mexico's Medicaid payment structure in the section titled "Payment in Full," stating that the providers agree to "accept as payment in full the amounts paid in accordance with the reimbursement structure in effect for the period during which such services were provided as per 42 C.F.R. 447.15." There is no doubt that Section 27-2-16(B), as an integral part of the state's Medicaid payment structure for pharmacists, was incorporated into the contracts. Thus, Section 27-2-16(B)'s requirement that pharmacists be reimbursed with the AWP, plus a reasonable dispensing fee when the pharmacist dispenses a lesser expensive, therapeutic equivalent drug, is a term of the provider agreements with which HSD must abide.

{74} HSD argues that Plaintiffs do not have a right to sue for further reimbursement under this contract because of the above quoted section in the agreements titled, "Payment in Full." HSD contends that this term of the contract waives any right to sue for further reimbursement because Plaintiffs promised to "accept as payment in full the amounts paid in accordance with the reimbursement structure in effect for the period during which such services were provided as per 42 C.F.R. 447.15." HSD argues that, under 42 C.F.R. 447.15, the Medicaid program must be "limited to providers who agree to accept as payment in full the amounts paid by the agency." HSD construes this to mean that providers may not seek further reimbursement or additional payments from the state even when HSD fails to pay providers for their services with the amount required by state statute.

{75} This is not the meaning of this clause of the contract. If it were, HSD could pay providers nominal fees for their services, and the providers would have no recourse. Plaintiffs entered into the provider agreements, agreeing to accept as payment in full "amounts paid in accordance with the reimbursement structure in effect." They did not agree to accept amounts less than that provided by statute as payment in full. If Plaintiffs were paid in accordance with the reimbursement structure in effect—Section 27-2-16(B)—we would agree that they could not sue under this contract. As Plaintiffs contend that they were paid less than the minimum $3.65 dispensing fee for Section 27-2-16(B)'s applicable prescriptions, we conclude that Plaintiffs have a right to sue for the deficiency.

{76} HSD further argues the MMCS agreements between HSD and the MCOs included a provision that exempts the state from liability for shortfalls in payments made by the MCOs to Plaintiffs. This provision states that "[t]he subcontractor must accept payment from the MCO as payment for any services included in the benefit package, and cannot request payment from HSD or from Medicaid members . . . for services performed under the subcontract." HSD argues that "[t]his provision was to be incorporated in all contracts between the MCOs and their subcontractors. . . . Thus, [Plaintiffs] have independently contracted away any claim they might have for additional reimbursement by HSD." We disagree with HSD's waiver argument. Pursuant to the district court's order requiring HSD to agree that Plaintiffs did not waive their rights by agreeing to participate in managed care, Plaintiffs have not waived their rights under provider

agreements by contracting to participate and participating in managed care.

{77} Last, HSD opposes Plaintiffs' argument on the ground that Plaintiffs admitted in their fourth amended complaint that the provider agreements only apply to fee-for-service transactions and not to managed care. The paragraph HSD references in Plaintiffs' fourth amended complaint states that "HSD has entered into contracts with . . . Plaintiffs and the Class for the provision of Medicaid pharmaceutical services on behalf of . . . HSD in the fee-for-service portion of the Medicaid [p]rogram that HSD administers." We do not see how this historical explanation of the provider agreements' purpose amounts to an admission that the contracts only apply to fee-for-service Medicaid reimbursements. The provider agreements were signed during the period in which HSD only reimbursed providers in accordance with the fee-for-service reimbursement plan, prior to the implementation of managed care. Such information was relevant to their complaint. Furthermore, the provider agreements explicitly state that assent by providers is a precondition to any reimbursement by the Medicaid program whatsoever. The final clause of the contract states the provider agreements must be signed as "a precondition to participation in the New Mexico Medical Assistance Program . . . that the provision of services, the billing of services, [and] the receiving of payment for services under the program cannot be accomplished without the proper completion and Department approval of [the provider agreement]." Thus, we conclude that these agreements govern Plaintiffs' relationship with HSD with regard to any Medicaid reimbursement. We therefore reject HSD's argument with regard to the admission.

{78} In sum, Plaintiffs may bring a breach of contract cause of action against HSD for the Medicaid program's failure to reimburse Plaintiffs in accordance with Section 27-2-16(B). We remand to the district court to determine whether HSD, in its performance under the provider agreements, has "fail[ed] to perform a contractual obligation when that performance is called for." UJI 13-822 NMRA.

E. Plaintiffs' Contract Claim as Third-Party Beneficiaries

{79} Plaintiffs seek to enforce contracts between HSD and the MCOs on a third-party beneficiary theory. As we stated earlier, these contracts specifically incorporate Section 27-2-16(B). The contractual provisions are written in clear language, and there can be no doubt that the MCOs and HSD intended compliance with the statute to form part of their agreement. In their most current form, the contracts provide that subcontracts "for pharmacy providers shall include a payment provision consistent with [Section 27-2-16(B)] unless there is a change in law or regulation." There have been no such changes.

{80} Plaintiffs argue that the district court erred when it held that "an action against [the] MCOs on a third-party beneficiary theory would be inconsistent with the [conclusion] that Plaintiffs have no private right of action." HSD argues that Plaintiffs were not intended third-party beneficiaries as they are not referenced in the MMCS agreements and neither HSD nor any MCO intended or believed that the agreements had the purpose of benefitting Plaintiffs. In addition, the MCOs put forward a two-fold parry to HSD's argument that Plaintiffs are not intended third-party beneficiaries. First, they echo the order of the district court, arguing that because no private right of action is available under the statute, any attempt to

enforce it through the contract must fail. Second, they argue that any analysis of such a claim must conclude that Plaintiffs were not intended third-party beneficiaries to the contracts between the MCOs and HSD and, therefore, the district court was correct. We consider each argument in turn.

{81} We are unpersuaded by HSD's contention that Plaintiffs were not intended third-party beneficiaries because they were not referenced by name in the contract, and the contention that Defendants did not believe that the purpose of the contract was to benefit Plaintiffs. "A third-party is a beneficiary if the actual parties to the contract intended to benefit the third-party. The intent to benefit the third-party must appear either from the contract itself or from some evidence that the person claiming to be a third party beneficiary is an intended beneficiary." *Callahan v. N.M. Fed'n of Teachers-TVI*, 2006-NMSC-010, ¶ 20, 139 N.M. 201, 131 P.3d 51 (internal quotation marks and citations omitted). Whether the parties had the requisite intent is a question of fact, appropriate for the trier-of-fact to decide. *Moriarity v. Meyer*, 21 N.M. 521, 529-30, 157 P. 652, 655 (1916). The fact that Plaintiffs were not referenced by name in the contract does not prove by itself that the contract was not intended to benefit them. Section 27-2-16(B), which is incorporated into the contract, specifically references Medicaid providers who dispense drugs to Medicaid participants. Plaintiffs fall within this class of Medicaid providers and, thus, could be found by a trier-of-fact to be intended third-party beneficiaries on that basis. Moreover, Defendants' assertions that they did not intend to benefit Plaintiffs, as well as the fact they were not named in the contract, are evidence for the trier-of-fact to consider in determining whether Plaintiffs are intended third-party beneficiaries.

{82} Next, the MCOs' first argument has been disposed of by our analysis above, indicating that there is an implied cause of action under Section 27-2-16(B). Even if there was not an implied cause of action under that statute, such a fact would not bar their third-party beneficiary claim. The cases cited by the MCOs and relied upon by the district court generally hold that a third-party beneficiary claim is just another way of getting a certain remedy from a statute that does not provide that remedy. *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 86 (2d Cir. 2003) (refusing to consider third-party beneficiary claim where the plaintiffs had not sought relief under the prescribed statutory remedy); *Hodges v. Atchison, Topeka & Santa Fe Ry. Co.*, 728 F.2d 414, 415 (10th Cir. 1984) (disallowing the plaintiff's claim under a third-party beneficiary theory because the plaintiff refused to participate in arbitration as provided by statute and, stating in dicta, that the claim was "but another aspect of the implied right of action argument"); *Carson v. Pierce*, 546 F. Supp. 80, 87 (E.D. Mo. 1982) (reaching the merits of the contract claim, but holding that the plaintiffs were not intended third-party beneficiaries on the basis that the statute created no implied right of action); *Wogan v. Kunze*, 623 S.E.2d 107, 117, 120 (S.C. Ct. App. 2005) (holding that the non-existence of a private remedy under the statute prohibited the third-party beneficiary claim).

{83} Nonetheless, other courts have recognized such claims. *See Brogdon ex rel. Cline v. Nat'l Healthcare Corp.*, 103 F. Supp. 2d 1322, 1330 (N.D. Ga. 2000) (allowing a third-party beneficiary claim despite a lack of Congressional intent to create a private remedy under the Medicare and Medicaid Acts); *Found. Health v. Westside EKG Assocs.*, 944 So. 2d 188, 194-95 (Fla. 2006) (holding that the lack of a private right of action in a state statute did not foreclose the

plaintiff's third-party beneficiary claim); *Dierkes v. Blue Cross & Blue Shield of Mo.*, 991 S.W.2d 662, 668 (Mo. 1999) (en banc) (allowing a third-party beneficiary claim to enforce the inclusion of a statute in a contract where the statute provided no private cause of action).

{84} The first approach promoted by the MCOs is founded on the notion that allowing a third-party beneficiary claim is somehow identical to recognizing an implied right of action under the statute. For instance, in *Hodges*, the circuit court disallowed the plaintiff's third-party claim after finding that there was no implied right of action. 728 F.2d at 416. It held that such a claim was "but another aspect of the implied right of action argument." *Id.* Similarly, in *Wogan*, the court held that "[n]othing in the contract creates liability outside the Medicare Act. Because the Act does not confer a private right of action to sue . . . , we refuse to allow an action . . . on the ground [that the defendant] breached his contract" to comply with the Act. 623 S.E.2d at 119.

{85} The MCOs would have us adopt the reasoning of those jurisdictions as discussed above, which disallows third-party beneficiary claims of this type. We refuse to do so. The court in *Dierkes* reasoned:

> [The] plaintiffs are not suing solely for [the defendant's] violation of [the statute], although compliance with that section becomes an element of the claim to the extent it is part of [the defendant's] promise. Instead, [the] plaintiffs are suing for . . . breach of contract, . . . [a] claim[] existing independent of the foregoing statute.

991 S.W.2d at 668.

{86} The contract specifically includes the statutory requirement for payment to Plaintiffs pursuant to law. Plaintiffs seek to enforce this contract on a third-party beneficiary theory. Plaintiffs are not foreclosed from asserting a third-party beneficiary contract claim just because they may not do so directly under Section 27-2-16(B) when operation of the statute appears to be written as a contractual requirement for their reimbursement.

{87} In looking at Plaintiffs' third-party beneficiary claim in this case, the district court began by asking why HSD entered into contracts with the MCOs "in the first place." It then found, based on an interpretation of Section 27-2-16(B) and by analogy to cases from other jurisdictions, that the statute expresses a motivation to serve "the medical needs of the aged, blind, and disabled. This [motivation] makes it apparent that the beneficiaries of these services are Medicaid enrollees, not providers." Finally, though not completely clear from the record, the conclusion that the statute was intended to benefit Medicaid enrollees led the district court to reason that the contract term incorporating it could not have been intended to benefit Plaintiffs. The district court stated that "Plaintiffs are not third[-]party beneficiaries to the contracts between HSD and the MCOs[.]" We hold that this finding requires reversal.

{88} As we discussed above, when a district court considers a motion for judgment on the pleadings, it must "accept as true all facts well pleaded and question only whether the plaintiffs might prevail under any state of facts provable under the claim." *Garcia*, 106 N.M. at 760, 750 P.2d at 121. In their fourth amended complaint, Plaintiffs argue that "HSD has entered into valid written contracts with the MCOs for implementation of the

managed care program[.]" Furthermore, Plaintiffs assert that they "are third[-]party beneficiaries under [those contracts] as the unambiguous language of such contracts governs the benefits received by Plaintiffs in dispensing prescription medicines to Medicaid recipients."

{89} By finding that the Medicaid program as a whole was intended to benefit only Medicaid enrollees, the district court decided the merits of the third-party beneficiary claim. Essentially, it ruled on the intent of HSD and the MCOs in bargaining for the inclusion of the term in the contract. We hold that such a finding was a factual determination inappropriate to decide in a judgment on the pleadings. We reverse the district court on this issue and remand for additional factual development. Though we do not reach the merits of the issue, at this point, we see no reason why the contract term could not have been intended to benefit *both* Medicaid recipients *and* Plaintiffs. Certainly, if Medicaid recipients are to receive prescription medication, the participation of Plaintiffs is essential to the proper functioning of the system, and it is for this reason that we are unpersuaded by Defendants' arguments against the recognition of a third-party claim.

F. Plaintiffs May Bring the Unjust Enrichment Claim

{90} Plaintiffs sued the MCOs for unjust enrichment, alleging that "the MCOs failed to pay Plaintiffs the reimbursement rates to which they were entitled under [Section] 27-2-16(B) and were [thus] unjustly enriched by the amount of Medicaid reimbursements they wrongfully withheld[—]the difference between what [Section] 27-2-16(B) required and what they paid." The district court dismissed Plaintiffs' unjust enrichment claim on the ground that a contract existed between Plaintiffs and the MCOs and between the MCOs and HSD, barring equitable relief. The court subsequently dismissed Plaintiffs' contractual claims.

{91} Unjust enrichment allows recovery by an aggrieved party from another who has profited at the aggrieved party's expense. *Heimann v. Kinder-Morgan CO2 Co.*, 2006-NMCA-127, ¶ 20, 140 N.M. 552, 144 P.3d 111. In order to state a claim for unjust enrichment against the MCOs, Plaintiffs are required to allege, first, that the MCOs knowingly benefitted at Plaintiffs' expense and, second, that allowing the MCOs to retain this benefit would be unjust. *Id.* That Plaintiffs had a contractual relationship with the MCOs does not foreclose a claim for unjust enrichment. *See Danley v. City of Alamogordo*, 91 N.M. 520, 521, 577 P.2d 418, 419 (1978) (holding that a builder was free to pursue an unjust enrichment claim despite the fact that it was in privity with the defendant); *Platco Corp. v. Shaw*, 78 N.M. 36, 37, 428 P.2d 10, 11 (1967).

{92} Plaintiffs argue that the district court improperly dismissed their claim for unjust enrichment, and we agree. In its order granting Presbyterian's 2006 motion for judgment on the pleadings, the court dismissed Plaintiffs' claim because it found they possessed "a complete and adequate remedy at law. . . . In this case, the party's actions are regulated by a contract [between the MCOs and HSD,] and Plaintiffs are seeking damages for breach of that contract." (Internal quotation marks and citation omitted.) Thus, the district court dismissed Plaintiffs' unjust enrichment claim because it considered it "legally insufficient."

{93} To support its conclusion, the district court relied on *Sims v. Sims*, 1996-NMSC-

078, ¶ 28, 122 N.M. 618, 930 P.2d 153, but that case is not dispositive on these facts. In *Sims*, our Supreme Court considered the issue of whether the existence of a statutory cause of action foreclosed a traditionally recognized equitable claim. *Id.* ¶ 17. Holding that equity remained available in such a situation, the Court concluded that "[t]here is no requirement that the creation of a statutory remedy at law for a particular type of claim will automatically supplant an equitable remedy that addresses the same claim. [Any] major departure from the long tradition of equity practice should not be lightly implied." *Id.* ¶ 29 (internal quotation marks and citations omitted). Likewise, as the Court held in *Hydro Conduit Corp. v. Kemble*, 110 N.M. 173, 178, 793 P.2d 855, 860 (1990), "unjust enrichment constitutes an independent basis for recovery in a civil-law action, analytically and historically distinct from the other two principal grounds for such liability, contract and tort." *See Tom Growney Equip., Inc. v. Ansley*, 119 N.M. 110, 112, 888 P.2d 992, 994 (Ct. App. 1994).

{94} Thus, dismissal of Plaintiffs' claim for unjust enrichment on Presbyterian's motion for judgment on the pleadings was error. Plaintiffs assert that the MCOs entered into valid contracts with HSD, ones in which the MCOs promised to pay in accordance with Section 27-2-16(B). Plaintiffs allege further that HSD paid the MCOs to comply with the statute, but that those payments were at least partially retained by them. Such pleadings are enough to state a claim in equity for unjust enrichment, and the fact that Plaintiffs had contracts with the MCOs does not work to automatically foreclose it. Our system explicitly provides for alternative pleading of civil claims. Rule 1-008(E)(2) NMRA. We therefore leave open their claim for unjust enrichment.

G. Declaratory and Injunctive Relief Was Properly Denied

{95} Finally, Plaintiffs argue that their demands for declaratory and injunctive relief were improperly dismissed by the district court. We disagree. Our Supreme Court has held:

> It is the general rule that the granting of declaratory relief is discretionary, under both the federal and the state acts. Whether such jurisdiction is to be entertained rests in the exercise of sound judicial discretion by the [district] court, and its decision will not be disturbed on appeal, in the absence of a clear showing of abuse of that discretion.

Allstate Ins. Co. v. Firemen's Ins. Co., 76 N.M. 430, 434, 415 P.2d 553, 555 (1966) (internal quotation marks and citation omitted). Furthermore, injunctive relief is a harsh, drastic remedy that a district court "should issue only in extreme cases of pressing necessity and only where there is a showing of irreparable injury." *Leonard v. Payday Prof./Bio-Cal Comp.*, 2008-NMCA-034, ¶ 14, 143 N.M. 637, 179 P.3d 1245 (internal quotation marks and citation omitted). The district court in this case acted within its discretion having already entered an order keeping Plaintiffs' statutory entitlement alive, allowing access to a measure of relief that perhaps might exceed the reach of declaratory or injunctive judgments. Plaintiffs' demands for injunctive and declaratory relief essentially sought to remedy the underlying substantive claims. Because the outcomes of those substantive issues were unclear at the time the district court considered these equitable remedies, the district court did not abuse its discretion in denying them.

H. Class Certification Was Proper

{96} Because we reverse in part the orders of the district court, we now consider Cimarron's conditional cross-appeal. Specifically, Cimarron makes two arguments that Plaintiffs' class was improperly certified. First, Cimarron claims that allowing the MCOs to be added as Defendants after the original class certification results in a violation of its constitutional due process rights. Second, Cimarron claims the district court improperly applied the requirements for class certification under Rule 1-023 NMRA. We affirm the certification.

{97} Decisions to certify a class are reviewed for abuse of discretion. Abuse occurs when the district court "misapprehends the law or if [its] decision is not supported by substantial evidence." *Brooks v. Norwest Corp.*, 2004-NMCA-134, ¶ 7, 136 N.M. 599, 103 P.3d 39. "Within the confines of Rule 1-023, the district court has broad discretion whether or not to certify a class." *Id.* The rule lists four prerequisites to certification of a class action:

> (1) [Numerosity:] the class is so numerous that joinder of all members is impracticable;
>
> (2) [Commonality:] there are questions of law or fact common to the class;
>
> (3) [Typicality:] the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) [Adequacy of representation:] the representative parties will fairly and adequately protect the interests of the class.

Ferrell v. Allstate Ins. Co., 2008-NMSC-042, ¶ 9, 144 N.M. 405, 188 P.3d 1156 (internal quotation marks and citation omitted). Litigants attempting to certify a class must also meet one of three requirements under Rule 1-023(B). In this case, the pertinent requirement is that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Rule 1-023(B)(3). In certifying the class, the district court "must engage in a rigorous analysis of whether the Rule's requirements have actually been met." *Ferrell*, 2008-NMSC-042, ¶ 8 (internal quotation marks and citation omitted).

{98} As we stated above, the court certified the class in this case before the MCOs were added as Defendants. Thereafter, Plaintiffs, unopposed by HSD, argued that the MCOs were indispensable parties by virtue of the changed Medicaid administrative and payment scheme. They persuaded the district court to allow amendment of their complaint. The MCOs attacked the class certification. They filed briefs asking the court to decertify the class and included a number of supporting exhibits. As a result, the district court allowed discovery into "whether the class should be decertified." After hearing oral arguments on the issue, the district court concluded that the class certification was proper. The court stated that "[a]fter a review of the various motions to decertify the class, determine it to be void, to dismiss and to sever, I have determined that those motions will be denied."

{99} Cimarron argues that this scenario gives rise to a due process violation. We disagree. As case law demonstrates, post-certification amendments to include additional defendants typically only violate due process

where the subsequently added defendants do not receive an adequate opportunity to contest the certification and the allegations against them. *See In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1075, 1086 (6th Cir. 1996) (holding that the additional defendants could not be added after original class certification without having time to contest the certification); *Van Vels v. Premier Athletic Ctr. of Plainfield, Inc.*, 182 F.R.D. 500, 506-07 (W.D. Mich. 1998) (allowing post-certification amendment to include the additional defendants as long as they were given additional time for discovery and dispositive motions); *see Walker v. World Tire Corp.*, 563 F.2d 918, 921 (8th Cir. 1977) (concluding that courts may not "rule on the class action question without affording the parties notice and an opportunity to make a record on the issue" and stating that "[t]he propriety of class action status can seldom be determined on the basis of the pleadings alone").

{100} Both Plaintiffs and Cimarron cite *In re Am. Med. Sys.*, Inc., 75 F.3d at 1086, and we too believe that case provides the appropriate analytical framework for these facts. There, the plaintiffs received class certification, and the next month they moved to amend their complaint to include an additional defendant. *Id.* at 1075. Then, "[w]ithout any further discovery, briefing, or argument, the district judge issued an amended order of class certification." *Id.* The newly added defendant appealed, and the Sixth Circuit held that "[t]he district [court] failed in its duty to conduct a rigorous analysis . . . and clearly abused its discretion." *Id.* at 1086 (internal quotation marks omitted). Such a defendant must receive a meaningful opportunity to respond to the complaint, a chance to conduct discovery, time to brief the issues, and a hearing in which the issue may be argued. *Id.*

{101} Each of the above requirements were met in the present case. Once the district court granted Plaintiffs' motion to amend their complaint, the MCOs almost immediately challenged the class certification. The district court granted discovery to the MCOs on the issue of "whether, under the [s]econd [a]mended [c]omplaint, Plaintiffs have abandoned the class certification against the [s]tate . . . and whether the MCOs, as new Defendants, are subject to the previous class certification[.]" Likewise, a hearing was held where the parties were given an opportunity to argue the issue and, on June 5, 2003, more than two years after Plaintiffs moved to add the MCOs as Defendants, the district court held that class certification was proper as to the MCOs. Under such conditions, where the MCOs had adequate notice and a chance to fully respond, we hold that no violation of their due process rights occurred.

{102} We are similarly unpersuaded by Cimarron's argument that the burden of proof as to class certification was unlawfully shifted to their shoulders. Our Supreme Court held:

> We can properly consider only those facts which appear in the transcript on appeal, which in this case is identical with the record proper in the district court. Upon a doubtful or deficient record[,] we indulge every presumption in support of the correctness and regularity of the decision of the trial court. Every reasonable intendment and presumption are resolved in favor of the proceedings and judgment in that court.

State ex rel. Alfred v. Anderson, 87 N.M. 106, 107, 529 P.2d 1227, 1228 (1974) (citations omitted).

{103} Given that Cimarron provides us with no citations to the record tending to prove its allegation, we must presume that the district court applied the correct burden of proof, requiring Plaintiffs to establish that class certification remained proper after the MCOs were added. *See Brooks*, 2004-NMCA-134, ¶ 10 (stating that the plaintiffs beared the burden of proof to demonstrate that the requirements of Rule 1-023 were met).

{104} We also hold that the district court did not abuse its discretion in its application of Rule 1-023. Plaintiffs clearly have standing to sue. They meet the requirements of numerosity, commonality, typicality, and adequacy of representation. Furthermore, it is clear to us that the Rule 1-023(B)(3) requirements of predominance and superiority were satisfied. Substantial evidence supports the district court's conclusions on these matters.

{105} The requirements of standing have been met. In order to demonstrate standing, a plaintiff must demonstrate "(1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 16, 130 N.M. 368, 24 P.3d 803 (internal quotation marks and citation omitted). Standing is a "threshold legal issue" to class certification. *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1022 (11th Cir. 1996). Cimarron alleges that because Plaintiffs contracted with the PBMs and not directly with the MCOs themselves, they lack standing to sue. This proposition is unsupported by precedent in Cimarron's briefs. Indeed, Plaintiffs alleged direct economic injuries against HSD and the MCOs because they were paid less than the statutory requirement. Such injuries were allegedly attributable to actions of either HSD, the MCOs, or both, and would presumably be cured if those parties were required to pay. That some Plaintiffs were required to contract with a PBM who, in turn, contracted with an MCO, does not defeat standing. In such a situation, a causal connection between the injury and challenged conduct may still exist and because the MCOs provide no law to the contrary, we hold that standing is not defeated by the mere existence of contracts between Plaintiffs and the PBMs. By the same token, some Plaintiffs had a direct relationship with an MCO; all allege the same right to payment of Medicaid reimbursement monies.

{106} We hold that substantial evidence supports the district court's conclusions as to numerosity, typicality, commonality, and adequacy of representation. Rule 1-023(A). This case provides an almost textbook example of a case proper for class certification. First, the rule requires that the number of potential plaintiffs be so high "that joinder of all members is impracticable[.]" Rule 1-023(A)(1). During class certification, Plaintiffs estimated that the number of potential plaintiffs would be between two and three hundred. Further, those potential plaintiffs were widely dispersed across the entire state. In the event that certification had been denied, those potential plaintiffs would have been greatly inconvenienced by having to individually join in the litigation, many from remote locations. Second, the rule requires that there be "questions of law or fact common to the class[.]" Rule 1-023(A)(2). Here, each class member argues that Section 27-2-16(B) allows for certain rights under both the statute and common law. The relationship of each with both HSD and the MCOs, and the facts necessary to decide the case as to each class member, is essentially identical. *See Cottrell v. Lopeman*, 119 F.R.D. 651, 657 (S.D. Ohio 1987) (stating that commonality is met where a regulatory

scheme common to all class members has been established). Third, the rule requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class[.]" Rule 1-023(A)(3). Each member in this class seeks an interpretation of Section 27-2-16(B) that will require either HSD or the MCOs to pay. Likewise, each seeks damages, though injured in a different sum, to recover the money that went unpaid under the statute. Fourth, Rule 1-023(A)(4) requires that "the representative parties [must] fairly and adequately protect the interests of the class." No evidence was presented below establishing that the interests of any individual class members were contrary to those of the entire class. Furthermore, counsel for Plaintiffs demonstrated that they were qualified and experienced enough to conduct the representation. When the MCOs were added as Defendants, little changed. Plaintiffs again asserted claims based on a common statute and involving a common set of factual circumstances. Under those conditions, we hold that the district court did not abuse its discretion in finding that the requirements of Rule 1-023(A) were met.

{107} Nor did it abuse its discretion in finding that the requirements of predominance and superiority were met. Under Rule 1-023(B)(3), the district court is required to find "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Cimarron asserts that because Plaintiffs in this case dealt with many different PBMs and because each suffered a different amount of economic injury, individual issues predominate over the larger issues of the class as a whole. This disregards the big picture of the issue at stake, and we disagree. "A single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions." *Armijo v. Wal-Mart Stores, Inc.*, 2007-NMCA-120, ¶ 32, 142 N.M. 557, 168 P.3d 129 (internal quotation marks and citation omitted). Such is the case here, where the claims of each class member involve a statutory interpretation of Section 27-2-16(B), a determination of whether that statute survived the transition to managed care, and a conclusion as to the legal effect of that statute's inclusion in contracts between HSD and the MCOs. Certainly, minor differences will exist among class members in this case, but the critical issues described above remain operative and predominate among all class members. In other words, in order to prevail, each class member will need a holding as to the major issues common to all. Each can then demonstrate the extent of its injury. Those are considerations far removed from a judgment on the pleadings.

{108} We find nothing in the record to indicate the existence of any class member interested in maintaining a separate action. Judicial resources will be saved by certification, the number of class members is manageable, and the damages of each class member can be calculated in a similar manner.

{109} In addition, Cimarron contends that the class certification resulted in "one-way intervention." Cimarron argues that Plaintiffs' decision to submit their motion for partial summary judgment for resolution after the original class certification, but before joining the MCOs, constituted impermissible "one-way intervention." One-way intervention is the principle that potential members of a class may not wait until after the resolution of the case on the merits before joining the class. *Valley Utils., Inc. v. O'Hare*, 89 N.M. 262, 264-65, 550 P.2d 274, 276-77 (1976). To do

so would be to "invite[] non[-]participating parties to share in the spoils of a judgment obtained by others even though those absent parties will not be bound by the judgment if they [subsequently] decide to bring another action." *Id.* at 265, 550 P.2d at 276.

{110} Cimarron fails to explain how one-way intervention is applicable to this situation, citing case law that expressly applies the principle solely to intervening plaintiffs in class actions. *See id.* at 264, 550 P.2d at 276 (holding that "only those members of [the plaintiff] class who joined the suit prior to the verdict are either bound by it, or allowed to benefit from it"); *see also Peritz v. Liberty Loan Corp.*, 523 F.2d 349, 353-54 (7th Cir. 1975) (describing one-way intervention as the problem created by potential class members waiting for a resolution of the merits before deciding to join the lawsuit). One-way intervention is inapplicable here as non-parties are not attempting to intervene and share in the spoils of a judgment already obtained by others in this case.

{111} As part of this one-way intervention argument, Cimarron further contends that Plaintiffs received "an impermissible preview of the merits before obtaining class certification binding all . . . parties in the case" because Plaintiffs obtained a partial decision on the merits that "[Section] 27-2-16(B) . . . applied to the pharmacy contracts at issue[.]" Even though the court decided that the statute applied to pharmacy contracts, this decision about a threshold legal matter was outside the scope of prohibited one-way intervention. As stated above, our Supreme Court prohibits the practice of intervention after a final judgment has been rendered, so as to prevent non-participating prospective plaintiffs from sharing in the "spoils of a judgment." *Valley Utils.*, 89 N.M. at 265, 550 P.2d at 277. The judgment at issue here was about a threshold legal matter that did not result in a final judgment against HSD or the MCOs. Thus, Plaintiffs' litigation of Section 27-2-16(B)'s applicability, prior to joining Cimarron, did not result in one-way intervention. One-way intervention is inapplicable to both the facts of this case and the decision at issue.

IV. CONCLUSION

{112} Based on the foregoing analysis, we affirm in part, reverse in part, and remand this case for further proceedings.

{113} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

JONATHAN B. SUTIN, Judge

Certiorari Denied, April 18, 2012, No. 33,518

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-054

Filing Date: February 20, 2012

Docket No. 29,538

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ERIC FIERRO,

Defendant-Appellant.

Gary K. King, Attorney General
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Santa Fe, NM

for Appellee

Jacqueline L. Cooper, Chief Public Defender
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Santa Fe, NM

for Appellant

OPINION

WECHSLER, Judge.

{1} Defendant Eric Fierro appeals his convictions for eight counts of first degree criminal sexual penetration (CSP), sixteen counts of second degree CSP, four counts of third degree criminal sexual contact (CSC), and two counts of bribery of a witness, all connected to his actions in sexually abusing his step-daughter, Vanessa, over a period of twelve years. On appeal, he claims that the fifty-five-month period between his arrest and second trial violated his right to a speedy trial, and, in the alternative, he claims ineffective assistance of counsel. We disagree that Defendant's speedy trial rights were violated because a significant portion of the delay to trial was due to Defendant's repeated claims that his counsel was ineffective and to the district court's justifiable efforts to ensure that Defendant received adequate representation. We further hold that counsel was not ineffective. Therefore, we affirm Defendant's convictions.

BACKGROUND

{2} Defendant was arrested on June 24, 2004, and indicted on multiple counts of CSP, CSC, and other criminal behavior relating to the alleged sexual abuse of Vanessa from the time she was six years old until she was eighteen. He was arraigned on July 19, 2004, and public defender Michael Rosenfield entered an appearance on his behalf and made a speedy trial demand on August 13, 2004.

{3} On December 16, 2004, the State filed the first stipulated Rule 5-604 NMRA petition for a six-month rule extension because it was waiting for DNA results and because Defendant was without counsel due to Rosenfield's reassignment to a different division of the public defender's office. In the petition, the parties characterize the case as a "[c]omplicated" one "involving allegations of long term sexual abuse by [D]efendant of his

step-daughter." On February 1, 2005, Donald Kochersberger entered his appearance on behalf of Defendant and demanded a speedy trial.

{4} The State filed a second opposed petition for a six-month rule extension on April 1, 2005, because the DNA results were still not available, preliminary plea negotiations were ongoing, and Kochersberger had recently entered his appearance. In April 2005, the State received the DNA results establishing that Defendant had fathered a child with Vanessa, and the State provided the results to Defendant.

{5} On July 1, 2005, the State filed a third opposed petition for a six-month rule extension outlining some discovery provided to Defendant and stating that preliminary plea negotiations were ongoing. Although Defendant objected to the petition, he agreed during pretrial conferences on July 7, 2005 and August 3, 2005, that the case was not ready for trial.

{6} On September 23, 2005, the State filed a fourth opposed petition for a six-month rule extension followed by an addendum on October 13, 2005. It noted that the parties were working together on discovery issues and they expected to begin witness interviews within a month, but the parties would not be ready for trial before early 2006, and court staff had yet to set a trial date due to a family illness. Although Defendant objected to the extension, he agreed that the parties would not be ready for trial until early 2006. Trial was set for March 27, 2006.

{7} In December 2005, Eric Turner, Kochersberger's law partner, took over Defendant's representation, and on February 3, 2006, Turner filed a notice that he would be unavailable for trial on March 27, 2006. Despite his unavailability for trial, Turner filed a motion to dismiss for violation of Defendant's speedy trial rights on February 22, 2006.

{8} On March 2, 2006, Defendant filed a pro se motion to represent himself, stating that no progress had been made in his case and his efforts to participate in his defense had been rebuffed by counsel. On March 13, 2006, Turner submitted a stipulated motion to continue the trial. The following day, Defendant personally asked the district court to grant Turner more time to prepare for trial, and he agreed to a six-month extension.

{9} The State urged the district court to set trial as soon as Turner returned from vacation, but the court granted the continuance and reset trial for July 10, 2006. On March 22, 2006, the State filed a fifth stipulated petition for a six-month rule extension because Defendant had obtained new counsel in mid-December 2005 and the March 27, 2006 trial setting had to be vacated due to defense counsel's unavailability.

{10} On April 13, 2006, Defendant appeared before the district court on his motion to proceed pro se and a speedy trial motion. He accused Turner and Kochersberger of malpractice, failure to communicate, failure to investigate, and failure to assert what Defendant believed to be legitimate issues. Turner conceded that he had been unable to establish an attorney-client relationship with Defendant. The State agreed that Defendant should have different counsel if his relationship with Turner was irreparably damaged, but it expressed concerns because a new attorney would need time to get up to speed on the "massive amount of discovery" that had been produced, and speedy trial problems might arise if the July 10 setting could not be maintained. The court allowed

Turner to withdraw due to the breakdown in the attorney-client relationship, but it stressed the urgency of having a new attorney immediately assigned to Defendant due to the upcoming trial date. After extensively investigating Defendant's capacity to represent himself, the district court urged Defendant to consult with a new attorney, and it refused to consider Defendant's speedy trial motion until he acquired new counsel, which the court hoped would happen within the next few days.

{11} Turner withdrew on April 19, 2006, and Defendant filed an addendum to his pro se speedy trial motion on May 9, 2006, indicating that a potential witness, Aaron Chavez, was shot and killed on April 17, 2006.

{12} On or around May 19, 2006, David Pottenger was appointed to represent Defendant, but he never entered an appearance or made any filings on Defendant's behalf. Defendant filed a pro se "notice of appeal for interlocutory appeal for motion to dismiss for speedy trial" on June 28, 2006. In late June, the State inquired whether Pottenger would be ready for trial on July 10, 2006, and it was informed first that Pottenger was in the hospital and later that he had lost his contract with the public defender's office.

{13} Troy Prichard appeared on behalf of Defendant on July 10, 2006, the date set for trial, and proceedings were continued to give Prichard an opportunity to prepare. Although Prichard was not ready for trial, he filed a speedy trial demand along with his appearance. On July 24, 2006, the district court set trial for December 4, 2006, and the State filed the sixth stipulated petition for a six-month rule extension due to the replacement of Defendant's counsel.

{14} Although represented by Prichard, Defendant filed a pro se motion to amend his speedy trial motion on July 20, 2006, claiming that his counsel, both former and current, were ineffective. Appearing before the district court on September 26, 2006, Defendant claimed that Prichard was not keeping in contact with him and asked for dismissal on ineffective assistance grounds. The court instructed Defendant to file a motion stating these contentions.

{15} On November 17, 2006, approximately four months after Prichard had appeared on Defendant's behalf and less than a month before trial, the court met with Defendant and Prichard to discuss some of Defendant's pro se motions and his dissatisfaction with Prichard. Defendant accused Prichard of failing to communicate and rendering ineffective assistance by failing to seek dismissal on speedy trial grounds, failing to investigate, and having a conflict of interest. Defendant claimed that he had a problem with the public defender's office and asked for Prichard to be dismissed so he could retain private counsel. He requested a six-month rule extension to retain other counsel or to prepare to defend himself.

{16} Prichard informed the district court of actions he had taken on behalf of Defendant, including reviewing the file, hiring a private investigator who had interviewed witnesses, speaking with Defendant and the district attorney, and explaining the State's "comprehensive" plea offer to Defendant. He explained that he had counseled Defendant to stop filing pro se motions and that some of his issues were not worth pursuing, but Defendant refused his advice and was unhappy with Prichard for informing him that certain filings were not in his best interest.

{17} At the hearing, the district court

noted that it would be the fifth time Defendant's counsel would be replaced for issues that could not be attributed to the State, and, if the court allowed Prichard to withdraw, Defendant would be injecting additional delay which could not be attributed to the State for purposes of speedy trial. The court instructed Defendant that he needed to work with the counsel assigned to him, but Defendant insisted that he needed trustworthy replacement counsel outside of the public defender's office, and he wanted to postpone trial an additional six months in order to obtain private counsel. The State objected due to speedy trial concerns and the numerous previous continuances. However, the court continued the trial to give Defendant an opportunity to obtain new counsel, while cautioning him that each request for an extension or continuance would weigh against him in terms of any speedy trial claims.

{18} On December 13, 2006, the State filed a seventh stipulated petition for a six-month rule extension so that Defendant could obtain new counsel even though the State opposed the extension. At the status conference the following day, Defendant had yet to obtain new counsel but continued to want to dismiss Prichard, claiming that he would not come to the jail to meet with Defendant. Defendant stated that his father was trying to obtain private counsel for him and wanted an additional week for him to do so.

{19} Prichard claimed he had done his best but was unable to satisfy Defendant and agreed his dismissal was warranted due to the severe breakdown in the attorney-client relationship. The district court permitted Prichard to withdraw over the State's objection. The State then stressed the need for an immediate appointment of new counsel and a trial date, offered its assistance in contacting the chief public defender so that counsel could be appointed for Defendant, and urged the district court to schedule a conference in two weeks to check Defendant's progress. The district court declined to hear any of Defendant's motions until he was represented by counsel. Trial was set for May 14, 2007.

{20} Defendant filed a pro se petition for writ of mandamus on January 3, 2007, claiming his speedy trial motions had yet to be heard, he had received ineffective assistance of counsel, and he was entitled to dismissal. At a status conference on January 4, 2007, the State explained its efforts in assisting to obtain counsel for Defendant. Defendant asked why his various pro se filings had not been addressed, and the district court informed Defendant that he had not been authorized to proceed pro se because he was supposed to be obtaining a private attorney. The State wanted a firm deadline for Defendant to obtain private counsel, but the district court refused.

{21} On January 8, 2007, Raul Lopez entered his appearance on behalf of Defendant and demanded a speedy trial. He withdrew and substitute private counsel, Houston Ross, entered his appearance on behalf of Defendant on March 29, 2007, and demanded a speedy trial. On the day set for trial, May 14, 2007, Ross moved for a continuance on the grounds that he needed more time to prepare. The State was ready for trial, but did not oppose the continuance, and it was granted. Despite his recent request for a continuance in order to prepare, Ross filed a motion to dismiss for violation of Defendant's speedy trial rights on June 7, 2007.

{22} The State filed its eighth opposed petition for a six-month rule extension on June 28, 2007. The petition stated that an extension was needed because there had been a large number of defense attorneys,

Defendant was not ready to try the case at the May 14, 2007 setting, although the State was ready, and Defendant had filed a number of motions that were unlikely to be heard within the current six-month period, which expired on July 10, 2007.

{23} On August 2, 2007, the district court conducted a hearing on Defendant's speedy trial motion and, as discussed in greater detail in the analysis of Defendant's speedy trial claims, denied the motion. At the same time, the State announced it was preparing an amended indictment to omit charges referring to time periods when Defendant and his family lived outside of Bernalillo County. On September 4, 2007, the case was reassigned from Judge J. Michael Kavanaugh to Judge Charles Brown, and trial was set for December 10, 2007.

{24} On September 11, 2007, though represented by Ross, Defendant filed a pro se addendum to the June 7, 2007 speedy trial motion, claiming that there were systematic problems in the public defender's office and that he had criticisms and concerns regarding Ross's representation, including Ross's presentation of Defendant's speedy trial arguments during the August 2, 2007 hearing. On September 21, 2007, Defendant also filed a motion to be allowed to proceed pro se, contending that Ross had an undisclosed interest with the public defender's office and had failed to present all of Defendant's arguments at the speedy trial hearing. On November 13, 2007, Ross filed a motion to reconsider the denial of the speedy trial motion, arguing that the district court had improperly weighed the speedy trial factors at the August 2, 2007 hearing.

{25} On December 7, 2007, Ross filed a motion to withdraw and to appoint a public defender to represent Defendant. Ross claimed that Defendant had created a conflict of interest and an adversarial relationship by claiming that Ross was ineffective, thus making it impossible for him to represent Defendant, that Defendant had stopped paying his fees, and that Defendant's father had filed a complaint against Ross with the State Bar of New Mexico. On December 10, 2007, the date set for trial, the State informed the district court that it was ready for trial, but the court continued the trial over the State's objection and permitted Ross to withdraw.

{26} On December 12, 2007, the State filed a ninth petition for a six-month rule extension because Defendant was without counsel and not ready to proceed to trial. The district court then set trial for June 23, 2008. The Supreme Court granted the extension, but it admonished the parties that the "June 23, 2008 trial setting will NOT be continued, extended or otherwise changed without express concurrence of Justice [Richard] Bosson" and the public defender representing Defendant would not be changed without the concurrence of Justice Bosson.

{27} John McCall was appointed to represent Defendant in February 2008. Although not ready for trial, McCall filed a motion to dismiss for speedy trial violation on June 16, 2008. A hearing was held on June 17, 2008, but the district court deferred ruling on the motion.

{28} In June and July 2008, McCall sought continuances, claiming he was not ready for trial because the defense needed to conduct more witness interviews and because of his health concerns. At the hearing on July 7, 2008, McCall informed the district court that he wanted a continuance and claimed that it would be ineffective assistance of counsel if he were to proceed to trial at that point. He outlined a number of matters that he believed

needed further investigation. The State explained how the information McCall was seeking had already been provided to the defense or was readily available. During the same hearing, McCall, on behalf of Defendant, again sought dismissal on speedy trial grounds, but the district court denied the motion.

{29} Defendant sought a tenth petition for a six-month rule extension from the Supreme Court, which the State opposed. The district court postponed trial until August 18, 2008, based in part on defense counsel's health concerns.

{30} Trial began on August 18, 2008, but the district court declared a mistrial on the fourth day after Vanessa improperly commented that her baby had been fathered by Defendant and impermissibly referred to Defendant's actions in having sex with her outside of Bernalillo County. The State moved for a new trial setting at the court's earliest convenience, and trial was set for September 16, 2008. Defendant moved to vacate the trial setting because he had not yet served witness subpoenas. The district court vacated the trial setting over the State's objection.

{31} The State requested a trial date of November 17, 2008, but Defendant objected because he was not ready due to a failure to serve witness subpoenas. Defendant again sought dismissal on speedy trial grounds, but the district court denied his motion.

{32} Trial commenced on January 12, 2009, and Defendant again sought dismissal on speedy trial grounds. The district court denied the motion, and a jury convicted Defendant of the charges. Defendant raised his speedy trial contentions one final time in a motion for new trial, which the district court denied.

SPEEDY TRIAL

{33} Defendant argues that the fifty-five-month delay between his arrest and second trial violated his right to a speedy trial. "The right to a speedy trial is a fundamental right of the accused." *State v. Garza*, 2009-NMSC-038, ¶ 10, 146 N.M. 499, 212 P.3d 387. In considering a speedy trial claim, New Mexico has adopted the balancing test articulated by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), which sets forth four factors to be considered when determining whether a defendant's speedy trial rights were violated: "(1) the length of delay, (2) the reasons for the delay, (3) the defendant's assertion of his right, and (4) the actual prejudice to the defendant." *Garza*, 2009-NMSC-038, ¶ 13 (internal quotation marks and citation omitted). "These four factors are interrelated and must be evaluated in light of other relevant circumstances in the particular case. No one factor constitutes either a necessary or sufficient condition to finding a deprivation of the right to a speedy trial." *State v. Johnson*, 2007-NMCA-107, ¶ 5, 142 N.M. 377, 165 P.3d 1153 (internal quotation marks and citation omitted).

{34} On appeal, we defer to the district court's factual findings, but then "independently evaluate the four *Barker* factors to ensure that the constitutional right has not been violated." *Id.* In this case, although Defendant's speedy trial claim was considered five times between August 2, 2007, and March 6, 2009, the district court's most comprehensive analysis of Defendant's speedy trial claims occurred during the August 2, 2007 hearing. Therefore, to the extent pertinent facts remained unchanged since August 2, 2007, we give deference to, and rely

on, the district court's findings at that hearing.

Length of Delay

{35} On appeal, we consider the length of delay as both "a threshold inquiry that triggers the rest of the analysis" and "as part of the balancing test itself." *State v. Stock*, 2006-NMCA-140, ¶ 13, 140 N.M. 676, 147 P.3d 885. We begin with the threshold inquiry.

{36} The time between Defendant's arrest on June 24, 2004, and the start of trial on January 12, 2009, was almost fifty-five months. The district court found Defendant's case to be of intermediate complexity, and a delay of fifteen months is presumptively prejudicial in intermediate cases, thus triggering a need to consider of all of the *Barker* factors. *See Garza*, 2009-NMSC-038, ¶¶ 23, 48. In balancing a delay of almost forty months beyond the bare minimum, this factor weighs heavily in Defendant's favor and against the State. *See id.* ¶ 24 ("[T]he greater the delay the more heavily it will potentially weigh against the [s]tate.").

Reasons for the Delay

{37} We next consider "[t]he reasons for a period of the delay [that] may either heighten or temper the prejudice to the defendant caused by the length of the delay." *Id.* ¶ 25 (internal quotation marks and citation omitted). We allocate the reasons for the delay to each side and determine the weight attributable to each reason. *See State v. Plouse*, 2003-NMCA-048, ¶ 45, 133 N.M. 495, 64 P.3d 522.

{38} The State is responsible for the period from the arrest until the time the DNA results were available, which accounts for approximately ten to eleven months of the delay. In assigning weight to this period, Defendant claims it was "entirely wasted" because the DNA results concerned events occurring outside of Bernalillo County and were therefore inadmissible. We disagree because, at the time the State sought DNA testing, it had not been established that the results would be inadmissible. Moreover, the district court did not unconditionally exclude the DNA test results establishing that Defendant fathered Vanessa's child, but it instead ruled that the evidence might be admissible to negate any claims by Defendant that he never had sex with Vanessa or to establish Vanessa's credibility. Finally, the State was not solely responsible for this delay because during the same time period, Defendant changed counsel, and his new counsel needed time to prepare for trial. Thus, although the initial period from arrest to when the DNA results were provided weighs against the State, it does so minimally. *See Garza*, 2009-NMSC-038, ¶ 27 (recognizing that some pretrial delay is inevitable and justifiable); *cf. State v. Parrish*, 2011-NMCA-033, ¶ 25, 149 N.M. 506, 252 P.3d 730 (weighing a four-and-one-half-month period during which "judges were reassigned and the [s]tate produced discovery, identified witnesses, and requested discovery from [the d]efendant" neutrally after determining that "the case progressed with customary promptness during this period").

{39} The period from receipt of the DNA results, approximately April or May 2005 to March 2006, weighs neutrally because the parties were apparently working on discovery and obtaining a possible sex offender evaluation of Defendant by Dr. Moss Aubrey, and Defendant agreed the case would not be ready for trial until early 2006. *See Garza*, 2009-NMSC-038, ¶ 27; *cf. State v. Valencia*, 2010-NMCA-005, ¶ 21, 147 N.M. 432, 224 P.3d 659 (stating that any delay occasioned by jointly requested continuances weighs neutrally).

{40} From March 2006 until the first trial on August 18, 2008, we attribute the delay to Defendant because the State was prepared for trial as of March 2006 and did everything it could to move the case toward trial. However, Defendant was allowed to change counsel at crucial times, which necessitated repeated continuances so defense counsel could adequately prepare a defense, which in turn resulted in Defendant being unprepared for trial until August 18, 2008. *See Vermont v. Brillon*, __ U.S. __, 129 S. Ct. 1283, 1290-92 (2009) (stating the general rule that delays sought or caused by defense counsel are ordinarily attributed to the defendant and applying that rule to hold that the delay caused by the failure of assigned counsel to move a case forward by requesting extensions and continuances should not be attributed to the state); *cf. State v. Stefani*, 2006-NMCA-073, ¶ 18, 139 N.M. 719, 137 P.3d 659 (noting that "when the constitutional right to a speedy trial is at issue, delays attributed to [the d]efendant weigh against the [d]efendant in later claims of violation"); *State v. Mascareñas*, 84 N.M. 153, 155, 500 P.2d 438, 440 (Ct. App. 1972) (recognizing that "where a defendant causes or contributes to the delay, or consents to the delay, he may not complain of a denial of the right" to a speedy trial).

{41} Primarily relying on *Stock*, Defendant argues that the delays caused by his changes in counsel should not be attributed to him but instead should weigh against the State, because it is the State's responsibility to ensure that Defendant goes to trial in a timely manner and the State's burden to provide counsel to an indigent defendant. In *Stock*, the district court had attributed over two-thirds of the three-and-a-half-year delay to "the nearly complete lack of attention to the case on the part of both the [s]tate and defense counsel." 2006-NMCA-140, ¶ 20. That court had found that the public defenders were working under extreme and unworkable case load levels and weighed the delay caused by the inactions of the public defenders against the state. *Id.* ¶¶ 8, 10, 26. Furthermore, the district court questioned whether the defendant agreed to defense counsel's continuances because, given that he had the intellectual capacity of a twelve year old, it was unclear whether the defendant was capable of acquiescing to the delays. *Id.* ¶ 11. Moreover, because the defendant was not present at the hearings, he was never given a chance to express his frustration with the delays. *Id.*

{42} On appeal, this Court agreed with the district court's analysis. *Id.* ¶ 29. While recognizing the general rule that a defendant is held accountable for the actions of his or her attorney, this Court nonetheless also recognized that, in certain cases, attorney neglect could not be held against a defendant. *Id.* ¶¶ 21-22; *see Brillon*, 129 S. Ct. at 1292 (recognizing an exception to the general rule that delay caused by assigned counsel is attributed to the defendant if the delay results in a "systemic breakdown in the public defender system" (internal quotation marks and citation omitted)). Further, this Court concluded that *Stock* was such a case and affirmed the district court's conclusion that the reasons for delay must weigh against the state. *Stock*, 2006-NMCA-140, ¶¶ 26, 29.

{43} We are not convinced that this case presents circumstances warranting the conclusion reached in *Stock*. In this case, the district court did not find that the delay was caused by the poor performance of Defendant's attorneys, their neglect, or any institutional deficiencies of the public defender system. *Cf. Brillon*, 129 S. Ct. at 1292-93 (holding that the Vermont court improperly attributed delays caused by defense counsel to the state in the absence of information in the record suggesting that

institutional problems caused part of the delay). Instead, the district court found that the numerous continuances and extensions were due to Defendant's actions in changing counsel and questioning counsel's strategies. Unlike in *Stock*, the district court specifically found that neither the State nor defense counsel sat on their hands, and even Defendant's own counsel opined that there was no fundamental breakdown in the public defender system.

{44} In addition, unlike in *Stock* in which the state facilitated the delay by doing "little or nothing to ascertain what was happening in the case or to move the case forward[,]" 2006-NMCA-140, ¶ 25, in this case, the State was ready for trial and trial was set six times before August 2008, only to be vacated so that Defendant could obtain new counsel or his newly appointed counsel could prepare for trial. Also, unlike in *Stock*, Defendant in this case was fully capable of asserting his rights and considering and acquiescing to the actions of his public defenders and private counsel, and the record is replete with examples of pro se pleadings and arguments made by Defendant on his own behalf, thus illustrating his capabilities. It was often at Defendant's personal request or as a result of his own actions that proceedings were delayed.

{45} Defendant also contributed to the delay during this period because the district court was reluctant to allow Defendant to appear pro se or to decide important, potentially dispositive motions when Defendant was without the benefit of counsel. Our review of the proceedings below indicates that the district court and the State were trying to ensure that Defendant was provided with effective, prepared counsel in a response to Defendant's repeated assertions that he should represent himself or that his counsel was failing to provide adequate representation. *See Garza*, 2009-NMSC-038, ¶ 11 (recognizing that, although "speed is an important attribute . . . , if either party is forced to trial without a fair opportunity for preparation, justice is sacrificed to speed [and] [w]e cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate" (alteration, internal quotation marks, and citations omitted)). While we agree with Defendant that it is ultimately the State's burden to bring a criminal defendant to trial in a timely manner, we are unpersuaded that the State failed to meet its burden in this case.

{46} We are also unpersuaded by the out-of-state authority cited by Defendant in support of his contention that this delay must be attributed to the State. In one case, the delay was not caused by the need for defense counsel to adequately prepare for trial. *See Middlebrook v. State*, 802 A.2d 268, 275 (Del. 2002) (characterizing the trial court's failure to rule on the defendant's motion to suppress for over a year as "inexcusable" and holding the state responsible for the court's failure to rule on the motion and the nine-and-one-half-month delay resulting from the failure of the court or the state to oppose defense counsel's vacation plans despite the long period during which charges had been pending). The other does not even concern a speedy trial matter. *See People v. Brown*, 235 N.E.2d 562, 564-65 (Ill. 1968) (reversing the trial court's decision to dismiss the defendant's appeal for want of prosecution when the defendant's counsel was at fault).

{47} Moreover, we cannot agree with Defendant's central contention that he should not be held accountable because the delay was caused by his attorneys and the "overburdened [p]ublic [d]efender system[.]" Nor was Defendant being forced to choose between his right to a speedy trial and his right to effective

assistance of counsel. To the contrary, the district court was receptive to Defendant's assertions of perceived deficiencies in his counsel, and it continued to grant continuances to assist Defendant even when the State expressed concerns about speedy trial problems and even when the State objected to additional continuances. The period of delay between March 2006 and trial in August 2008 weighs against Defendant. *See Brillon*, 129 S. Ct. at 1292-93.

{48} Turning to the time period between mistrial and retrial, we note that the State immediately sought retrial, but additional delay resulted from defense counsel's inability to serve subpoenas. The district court found that trial was set as soon as possible due to Defendant's need to subpoena witnesses and scheduling conflicts. Therefore, this period should weigh neutrally. *See State v. O'Neal*, 2009-NMCA-020, ¶¶ 20-21, 145 N.M. 604, 203 P.3d 135 (weighing period between declaration of mistrial due to possible juror misconduct and the rescheduled second trial neutrally); *cf. Parrish*, 2011-NMCA-033, ¶ 27 (weighing the two-month period after the appellate court issued mandate and the date of the defendant's trial neutrally because the "case proceeded with customary promptness following the remand").

{49} In sum, the reasons for the delay factor weighs against Defendant. Before concluding our analysis of the reasons for delay, we briefly address two procedural matters that Defendant contends resulted in a delay that should be imputed to the State. First, Defendant claims that the State is responsible for portions of the delay because it initially charged him with conduct occurring outside of Bernalillo County and persisted in this error even after Defendant brought it to the State's attention.

{50} Defendant's pro se filing denying all of the charges in the complaint did include a claim of improper venue, but such a general denial did not inform the State of any specific venue challenge. Once defense counsel moved to dismiss counts two through twenty-two for improper venue on June 7, 2007, the State filed a timely response on June 29, 2007, seeking to amend the indictment to dismiss count 14 and to narrow the range of dates charged in the remaining counts so as to exclude any time period when Defendant and his family lived outside of Bernalillo County. Given the State's prompt action in seeking to amend the indictment, we decline to attribute any delay to the State based on the over-inclusive initial indictment.

{51} We are also not convinced that delay should be attributed to the State because it was "tardy" in recognizing that Defendant's taped statement to detectives could not be used at trial, because the record indicates that the State had no intention of attempting to use Defendant's confession at trial. Because Defendant has failed to show how either of these matters resulted in delay to trial, we decline to attribute any additional delay to the State based on these contentions.

Assertion of the Right

{52} In considering Defendant's assertion of his right to a speedy trial, we assess the timing of the assertions "and the manner in which the right was asserted." *Garza*, 2009-NMSC-038, ¶ 32. "Thus, we accord weight to the frequency and force of the defendant's objections to the delay." *Id.* (internal quotation marks and citation omitted). "We also analyze the defendant's actions with regard to the delay." *Id.* Defendant contends that this factor should weigh heavily in his favor because his assertion of his right to speedy trial was early, frequent, and forceful.

See Zurla v. State, 109 N.M. 640, 644, 789 P.2d 588, 592 (1990).

{53} Each of Defendant's attorneys who entered an appearance filed pro forma demands for speedy trial when they entered their appearances, but such "[e]arly pro forma assertions are generally afforded relatively little weight." *Valencia*, 2010-NMCA-005, ¶ 27. Defendant also repeatedly asserted his speedy trial rights in motions filed by counsel and in various pro se filings he submitted. However, at the same time Defendant was filing speedy trial motions, he was challenging the representation provided by his counsel by filing motions to appoint substitute counsel or to represent himself, and he and counsel were asking for continuances claiming that he and/or his counsel needed additional time before trial.

{54} Defendant's actions in contributing to the delay and being unready for trial while simultaneously asserting his speedy trial right lead us to give little weight to Defendant's assertions of his speedy trial rights. *See State v. Coffin*, 1999-NMSC-038, ¶ 67, 128 N.M. 192, 991 P.2d 477 (observing that the defendant's assertion of his speedy trial right was not meaningful when he objected to the rule extension but also represented that he was not prepared for trial); *cf. United States v. Loud Hawk*, 474 U.S. 302, 314-15 (1986) (according little weight to the defendants' repeated motions to dismiss on speedy trial grounds because at the same time the defendants consumed the district court's time by filing "repetitive and unsuccessful motions"); *Garza*, 2009-NMSC-038, ¶ 32 (stating that the force of a defendant's assertion of his speedy trial right will be mitigated when the motion asserting the speedy trial right is followed closely by other motions that would slow down the proceedings). It is inconsistent for Defendant to object to continuances and to assert his speedy trial rights, while he is simultaneously objecting to his attorney's representation, requesting substitute counsel, and claiming that he or his attorney needs additional time to prepare. *See Coffin*, 1999-NMSC-038, ¶ 67; *cf. United States v. Tranakos*, 911 F.2d 1422, 1429 (10th Cir. 1990) ("We are unimpressed by a defendant who moves for dismissal on speedy trial grounds when his other conduct indicates a contrary desire.").

{55} Finally, to the extent Defendant filed speedy trial motions after the first trial ended in a mistrial while his counsel was simultaneously stating he could not immediately proceed with retrial, we accord those assertions little to no weight. *See Tranakos*, 911 F.2d at 1429; *Coffin*, 1999-NMSC-038, ¶ 67. Based upon the foregoing, this factor weighs in Defendant's favor, but only slightly.

Prejudice

{56} "The United States Supreme Court has identified three interests under which we analyze prejudice to the defendant: [(1)] to prevent oppressive pretrial incarceration; [(2)] to minimize anxiety and concern of the accused; and [(3)] to limit the possibility that the defense will be impaired." *Garza*, 2009-NMSC-038, ¶ 35 (internal quotation marks and citation omitted). As to the first and second interests, "some degree of oppression and anxiety is inherent for every defendant who is jailed while awaiting trial." *Id.* (alterations, internal quotation marks, and citation omitted). "Therefore, we weigh this factor in the defendant's favor only where the pretrial incarceration or the anxiety suffered is undue." *Id.* It is Defendant's burden to demonstrate and substantiate any alleged "undue" oppressive pretrial incarceration and anxiety. *Id.* ¶¶ 35, 39-40.

{57} Defendant argues that his incarceration was especially oppressive because he was housed in segregation for almost the entire fifty-five months of incarceration. He also claims he suffered "from the anxiety and concern one would expect from someone housed under such conditions while facing extremely serious charges[.]" He cites to his testimony about the mental and physical toll the ordeal took on him and the medications he was prescribed to endure it. He then concludes that the prejudice prong "unquestionably weighs *heavily* in his favor."

{58} We first consider whether Defendant suffered undue prejudice because he was incarcerated in solitary confinement for the entire fifty-five-month period awaiting trial, noting that Defendant did not, or could not, post bond which led him to be incarcerated during the entire period. Bond was set at $250,000, cash only, due to allegations that Defendant had threatened Vanessa and her family and allegations that Defendant had tried to get Vanessa's brother to kill her. Moreover, solitary confinement was necessary for Defendant's own safety. Given these circumstances, we cannot conclude that Defendant has demonstrated any particularized or undue prejudice due to his incarceration. *Cf. State v. Wilson*, 2010-NMCA-018, ¶ 48, 147 N.M. 706, 228 P.3d 490 ("Some degree of oppression and anxiety is inherent for every defendant who is jailed while awaiting trial.").

{59} Defendant also argues that the pretrial delay impaired his defense, the most serious type of prejudice. *See Garza*, 2009-NMSC-038, ¶ 36 (stating that prejudice to a defendant's ability to present a defense is the "most serious," but the defendant must still substantiate this type of prejudice (internal quotation marks and citation omitted)). Defendant claims that his defense was prejudiced by the death of a potential witness, Aaron Chavez, on April 17, 2006. Chavez was allegedly having an affair with Defendant's wife, and Defendant claims he would have testified that Vanessa and her mother fabricated the charges against him.

{60} The district court found that Chavez's potential testimony was wholly speculative, that despite its alleged importance, Defendant made no effort to interview Chavez or to memorialize his testimony, and that the State, not Defendant, might possibly have benefitted from the testimony. Thus, we agree with the district court's conclusion that Defendant has failed to demonstrate that Chavez's testimony would have assisted him. *See Coffin*, 1999-NMSC-038, ¶ 71 (observing that, in order to show prejudice resulting from the unavailability of a witness, the defendant must demonstrate that the witness's testimony would have benefitted the defense). Moreover, it is impossible to determine whether the lapse of time and the fading of memories of witnesses might have prejudiced the State as much as Defendant. *Cf. Garza*, 2009-NMSC-038, ¶ 36 (requiring a defendant to substantiate any prejudice to his defense caused by the delay). Based on the foregoing, the prejudice factor weighs neutrally.

Balancing

{61} The length of delay weighs heavily in favor of Defendant. The reasons for the delay, on balance, weigh against Defendant. The assertion of the right weighs in Defendant's favor, but minimally given his competing requests for continuances and delays. Finally, Defendant failed to demonstrate that he suffered any type of significant or individualized prejudice. Under these circumstances, we reject Defendant's assertion

that his right to a speedy trial was violated. See *id.* ¶ 40 (concluding that, because the defendant failed to show prejudice, and the remaining factors did not weigh heavily in his favor, the defendant's right to a speedy trial was not violated).

{62} We note that the delay in this case was significantly longer than what should be customary. We recognize that the district court may have been justified had it decided to deny some of Defendant's requests to replace his attorney or some of the attorneys' requests for a continuance to enable additional trial preparation. *Cf. State v. Salazar*, 2006-NMCA-066, ¶¶ 26-27, 139 N.M. 603, 136 P.3d 1013 (holding that it was not an abuse of discretion for the district court to deny the fifth motion to continue a week before trial when four prior continuances had been granted resulting in eight months of delay before trial). However, we decline to hold that the district court violated Defendant's speedy trial rights when, in the interest of ensuring that Defendant was given every opportunity to obtain the counsel of his choice and ensuring that his chosen counsel had adequate time to prepare for trial, the court granted Defendant significant leeway and every opportunity to prepare an adequate defense.

INEFFECTIVE ASSISTANCE OF COUNSEL

{63} Defendant contends that, if we do not conclude that his right to a speedy trial was violated, we should nonetheless conclude that his eight attorneys were "individually and cumulatively ineffective." We disagree.

{64} "To make a prima facie case [of ineffective assistance of counsel, the d]efendant has the burden of proving (1) that counsel's performance fell below that of a reasonably competent attorney and (2) that [the d]efendant was prejudiced by the deficient performance." *State v. Martinez*, 2007-NMCA-160, ¶ 19, 143 N.M. 96, 173 P.3d 18. "With respect to the showing that counsel's deficient performance prejudiced the defense, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lytle v. Jordan*, 2001-NMSC-016, ¶ 27, 130 N.M. 198, 22 P.3d 666 (alteration, internal quotation marks, and citation omitted).

{65} Defendant has failed to identify any deficiencies on the part of any of his attorneys that prejudiced his defense; he merely claims that the long delay to trial must be a product of his attorneys' ineffectiveness. As discussed at length in analyzing Defendant's speedy trial claim, Defendant questioned the performance of all of his attorneys who remained on his case for any significant portion of time. Despite Defendant's questioning and criticism, the record indicates that, while the district court occasionally found that relations between counsel and Defendant had irretrievably broken down, it made no findings that any deficiencies of the attorneys were the cause of the conflict. Instead, it appears that the conflict was due to Defendant's dissatisfaction with his attorneys' strategic decisions to prepare for trial, instead of to continuously pursue Defendant's speedy trial claims. We are not convinced that such defense tactics constitute ineffective assistance. *See id.* ¶ 43 ("On appeal, we will not second guess the trial strategy and tactics of the defense counsel." (internal quotation marks and citation omitted)). Finally, Defendant has failed to make any showing, much less a showing to a reasonable probability, that, but for the alleged errors of his attorneys, the result of his trial would have been different. *See id.* ¶ 27.

CONCLUSION

{66} For the reasons stated above, we affirm Defendant's convictions.

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

JAMES J. WECHSLER, Judge

WE CONCUR:

CELIA FOY CASTILLO, Chief Judge

JONATHAN B. SUTIN, Judge

Certiorari Denied, April 20, 2012, No. 33,549

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-055

Filing Date: March 1, 2012

Docket No. 30,535

ARNOLD LUCERO,

Plaintiff-Appellee,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF NEW MEXICO, UNIVERSITY OF NEW MEXICO HEALTH SCIENCES CENTER,

Defendants-Appellants.

Law Offices of Michael E. Mozes, P.C.
Michael E. Mozes
Albuquerque, NM

for Appellee

Sheehan & Sheehan, P.A.
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for Appellants

OPINION

WECHSLER, Judge.

{1} Defendants University of New Mexico Board of Regents and University of New Mexico Health Sciences Center (UNMHSC) appeal after a bench trial resulted in a verdict in favor of Plaintiff Arnold

Lucero. Defendants argue that the district court erred in denying its motion for summary judgment on Plaintiff's breach of contract claim because Plaintiff did not exhaust the grievance procedures contained in UNMHSC's human resources policies and procedures manual (the employee handbook). We hold that Plaintiff must substantially comply with the mandatory internal grievance procedures contained in the employee handbook before filing suit for breach of contract based on an alleged failure of Defendants to follow the employee handbook. Accordingly, we reverse the district court's denial of Defendants' motion for summary judgment.

BACKGROUND

{2} Defendants employed Plaintiff beginning in 2003 as an assistant director of environmental services, a management position. UNMHSC's employee handbook governed Plaintiff's employment. The employee handbook contains a two-step grievance process for "those questions, issues or concerns which are not resolved through informal discussions with successive levels of supervisors." Step one of the grievance process requires the employee to submit the grievance. Section 6.1.1 of the handbook states that "[i]f a manager/supervisor is unable to reach an understanding with an immediate supervisor through informal discussions, he/she may submit a grievance in writing to the immediate supervisor or Administrator within ten (10) work days of the occurrence of knowledge of the event causing the grievance."

{3} On March 23, 2005, Defendants issued Plaintiff a notice of decision to suspend, imposing a thirty-day suspension. On March 31, 2005, Plaintiff's attorney sent a letter to Melissa Chavez, a senior employee relations specialist for Defendants, advising her that Plaintiff intended to submit a grievance by April 6, 2005. However, Plaintiff did not submit a grievance, and Plaintiff's attorney sent Chavez a letter on April 12, 2005, acknowledging missing the ten-day deadline to file a grievance.

{4} On September 9, 2005, Defendants issued Plaintiff a notice to terminate. Plaintiff did not submit a grievance and testified that he could not remember why he did not file a grievance challenging the termination. More than seven months after the termination, on April 4, 2006, Plaintiff filed a complaint in district court, alleging a breach of express and implied contracts of employment for the suspension and termination. On February 27, 2007, Plaintiff filed an amended complaint consisting of three claims: (1) breach of implied contract, (2) breach of express contract, and (3) wrongful termination. All three claims allege that UNMHSC's employee handbook created a contract and that Defendants breached the contract by failing to abide by the employee handbook's policies and procedures governing workplace performance, disciplinary action, a harassment-free workplace, employer-employee relations, progressive discipline, and by disciplining Plaintiff without just cause. The employee handbook contains all of the contractual provisions and employment policies that Plaintiff alleges Defendants breached.

{5} Defendants filed a motion for summary judgment, arguing that Plaintiff's claims were barred because he failed to exhaust the employee handbook's internal grievance procedures. Plaintiff filed a response admitting all material facts in Defendants' motion, but he argued that the grievance procedures are not mandatory and he therefore was not required to exhaust the

procedures. The district court issued an order granting in part and denying in part Defendants' motion. The district court granted the motion to the extent that Plaintiff based his claims on an alleged failure of Defendants to follow grievance procedures but denied the motion as to the remaining claims. The district court also denied Defendants' motion to reconsider the issue. In denying the motion to reconsider, the district court stated that "Defendant[s'] grievance scheme is ambiguous, and by its own terms does not require Plaintiff to exhaust Defendant[s'] grievance procedure prior to filing suit in court." The district court stated that it "is of great significance to this court that within . . . Defendant[s'] grievance procedure both 'may' and 'shall' are used. The section of the procedure that sets out the steps to be taken by an employee if he disagrees with the contemplated disciplinary action, uses 'may' when discussing the employee's actions. Thus, the court will presume that the use of the term 'may' was purposeful, and that exhaustion of . . . Defendant[s'] grievance procedure is not a condition precedent to Plaintiff filing suit in this court."

{6} Subsequently, the district court held a four-day bench trial commencing December 8, 2009. On May 17, 2010, the district court entered a final judgment in Plaintiff's favor, concluding that the employee handbook created an implied contract that Defendants violated by suspending and terminating Plaintiff without just cause and without appropriate progressive discipline.

{7} On appeal, Defendants argue that the district court erred in not granting its motion for summary judgment. Particularly, Defendants argue that (1) an employee cannot pursue a breach of contract claim based on policies in an employee handbook without first exhausting the grievance procedures in the employee handbook, and (2) the use of permissive language in the employee handbook's grievance procedures did not allow Plaintiff to bypass the grievance process and file a breach of contract claim.

STANDARD OF REVIEW

{8} Defendants' arguments in this appeal present an issue of law arising out of undisputed facts. Accordingly, we apply a de novo standard of review. *See Barreras v. State Corr. Dep't*, 2003-NMCA-027, ¶ 5, 133 N.M. 313, 62 P.3d 770.

EXHAUSTION OF REMEDIES

{9} New Mexico courts recognize the doctrine of exhaustion of administrative remedies. "Under the exhaustion of administrative remedies doctrine, where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed." *Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 26, 142 N.M. 786, 171 P.3d 300 (alteration, internal quotation marks, and citation omitted). The exhaustion doctrine rests on the principle that the interests of justice are served by allowing an agency with particular expertise to resolve issues before a claim is brought to court. *Headen v. D'Antonio*, 2011-NMCA-058, ¶ 13, 149 N.M. 667, 253 P.3d 957.

{10} Related to the exhaustion of administrative remedies doctrine, our Supreme Court has held that an employee must exhaust grievance procedures in an employee handbook or manual before filing claims against the employer for breach of contract or civil rights violations based on the policies governing employment. In *Francis v. Mem'l*

Gen. Hosp., 104 N.M. 698, 698-99, 726 P.2d 852, 852-53 (1986), a registered nurse sued his employing hospital for breach of contract, due process violations, and wrongful discharge after he voluntarily terminated his employment. The employer had suspended the plaintiff for two days for refusing to comply with hospital policy. *Id.* Pursuant to the hospital's employee manual, the plaintiff submitted a grievance, and the hospital scheduled a fact-finding hearing. *Id.* After the hospital informed the plaintiff, as provided in the employee manual, that his attorney could not attend the hearing, the plaintiff refused to proceed any further with the grievance and voluntarily terminated his employment. *Id.* Our Supreme Court held that the plaintiff was "estopped from asserting that he suffered a deprivation of either a contractual expectation or a constitutionally protected entitlement" because he failed to exhaust the grievance procedures in the employee manual. *Id.* at 700, 726 P.2d at 854. The Court reasoned that when an implied contract, in this case an employment manual, creates rights, the rights are "limited by the terms of the [employment manual] that gave them birth." *Id.*

{11} Similarly, in *McDowell v. Napolitano*, 119 N.M. 696, 699, 895 P.2d 218, 221 (1995), the plaintiff, a university professor, sued his employer for breach of contract and civil rights violations after being denied tenure. The defendants argued that the district court did not have jurisdiction over the case because the plaintiff failed to exhaust administrative remedies contained in the faculty handbook. *Id.* at 700, 895 P.2d at 222. Our Supreme Court framed the issue as whether the plaintiff "substantially discharged his own contractual obligations so as to be able to complain of a breach by his employer." *Id.* at 701, 895 P.2d at 223. The Court held that, because the plaintiff substantially complied with the terms of his employment contract by "properly follow[ing] the appeals process outlined in the Faculty Handbook [and pursuing] the appeals process to the highest authority within the University," the exhaustion doctrine did not bar litigation of the plaintiff's case. *Id.*

{12} From *Francis* and *McDowell*, we glean the general rule that an employee must substantially comply with mandatory internal grievance procedures contained in an employee manual or handbook before filing suit for breach of contract claims based on an alleged failure of an employer to follow its employment policies. In applying this general rule to this case, we note that neither *Francis* nor *McDowell* mention whether the employee handbook or manual containing the grievance procedures also contained the employment policies the defendants allegedly breached. In this case, Defendants' argument for applying the exhaustion requirement rests on the strongest factual basis because the employee handbook contained both the grievance procedures that Defendants allege that Plaintiff did not exhaust and the employment policies and procedures that Plaintiff alleges that Defendants did not follow. Applying *Francis* and *McDowell*, the district court erred by denying Defendants' motion for summary judgment because Plaintiff did not exhaust the grievance procedures in the employee handbook. Courts from other jurisdictions have uniformly applied the same rule, regardless of whether the employer is a public entity or a private entity. *See, e.g.*, *McGuire v. Cont'l Airlines, Inc.*, 210 F.3d 1141, 1146-47 (10th Cir. 2000) (upholding summary judgment on exhaustion grounds in favor of employer on employee's breach of contract claim because employee failed to complete the final two steps of the employee handbook's four-step grievance process); *Orr v. Westminster Vill. N., Inc.*, 689 N.E.2d 712,

721-22 (Ind. 1997) (stating that even if an employer's handbook constituted a contract, summary judgment on employee's breach of contract claim arising out of policies in the employee handbook was appropriate because employee failed to exhaust grievance procedures in the employee handbook); *O'Brien v. New England Tel. & Tel. Co.*, 664 N.E.2d 843, 849 (Mass. 1996) (holding that an employee must exhaust grievance procedures in an employee manual before suing for breach of contract based on a failure of employer to follow rule requiring just cause to discipline an employee in the employee manual).

{13} In addition, policy reasons support our conclusion that an employee must exhaust internal grievance procedures contained in an employee handbook before filing suit for breach of contract based on an alleged failure of the employer to follow policies in the employee handbook. First, the grievance process allows an employer to redress wrongs without burdening the courts with unnecessary litigation. *See Neiman v. Yale Univ.*, 851 A.2d 1165, 1172 (Conn. 2004) (stating that grievance procedures "merely ensure that the grievant and the school have an opportunity to resolve the dispute before seeking redress in the courts, thereby conserving judicial resources"). Second, not requiring an employee to exhaust internal grievance procedures allows the employee to choose which employment policies are binding. *See, e.g.*, *McGuire*, 210 F.3d at 1147 ("An employee must accept both the benefits and the responsibilities of an employee handbook which creates an implied contract."). In this case, the employee handbook required that Plaintiff allow Defendants to redress the perceived violation of the right to be disciplined and terminated for "just cause" stemming from the employee handbook. Once Plaintiff exhausted the grievance procedure, he could have then instituted his lawsuit had he not been satisfied with the result. *See McDowell*, 119 N.M. at 701, 895 P.2d at 223 (holding that exhaustion requirement did not bar litigation of the plaintiff's claim because he substantially complied with grievance process); *see also Neiman*, 851 A.2d at 1172 ("[I]internal procedures do not preclude access to the courts should the grievant be dissatisfied with the ultimate result.").

{14} Plaintiff argues that New Mexico courts "have not adopted a broad, general rule that a plaintiff cannot pursue a breach of contract claim founded in an employee handbook without first exhausting the grievance procedures [and instead] have take[n] a more measured and considered approach in deciding whether exhaustion . . . is a prerequisite to pursuing a breach of implied contract claim in the district courts." Plaintiff argues that New Mexico courts "review the nature of the grievance procedure in deciding whether exhaustion of the procedure is required." However, the cases cited by Plaintiff address different issues. Some of the cases address whether a legislative body intended an administrative scheme to be the exclusive remedy for a plaintiff's cause of action. *See Barreras*, 2003-NMCA-027, ¶¶ 9, 21 (addressing whether the administrative adjudication in the state personnel act is the exclusive remedy for breach of contract claims arising under the state personnel act); *Pan Am. Petroleum Corp. v. El Paso Natural Gas Co.*, 77 N.M. 481, 484, 424 P.2d 397, 399 (1966) (addressing whether a federal agency had exclusive jurisdiction to determine whether the state legislature could impose a tax); *Chavez v. City of Albuquerque*, 1998-NMCA-004, ¶¶ 14-18, 124 N.M. 479, 952 P.2d 474 (determining that a grievance procedure for municipal employees did not provide the exclusive remedy for claims arising from an alleged

breach of the municipality's ordinance governing employment). In cases addressing the exclusivity of an administrative setting, the nature of the proceedings is an important factor to consider because a plaintiff is either barred from court or may appeal to a court under a limited standard of review. In this case, Defendants do not argue that the grievance process provided Plaintiff's exclusive remedy, only that the process must be exhausted before Plaintiff files an action in district court. *See Chavez*, 1998-NMCA-004, ¶ 14 (defining exclusive remedy as "one which provides for a plain, adequate, and complete means of resolution"). Further, one case cited by Plaintiff considers whether a collective bargaining agreement's administrative proceeding covered the plaintiff's claims against the labor union. *See Callahan v. N.M. Fed'n of Teachers-TVI*, 2005-NMCA-011, ¶ 21, 136 N.M. 731, 104 P.3d 1122, *aff'd in part, rev'd in part by* 2006-NMSC-010, 139 N.M. 201, 131 P.3d 51. The other case cited by Plaintiff addressed only whether policies and procedures governing the plaintiff's employment created an implied contract, not whether exhaustion was required. *See Whittington v. State Dep't of Pub. Safety*, 2004-NMCA-124, ¶ 1, 136 N.M. 503, 100 P.3d 209. Plaintiff fails to cite authority supporting his argument that New Mexico law is inconsistent with a broad, general rule requiring exhaustion of grievance proceedings in an employee handbook.

{15} Plaintiff next argues that the permissive language in the grievance procedure permits an employee to bypass the grievance process and pursue a direct court action. Plaintiff argues that the grievance policy in this case is permissive because it states that the employee "may," not "shall," file a grievance. However, we read the plain language of Section 6.1.1 of the employee handbook, using the term "may," to be permissive only to the extent that it provides a potential grievant with two options: (1) file a grievance, thereby exhausting the remedies under the employee handbook and allowing the grievant to then file an action in district court for an alleged breach of the employee handbook, or (2) forego the grievance process and accept the disciplinary decision of Defendants. *See Neiman*, 851 A.2d at 1173 (rejecting argument that the use of "may" in an internal grievance process made the grievance procedure permissive); *United Nuclear Corp. v. Allstate Ins. Co.*, 2011-NMCA-039, ¶ 11, 149 N.M. 574, 252 P.3d 798 ("We consider the plain language of the relevant provisions, giving meaning and significance to each word or phrase within the context of the entire contract, as objective evidence of the parties' mutual expression of assent." (internal quotation marks and citation omitted)), *cert. granted*, 2011-NMCERT-005, 150 N.M. 667, 265 P.3d 718 . In other words, the word "may" relates to whether the employee wishes to challenge the proposed disciplinary action by Defendants, not whether the employee must do so. The grievance procedure in the employee handbook is mandatory if an employee wishes to challenge a disciplinary action.

CONCLUSION

{16} An employee must substantially comply with mandatory internal grievance procedures contained in an employee handbook before filing suit for breach of contract based on an alleged failure of the employer to follow the employee handbook. Because Plaintiff did not exhaust the grievance procedures in Defendants' employee handbook, we reverse the district court's denial of Defendants' motion for summary judgment.

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

JAMES J. WECHSLER, Judge

WE CONCUR:

RODERICK T. KENNEDY, Judge

J. MILES HANISEE, Judge

Certiorari Granted, May 23, 2012, No. 33,589; Certiorari Granted, May 23, 2012, No. 33,594

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-056

Filing Date: March 28, 2012

Docket No. 30,172

PINGHUA ZHAO,

Plaintiff-Appellant,

v.

KAREN L. MONTOYA, BERNALILLO COUNTY ASSESSOR,

Defendant-Appellee,

consolidated with

GREGG VANCE FALLICK and JANET M. FALLICK,

Plaintiffs-Appellants,

v.

KAREN L. MONTOYA, BERNALILLO COUNTY ASSESSOR,

Defendant-Appellee.

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OPINION

KENNEDY, Judge.

{1} In this consolidated case, certified to us by the Bernalillo County District Court, Pinghua Zhao, Gregg Fallick, and Janet Fallick (Homeowners) appeal a significant increase in the value of their homes for property tax assessment as a result of a phenomenon commonly called "tax lightning." This phenomenon occurs when a home that has been owned by the same taxpayer for more than a year is sold to a new owner for a price representing a significant increase from its previously assessed value. The property is then reassessed for its "current and correct" taxable value which reflects the property's market value. NMSA 1978, § 7-36-15(B) (2008); 3.6.5.23(C) NMAC. This reassessment can result in a proportionately significant increase in the property's assessed value and, hence, the disparity between the former and the new homeowner's tax bill. *See* NMSA 1978, § 7-36-21.2 (2003) (amended 2010). Such was the case with Homeowners. Homeowners maintain that this increase in taxable value contravenes Article VIII, Section 1 of the New Mexico Constitution, which mandates that the Legislature limit annual increases in the assessed value of residential property and states that these limitations may be implemented according to certain "classes" of taxpayers, including a class based upon "owner-occupancy."

{2} We disagree with Homeowners, holding that the Property Tax Code's different valuation methods under Section 7-36-21.2 for newly sold residential properties and those owned more than a year do not create a new class of taxpayer not specified by the New Mexico Constitution. Consequently, the County Assessor correctly operates within the parameters of the New Mexico Constitution and New Mexico statutes in resetting the value of residential property in the tax year following its sale at a current and correct market value.

I. BACKGROUND

{3} The facts in the case are not in dispute. Homeowners bought and occupied new homes and, in the year following their purchase, Bernalillo County valued their properties at significantly greater amounts for tax assessment purposes than it had for the properties' previous owners. As a result, the property tax assessment for each home significantly increased. Homeowners appealed to the Bernalillo County Valuation Protests Board (Board), contending that the statute with which their properties were assessed was unconstitutional. The Board rejected the appeals and upheld the assessor's valuations. Homeowners then appealed to the district court, which, in light of what it believed to be a slew of similar cases, did not decide the case. Rather, the district court took judicial notice of two previous cases from the district with disparate results and certified the cases to this Court. *See* NMSA 1978, § 39-3-1.1(F) (1999); Rule 12-608 NMRA (setting forth the requirements and procedures for such certification to this Court). The question certified was

> [w]hether Subsections (A)(3)(a), Subsection (B), and Subsection (E) of . . . [Section] 7-36-21.2 . . . violate the New Mexico Constitution, Article VIII, [Section] 1 (as amended 1998), because the Subsections create a classification based on when residential property was acquired, not on the constitutionally permissible classifications of owner-occupancy, age, or income.

{4} Because this question is one of broad and substantial public interest and likely to recur, we conclude that the district court properly certified the question to us, and we accept the certification. *See Jicarilla Apache Nation v. Rio Arriba Cnty. Assessor*, 2004-NMCA-055, ¶ 13, 135 N.M. 630, 92 P.3d 642, *rev'd on other grounds by Jicarilla Apache Nation v. Rodarte*, 2004-NMSC-035, 136 N.M. 630, 103 P.3d 554.

II. DISCUSSION

{5} Enacted in 2000 and amended in 2001 and 2003, Section 7-36-21.2 is at issue in this case and provides in pertinent part:

> A. Residential property shall be valued at its current and correct value in accordance with the provisions of the Property Tax Code . . . ; provided that for the 2001 and subsequent tax years, the value of a property in any tax year shall not exceed the higher of one hundred three percent of the value in the tax year prior to the tax year in which the property is being valued or one hundred six and one-tenth percent of the value in the tax year two years prior to the tax year in which the property is being valued. This limitation on increases in value does not apply to:
>
> . . . .
>
> (3) valuation of a residential property in any tax year in which:
>
> (a) a change of ownership of the property occurred in the year immediately prior to the tax year for which the value of the property for property taxation purposes is being determined[.]
>
> . . . .
>
> B. If a change of ownership of residential property occurred in the year immediately prior to the tax year for which the value of the property for property taxation purposes is being determined, the value of the property shall be its current and correct value as determined pursuant to the general valuation provisions of the Property Tax Code.
>
> . . . .
>
> E. As used in this section, "change of ownership" means a transfer to a transferee by a transferor of all or any part of the transferor's legal or equitable ownership interest in residential property except for a transfer[.]

{6} The limitation on property value accorded by Section 7-36-21.2(A) is an exception to the general provisions of the Property Tax Code governing valuation of property for taxation purposes. *See* NMSA 1978, § 7-36-15(B) (1995) (amended 2008) (stating the general provisions for valuation of property); NMSA 1978, § 7-36-16(A) (2000) (noting the limitations on value imposed by Section 7-36-21.2 as an exception to the requirement that assessors regularly update the values of property for property taxation purposes to current and correct levels). Generally, all property is valued to reflect "current and correct" values, and current and correct values are updated and maintained regularly. *See* § 7-36-16; NMSA 1978, § 7-38-7 (1997). Section 7-36-21.2(A) creates an exception to

that rule by limiting the increase in valuation to three percent a year after the residential property has changed ownership and been revalued according to "general valuation provisions of the Property Tax Code." Section 7-36-21.2(B). Section 7-36-21.2 limits increases in this manner, so long as the property is not transferred to a new owner. The applicability of this exception begins anew in the year following the purchase of a home by a new owner.

{7} Homeowners argue that the limitation on taxation created by Section 7-36-21.2 violates Article VIII, Section 1 of the New Mexico Constitution by creating an unauthorized class of residential property taxpayers based upon the time of acquisition.[1] Homeowners also argue that Section 7-36-21.2 is invalid on its face. For reasons explained in this Opinion, we hold that Section 7-36-21.2 does not violate the New Mexico Constitution.

A. Standard of Review

{8} Because the facts in this matter are not in dispute, and the issue certified is solely one of statutory and constitutional interpretation, we review the question presented to us de novo. *Dell Catalog Sales L.P. v. Taxation & Revenue Dep't*, 2009-NMCA-001, ¶ 17, 145 N.M. 419, 199 P.3d 863. Likewise, we review de novo whether Section 7-36-21.2 conflicts with Article VIII, Section 1 of the New Mexico Constitution. *See Georgia O'Keeffe Museum v. Cnty. of Santa Fe*, 2003-NMCA-003, ¶ 27, 133 N.M. 297, 62 P.3d 754. "It is presumed that words appearing in [the C]onstitution have been used according to their plain, natural, and usual signification and import, and the courts are not at liberty to disregard the plain meaning of words of [the C]onstitution in order to search for some other conjectured intent." *State ex rel. Gomez v. Campbell*, 75 N.M. 86, 101, 400 P.2d 956, 966 (1965) (alteration omitted) (internal quotation marks and citation omitted).

{9} Similarly, "plain language of a statute is the primary indicator of legislative intent." *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 (internal quotation marks and citation omitted). We "give the words used in the statute their ordinary meaning unless the [L]egislature indicates a different intent." *Id.* (internal quotation marks and citation omitted). We do not read additional language into the statute, particularly when it makes sense as the Legislature wrote it. *Id.*

{10} In our review, we indulge in a strong presumption that the statute in question is constitutional, and we will uphold a statutory enactment unless we are satisfied beyond all reasonable doubt of its unconstitutionality. *Bounds v. State*, 2011-NMCA-011, ¶ 34, 149 N.M. 484, 252 P.3d 708, *cert. granted sub nom. Bounds v. D'Antonio*, 2011-NMCERT-001, 150 N.M. 560, 263 P.3d 902. "[T]he party attacking the constitutionality of the statute has the burden of proving the statute is unconstitutional beyond all reasonable doubt." *Wachocki v. Bernalillo Cnty. Sheriff's Dep't*, 2010-NMCA-021, ¶ 33, 147 N.M. 720, 228 P.3d 504 (internal quotation marks and citation omitted), *aff'd*, 2011-NMSC-039, 150

[1]In this case, Homeowners have eschewed any argument that the Property Tax Code's distinction between residential properties owned more or less than a year implicates the equal protection clause of the United States and New Mexico Constitutions. *See Nordlinger v. Hahn*, 505 U.S. 1 (1992) (rejecting equal protection challenge to time-of-acquisition value system of valuing property for taxation as having rational basis).

N.M. 650, 265 P.3d 701. "It is . . . a fundamental principle that courts will not declare a legislative act unconstitutional if there is any reasonable basis upon which it can be upheld." *Amador v. State Bd. of Educ.*, 80 N.M. 336, 337, 455 P.2d 840, 841 (1969). And where we adjudicate an attack on a statute's constitutionality, "we look at whether there exists a set of circumstances in which the statute can be constitutionally applied." *Bounds*, 2011-NMCA-011, ¶ 34.

B. Section 7-36-21.2 Does Not Violate Article VIII, Section 1 of the New Mexico Constitution

{11} Homeowners contend that Section 7-36-21.2(A)(3)(a), (B), and (E) violate Article VIII, Section 1 of the New Mexico Constitution by creating an unauthorized class of residential property taxpayers based upon the time owners acquire the property. Article VIII, Section 1 of the New Mexico Constitution is composed of two components, the latter of which mandates the Legislature to impose a limitation on annual increases in property valuation and states that the limitation may be applied to certain classes of taxpayers. Homeowners concede that "[t]he dispositive issue is not whether [Section] 7-36-21.2 levies residential property taxes equally and uniformly within the *same* class of taxpayers; undoubtedly it does." As a result, we will only discuss Article VIII, Section 1(B) of the New Mexico Constitution in our analysis.

{12} Specifically, Homeowners contend that Section 7-36-21.2 "creates two classes of taxpayers—older and newer homeowners—defined solely on the basis of whether a homeowner changed ownership in the year immediately prior to the assessment year at issue, or in earlier years." They argue that this classification violates Article VIII, Section 1(B) of the New Mexico Constitution, which states: "The [L]egislature shall provide by law for the valuation of residential property for property taxation purposes in a manner that limits annual increases in valuation of residential property. The limitation may be applied to classes of residential property taxpayers based on owner-occupancy, age[,] or income." Homeowners interpret the second sentence of Section 1(B) to restrict the Legislature to the classifications of owner-occupancy, age, or income when creating statutes limiting annual taxable value increases. Homeowners occupy the residences they own. Because Homeowners believe that Section 7-36-21.2 classifies residential property owners based on when they acquired their property, they argue that the statute violates the Constitution as the classification is not one of the permissible classes provided in Article VIII, Section 1(B) of the New Mexico Constitution.

{13} We disagree that a new classification of taxpayer is created based on the time of acquisition. Section 7-36-21.2 applies the limitation to increases based upon when a taxpayer acquires ownership of the property and, hence, taxpayer status relative to that property. An owner of residential property is "the person in whom is vested any title to property[.]" NMSA 1978, § 7-35-2(G) (1994). "Property taxes imposed are the personal obligation of the person owning the property on the date on which the property was subject to valuation for property taxation purposes." NMSA 1978, § 7-38-47 (1973). All property subject to taxation is valued as of January 1 of each tax year, Section 7-38-7, at its "current and correct value[]," Section 7-36-16(A). The class of owner-occupants, contained in Article VIII, Section 1, does not include anyone until they own property. What this means is the classification is based on the acquisition of taxpayer status. The value

limitation in question only commences once a taxpayer owns the property.

{14} The limitation accrues to owners of property after the initial valuation of their home during their first year of ownership and limits increases in valuation thereafter to no more than three percent of the prior year's value. *See* § 7-36-21.2(A). That exception to the general valuation statute conferred by Section 7-36-21.2(A) continues to benefit the homeowner every year until such time as the property is sold. Thus, Section 7-36-21.2 establishes a limitation predicated on the property being owned by the taxpayer, beginning anew with the current and correct value established by the market when the property was acquired by the new owner. *See* § 7-36-21.2(B). The limitation ceases with the end of the owner-occupant's tenancy after the sale of the property.

{15} To the extent Homeowners seem to assert that the value limitation carries over from the previous owner, such a contention is unsupported by the property tax code. After an owner sells his or her property, he or she is neither the taxpayer for property tax purposes, nor the owner-occupant of the home who benefits from the limited valuation conferred by Section 7-36-21.2. The purchaser, not owning the property on the date it was last subject to valuation pursuant to the limitation, is not entitled to benefit from that lower taxable value. The statute therefore does not classify newer owners and older owners in violation of the Constitution. Rather, the difference in taxable value between the former owner's tax bill and the new owner's tax bill is based upon the fact that the new owner, at the relevant date from which the limited taxable value was calculated for the former owner, was not an owner of the property.

{16} In this case, Homeowners were not owners of the properties when they were subject to the previous owners' entitlement to the value limitation. They consequently do not obtain the benefit of the limitations until their purchases of the properties are complete, at which time, they attain membership in the class of owner-occupants to whom the limitation applies.

C. Section 7-36-21.2 Is Not Invalid On Its Face

{17} Homeowners also contend that Section 7-36-21.2 is invalid on its face. Homeowners fail to provide us with authority to evaluate this argument, other than assertions that "taxpayers['] homes lying side-by-side and receiving identical governmental services, were assessed using different valuation methods . . . and [the taxable value of these homes] increased at substantially disparate levels" and that the statute defines "change of ownership" in an arbitrary way. Homeowners do not provide authority about how we are to evaluate their claim that this law is "invalid on its face." We will not consider propositions that are unsupported by citation to authority. *ITT Educ. Servs., Inc. v. Taxation & Revenue Dep't*, 1998-NMCA-078, ¶ 10, 125 N.M. 244, 959 P.2d 969. And, where a party cites no authority to support an argument, we assume no such authority exists. *In re Adoption of Doe*, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984). This Court has no duty to review an argument that is not adequately developed. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (declining to entertain a cursory argument that relied on several factual assertions that were made without citation to the record).

{18} Homeowners urge that Article VII, Section 1(B) of the New Mexico Constitution permits the Legislature to favor owners who

occupy their homes over residential property owners who do not occupy or who rent out the property. This might be so, but authority cited by Homeowners as to this proposition directs us to restrict our reading of the constitutional provision to limit its scope to its own words and to neither add nor subtract language or concepts from it. Homeowners insist that "ownership must be linked to 'occupancy.'" First, we again note that Homeowners are "owner-occupants." What they want is to receive the benefit of the statutory limitation on value as neighbors who became owners before they did. As discussed above, this constitutionally based benefit is limited by the fact that Section 7-36-21.2 only allows the limitation of assessed valuation increases to someone who has become an owner, beginning at the moment ownership commences, and the property is valued so as to establish the new owner's obligation to pay taxes.

{19} To the extent Homeowners attempt to assert that revaluation at the time of a "change of ownership" in Section 7-36-21.2 operates to either create an impermissible temporal statutory exception to Article VIII, Section 1(B) of the New Mexico Constitution or creates a newly created class of taxpayers defined by the time of acquisition of their home who are excepted from this favorable scheme, their argument fails. This part of the statute is quite congruent with the constitutional class created in Article VIII, Section 1 of the New Mexico Constitution, and Homeowners are unequivocally members of that class of taxpayer as of the moment they purchased their homes. The argument that favoring older owners over newer owners is outside the constitutional classification is misplaced. The act of acquisition of residential property is what creates an ownership status with regard to that property, not its timing. Along with the acquisition of residential property goes the conferring of ownership and taxpayer status as to that property as we noted above. Thus, Homeowners were not members of the constitutionally protected class to whom a limitation of valuation would apply until their purchase of the property. The time of acquisition is the beginning terminus of that status, before which a person has no status at all. We hold that one cannot be an owner-occupant until after one purchases residential property and that begins the valuation process as of that date as provided under the general valuation methods of the Property Tax Code and thereafter limits increases in the value of the property for assessment purposes. It is not invalid on its face as to Homeowners.

{20} Homeowners' assertions that persons who are not "occupants" of residential properties are also included and mentioned in Section 7-36-21.2 cannot concern us, as nowhere in this case is it asserted that persons to whom those provisions apply are parties in this case. Homeowners' complaint that they are not treated the same as persons who became owner-occupiers at an earlier date than they did is the basis for our decision. The statute's application or non-application to owners of residential property who do not occupy their premises is a matter we leave to the Legislature to evaluate.

{21} Moreover, unless a statute violates the Constitution, "[w]e will not question the wisdom, policy, or justness of legislation enacted by our Legislature." *Madrid v. St. Joseph Hosp.*, 1996-NMSC-064, ¶ 10, 122 N.M. 524, 928 P.2d 250. As we have addressed the specific constitutional claims raised by Homeowners and have determined that the statute does not violate those parts of the Constitution, we review this argument no further.

III. CONCLUSION

{22} We hold that Section 7-36-21.2 does not violate the New Mexico Constitution, as it limits revaluation for taxation purposes based upon owner-occupant status. Accordingly, we remand these cases to the district court for adjudication of Homeowners' claims consistent with the law as determined in this Opinion.

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

RODERICK T. KENNEDY, Judge

I CONCUR:

CELIA FOY CASTILLO, Chief Judge

SUTIN, Judge (specially concurring).

{24} I concur in the Majority Opinion. I hesitate signing on with no separate statement only because I have concern about what I consider some imprecise, inaccurate, or ambiguous wording that might cause problems down the line, particularly with regard to the propriety of valuation procedure employed under Section 7-36-21.2. I also hope it is clear that the Majority Opinion is to be narrowly read as limited to Homeowners' claim that the valuation under Section 7-36-21.2 violated Article VIII, Section 1(B) in that a new class of taxpayer not specified in Section 1(B) was created.

{25} Thus, following the letter of the certified question, I concur in affirming the district court on the very limited ground that Subsections (A)(3)(a), (B), and (E) of Section 7-36-21.2 do not, as Homeowners contend, unconstitutionally go beyond owner-occupancy, age, and income by "creat[ing] a classification based on when residential property was acquired[.]" I am not persuaded by Homeowners' "fourth taxpayer classification" theory.

{26} Although not at issue in the appeal before us, I think it useful to write separately to raise questions in regard to the valuation procedure employed under Section 7-36-21.2. The Majority Opinion analyzes the issue as follows. The seller has the benefit of the 3% increase limitation until such time as he sells, at which time he no longer needs or deserves the benefit of that limitation. The buyer gains the benefit of the 3% increase limitation until such time as he sells, at which time he, too, no longer needs or deserves the benefit of that limitation. A new valuation (from which the 3% increase limitation starts) based on the sale price of the property is properly imposed on the property purchased. The valuation based on the sale price reflects the current and correct value and thus the "market value" of the purchased property. Exclusion of purchased property from a 3% annual increase based on the last valuation of the property, and starting the 3% annual increase based on a new purchase price valuation, does not create an unconstitutional fourth taxpayer status classification, that is, a taxpayer classification in addition to the three allowed in Article VIII, Section 1(B), namely, "owner-occupancy, age[,] or income." The Majority Opinion properly does not delve into whether this valuation and ultimately the taxation process violates or is a permissible exception to the equal and uniform clause in Article VIII, Section 1(A) of the New Mexico Constitution.

{27} Concern about the equality and uniformity of this purchase-price-valuation scheme is raised based on the following hypothetical example. Homeowners A and B live next door and live in virtually identical residences situated on the same amount of acreage. Their valuations in 2007 are $100,000. Homeowner A sells his home to

Buyer C in 2007, a bubble housing economy, for $300,000. Buyer C's 3% limitation increase starts at $300,000. Homeowner B continues to have a 3% limitation increase based on $100,000. Homeowner B sells his property to Buyer D in 2012 for $125,000, the market having sunk dramatically. Buyer D, sitting next door to Buyer C, has the protective 3% limitation benefit on a $125,000 value; whereas Buyer C has that benefit on a $300,000 value. One can suppose that, in 2012, Buyer C can attempt to get a reduction of the 2012 assessed value, but one should not count on it. Buyer C would have to protest the valuation and prove a lower value by comparable sales. Comparable sales are likely to be a mixture of low and high prices, depending on market fluctuations over the period considered for comparable sales. The foregoing example can be extended to residential homes in a neighborhood or larger area consisting of like homes.

{28} Article VIII, Section 1(B) gives no inkling of an intent that whatever annual increase limitation the Legislature might enact could carry the change-of-ownership exclusion enacted in Section 7-36-21.2(A). An issue may well remain open as to whether Article VIII, Section 1(A) can be construed as intending its equal and uniform mandate to permit the purchase-price-valuation process.

{29} Section 1(A) deals with (1) value of classes of property and (2) methods of valuation of that property, with a percentage tax rate limitation. "[S]o long as the tax is equal and uniform on all subjects of a class and the classifications for taxation are reasonable, such legislation does not offend these provisions of the State or Federal [C]onstitutions." *Gruschus v. Bureau of Revenue*, 74 N.M. 775, 777, 399 P.2d 105, 106-07 (1965); *see* NMSA 1978, § 7-36-2.1(A) (1995) (stating that property is classified as residential and non-residential). What are we to understand from Article VIII, Section 1(A)'s "Except as provided in Subsection [(B)] of this section" preface? Are we to understand that Subsection 1(A) says that Subsection (B) controls even if taxes are not equal and uniform upon residential property? Do we construe Subsection (B) to permit use of valuation methods resulting in taxes upon residential property that are not equal and uniform? Did the Legislature intend such broad constitutional authority in order to enhance its own plenary authority in taxation? Were the people who approved the amendment sufficiently advised of the breadth of such authority, and did they understand what it could bring about?

{30} Article VIII, Section 1(B) requires the Legislature to provide by law for the valuation of residential property for property taxation purposes "in a manner that limits annual increases in valuation of residential property." Subsection (B) then states that the annual increase limitation "may be applied to classes of residential property taxpayers based on owner-occupancy, age[,] or income." Article VIII, Section 1(A)'s equal and uniform clause relates to subjects of taxation of the same class. Property is the subject of taxation. Residential property is a subject of taxation of the same class. Article VIII, Section 1(B)'s mandate to limit increases relates to valuation of residential property.

{31} Section 7-36-21.2 is the Legislature's apparent attempt to come within the constitutional mandates of Article VIII, Sections 1(A) and 1(B). In that apparent attempt to come within the constitutional mandates, the Legislature created not only the 3% "manner" of annual valuation increase in Section 7-36-21.2(A), but at the same time created in Section 7-36-21.2(B) what appears to call for a re-valuation of the property

purchased at the point of ownership change. That is how the valuation authorities have construed Section 7-36-21.2(B). Under Section 7-36-21.2(B), the valuation of the new purchaser's property must be the "current and correct value as determined pursuant to the general valuation provisions of the Property Tax Code."

{32} Section 7-36-15(B) of the Property Tax Code sets out the methods of valuation for property taxation purposes for residential and other property not covered under other specific statutory provisions. Market value is to be "determined by application of the sales of comparable property, income or cost methods of valuation[,] or any combination of these methods." *Id.* And the valuation authority must "apply generally accepted appraisal techniques[.]" Section 7-36-15(B)(1). Yet, when a residential property is sold, the valuation authorities are employing a valuation method that determines value based solely on the purchase price of the property.[2]

{33} This purchase-price method of valuation is not a valuation method based on comparable sales, although comparable sales appears to be the primary if not only method of valuation contained in the Property Tax Code for valuation of purely residential property. *See* § 7-36-15(B). Furthermore, it is not readily apparent that using the purchase price of the property being valued as the sole valuation determinant is a generally accepted appraisal technique. In addition, according to Property Tax Department Regulation 3.6.5.22(G)(6) NMAC, "[e]vidence of the sale price of the property being valued is not sufficient to establish a market value under Section 7-36-15 . . . if the evidence of the sales of comparable property indicates the sales price was not the market value." Also, Department Regulation 3.6.5.23(C)(1) and (2) NMAC define "current and correct values of property" in terms of market value, and "market value" is determined based on the market value method of valuation set out in 3.6.5.22(G)(1) NMAC as "a process of analyzing sales of similar recently sold properties in order to derive an indication of the most probable sales price of the property being appraised." Nothing in Article VIII, Section 1 indicates an intent that what should be an equal and uniform annual increase limitation gives rise to use of purchase price as the exclusive method of re-valuing a particular residential property that happens to be sold, where all similar properties remain undervalued.

{34} In the attempt to construe Article VIII, Sections 1(A) and 1(B) and Section 7-36-21.2 in tandem and harmony, one must at least question whether the Constitution permits the Legislature to enact legislation that results in apparent non-uniform and unequal valuation and taxation of properties of the same class. Were Plaintiffs to have raised whether the manner in which valuation authorities have applied Section 7-36-21.2 violates the equal and uniform clause or constitutional equal protection, it is not all that clear that *Nordlinger*, 505 U.S. 1, would control rather than *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty.*, 488 U.S. 336 (1989).

{35} It would at least seem arguable that Section 7-36-21.2 violates Article VIII, Section 1. The argument would be that, as the statute reads, as well as in the manner in which it has been interpreted and applied by the valuation authorities, Section 7-36-21.2 goes

[2]The valuation authorities refer to this methodology for determining property value as an "acquisition value system." *See Dzur v. Bernalillo Cnty. Protests Bd.*, No. CV-2008-12410, ¶ 23 (2d Jud. Dist. Ct.).

beyond simply providing for valuation in a manner that uniformly limits annual increases in valuation of residential property during valuation cycles. This view may very well have been how the electorate saw the benefit of constitutional amendment when they voted in favor of its adoption. It would seem arguable that Section 7-36-21.2 has created an impermissible offspring through application of a method of valuation that results in what amounts to unequal and non-uniform checkerboard and patchwork valuation and taxation of the same class of property. The argument would be based on singling out one property for a currently higher valuation while leaving all unsold similar, comparable properties in perhaps lesser or under market value status. We have no evidence here of public benefit from long-term home ownership or even of a weighing of any such benefit against any detrimental effect resulting from discouragement and disincentive with regard to alienation of property when purchase of a new property is contemplated. How persuasive these arguments might be must be left for any future proceedings that may arise. Plaintiffs did not raise and argue any of this.

{36} As I indicated earlier, what I have discussed here does not specifically reside within the letter of the limited question certified to this Court. But nothing I have discussed should, if legitimately arguable, be considered precluded by anything written in the Majority Opinion from contention and argument in any other pending or future case.

JONATHAN B. SUTIN, Judge

Certiorari Granted, June 5, 2012, No. 33,604

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-057

Filing Date: April 16, 2012

Docket No. 30,205

STATE OF NEW MEXICO,

Respondent-Appellee,

v.

MARTIN RAMIREZ, a/k/a RICHARD G. SANCHEZ,

Petitioner-Appellant.

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OPINION

KENNEDY, Judge.

{1} Martin Ramirez, a/k/a Richard Sanchez, (Petitioner) appeals the district court's denial of his writ of coram nobis, which sought to vacate Petitioner's twelve-year-old conviction due to ineffective assistance of counsel under *State v. Paredez*, 2004-NMSC-036, 136 N.M. 533, 101 P.3d 799. *Paredez* requires appointed counsel to instruct defendants about the specific immigration consequences associated with a conviction for the charged crime prior to pleading guilty. *Id.* ¶ 9. This duty is more pressing in a case like this in which deportation was a near certainty for a relatively minor offense. The district court denied the writ on the ground that the rule announced in *Paredez* should not be applied retroactively to collateral challenges to final judgments and sentences. We reverse and hold that the ineffective assistance of counsel rules stated in *Paredez* and *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) (holding that defense counsel must inform his or her client whether the client's plea carries a risk of deportation) are but extensions of a previously entrenched duty to provide representation and are retroactive. We remand for further proceedings consistent with this Opinion.

I. BACKGROUND

{2} In 2009, Petitioner filed a writ of coram nobis, requesting the district court to vacate his 1997 misdemeanor convictions for possession of marijuana (under one ounce), possession of drug paraphernalia, and concealing identity. In his writ, Petitioner contended that he was denied his right to effective assistance of counsel because his appointed counsel failed to instruct him about any immigration consequences of pleading guilty to the crimes as required by *Paredez*, 2004-NMSC-036, ¶ 19.

{3} At the hearing, Petitioner proffered evidence to prove that his attorney failed to instruct him about the immigration consequences and that this failure prejudiced him. The State did not contest the evidence, arguing only that it was irrelevant and that Petitioner was not entitled to relief because *Paredez* was not retroactive. The district court, accordingly, found that Petitioner's proffer was "essentially admitted . . . [and] not disputed" and proceeded to hear argument on whether *Paredez* was retroactive. The district court subsequently denied Petitioner's request on the ground that *Paredez* did not apply retroactively. Petitioner now appeals the district court's denial of his writ of coram nobis. We interpret such actions as motions pursuant to Rule 1-060(B) NMRA. *State v. Barraza*, 2011-NMCA-111, ¶ 5, 267 P.3d 815.

II. DISCUSSION

A. *Paredez* and *Padilla* Apply Retroactively

{4} In *Paredez*, the New Mexico Supreme Court held that "criminal defense attorneys are

obligated to determine the immigration status of their clients. If a client is a non-citizen, the attorney must advise that client of the specific immigration consequences of pleading guilty, including whether deportation would be virtually certain." 2004-NMSC-036, ¶ 19. Our Supreme Court concluded that failure to inform the defendant of these consequences would constitute ineffective assistance of counsel if the defendant suffered prejudice due to the omission. *Id.* Six years later, the United States Supreme Court in *Padilla* similarly held that "counsel must inform her client whether his plea carries a risk of deportation." 130 S. Ct. at 1486. The Supreme Court explained: "Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less." *Id.* The question before us today is whether the rule stated in *Paredez* and *Padilla* applies retroactively to cases on collateral review. "Retroactivity is a legal question, which we review de novo." *Kersey v. Hatch*, 2010-NMSC-020, ¶ 14, 148 N.M. 381, 237 P.3d 683 (internal quotation marks and citation omitted).

{5} Although this is an issue of first impression in New Mexico, a number of state and federal appellate decisions have addressed the issue of retroactivity, causing a national split. A number have held that *Padilla* is retroactive. *United States v. Orocio*, 645 F.3d 630 (3d Cir. 2011); *People v. Gutierrez*, 954 N.E.2d 365 (Ill. App. Ct. 2011); *Denisyuk v. State*, 30 A.3d 914 (Md. 2011); *Commonwealth v. Clarke*, 949 N.E.2d 892 (Mass. 2011); *Campos v. State*, 798 N.W.2d 565 (Minn. Ct. App. 2011); *People v. Nunez*, 917 N.Y.S.2d 806 (N.Y. App. Term 2010); *Ex parte De Los Reyes*, 350 S.W.3d 723 (Tex. Ct. App. 2011). On the other hand, some have held that *Padilla* is not retroactive. *Chaidez v. United States*, 655 F.3d 684 (7th Cir. 2011); *United States v. Chang Hong*, No. 10-6294, 2011 WL 3805763 (10th Cir. Aug. 30, 2011); *State v. Poblete*, 260 P.3d 1102 (Ariz. Ct. App. 2011); *Hernandez v. State*, 61 So. 3d 1144 (Fla. Dist. Ct. App. 2011); *State v. Shaikh*, 65 So.3d 539 (Fla. Dist. Ct. App. 2011); *Barrios-Cruz v. State*, 63 So. 3d 868 (Fla. Dist. Ct. App. 2011); *Gomez v. State*, No. E2010-01319-CCA-R3-PC, 2011 WL 1797305 (Tenn. Crim. App. May 12, 2011) (unpublished decision). The primary dividing line is the question of whether this principle is a "new" or "old" rule of law. "Old" rules are generally accorded retroactivity. For the reasons explained below, we are persuaded that those courts, which conclude that *Padilla* does not establish a new rule and is retroactive, represent the better reasoned view.

{6} New Mexico has adopted the approach set out by the United States Supreme Court in *Teague v. Lane*, 489 U.S. 288 (1989), to determine whether a rule is new or old for purposes of retroactivity. *See State v. Frawley*, 2007-NMSC-057, ¶ 34, 143 N.M. 7, 172 P.3d 144. "If it is an old rule, it applies both on direct and collateral review. If it is a new rule, it generally applies only to cases that are still on direct review." *Id.* ¶ 34 (internal quotation marks and citations omitted). The exception to this principle is that "[a] new rule . . . may apply retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a watershed rul[e] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.* (internal quotation marks and citation omitted).

{7} Thus, the threshold issue here is whether the rule that attorneys must inform their clients about immigration consequences is new or old. "[A] court establishes a new rule when its decision is flatly inconsistent with the prior

governing precedent and is an explicit overruling of an earlier holding." *Id.* ¶ 35 (internal quotation marks and citation omitted). This typically results in the court "break[ing] new ground or impos[ing] a new obligation on the [s]tates or the [f]ederal [g]overnment. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Kersey*, 2010-NMSC-020, ¶ 16 (internal quotation marks and citation omitted). As explained below, neither the decision of the New Mexico Supreme Court nor the United States Supreme Court were flatly inconsistent or explicitly contrary to precedent. As a result, we conclude that the rules stated in *Paredez* and *Padilla* are old rules and thus retroactive.

{8} In *Paredez*, 2004-NMSC-036, ¶¶ 19-20, our Supreme Court defined counsel's failure to inform the defendant of his specific immigration consequences as ineffective assistance of counsel by applying *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court likewise held that defendants were constitutionally guaranteed effective assistance of counsel under *Strickland* in the form of advice about both certain and potential immigration consequences before pleading guilty. *Padilla*, 130 S. Ct. at 1483. In *Strickland*, the Supreme Court held that a defendant must prove both deficient performance by counsel and prejudice for that deficiency to succeed on an ineffective assistance claim. 466 U.S. at 687. The Supreme Court explained that "[r]epresentation of a criminal defendant entails certain basic duties." *Id.* at 688. After listing some basic duties, including the duty of loyalty and avoiding conflicts of interest, the Supreme Court stated that "[t]hese basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance." *Id.* Because the circumstances of each case are different, "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690.

{9} Even while applying an individualized inquiry, the United States Supreme Court has stated that a defendant's right to effective assistance of counsel as stated in *Strickland* is a clearly established rule. In concluding that a defendant was entitled to relief for ineffective assistance of counsel on collateral review, the Supreme Court stated that "it can hardly be said that recognizing the right to effective counsel breaks new ground or imposes a new obligation on the [s]tates[.]" *Williams v. Taylor*, 529 U.S. 362, 391 (2000) (internal quotation marks and citation omitted). As Justice Kennedy has commented in regard to the *Teague* analysis, "[w]here the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." *Wright v. West*, 505 U.S. 277, 309 (1992).

{10} We conclude that *Paredez* and *Padilla* forge no new rule. Neither imposed a new obligation on counsel or directly contradicted precedent because defendants in New Mexico have been guaranteed effective assistance of counsel as set forth in *Strickland* since 1984. Both cases apply well-established principles regarding the effective assistance of counsel to a set of facts that have taken on a rising trajectory of importance to criminal jurisprudence. *Strickland* is a rule designed for application to a myriad of factual contexts, and we conclude that its application in this context fails to contradict existing norms or

forge new precedent in such a way that would require us to consider it a new rule. As the *Padilla* Court pointed out in citing a number of sources that date back prior to Petitioner's conviction, "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." 130 S. Ct. at 1482. The Court concluded that "[f]or at least the past [fifteen] years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea." *Id.* at 1485. *Paredez* and *Padilla* simply apply an old rule with established norms of effective representation to a new set of facts. Under those facts, it had been clear before Petitioner's conviction that those norms obligated attorneys to advise their clients about deportation consequences.

{11} The State argues that both *Paredez* and *Padilla* broke with longstanding precedent. The majority of the State's argument relies on the fact that other state and federal circuit courts had precedent that did not require defendants to be instructed about immigration consequences. To the extent that the State cites out-of-state case law for the proposition that *Padilla* broke with longstanding precedent, we consider New Mexico precedent more persuasive and, as we explain below, the New Mexico cases that the State relies on are not applicable. With regard to New Mexico precedent, the State contends that *Paredez* contradicted established law in *State v. House*, 1996-NMCA-052, 121 N.M. 784, 918 P.2d 370, and *State v. Miranda*, 100 N.M. 690, 675 P.2d 422 (Ct. App. 1983). Though both *House* and *Miranda* dealt with issues unrelated to immigration consequences, *Miranda* held that defense counsel had no duty to advise the defendant about the collateral consequences of a deferred sentence. 100 N.M. at 692, 675 P.2d at 424. In *House*, the defendant appealed a sentencing enhancement on his second DWI conviction because the magistrate, who convicted him of his first DWI for which he represented himself, did not explain the consequences of the prior guilty plea. 1996-NMCA-052, ¶¶ 28-29. *Paredez* clearly enunciates a standard for effective representation that deals with a completely different context. Here, *Paredez* enunciates a norm of conduct specific to advising a criminal defendant of immigration consequences of his plea.

{12} To the extent that the State argues *Paredez* and *Padilla* overrule cases, which indicate that counsel does not have a duty to instruct a client about collateral consequences of a plea agreement, we view the departure as reflecting that collateral consequences are more robust in some varieties, such as deportation that affects a very broad scope of interests. *Padilla* stated that "distinction [of collateral consequences] is . . . ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation[.]" 130 S. Ct. at 1476. The Supreme Court in *Padilla* explained that, "[a]lthough removal proceedings are civil, deportation is intimately related to the criminal process, which makes it uniquely difficult to classify as either a direct or a collateral consequence." *Id.* Thus, precedent about unrelated collateral consequences is inapplicable to *Paredez* and *Padilla*.

{13} The State also contends that "*Padilla* established a 'new rule' by categorically creating a claim for relief where none existed before." The State argues that "[a] court adjudicating the first prong of a *Paredez-Padilla* claim does not have to engage in the highly deferential review of evidence [that] *Strickland* commands for other types of ineffective assistance claims." The State cites *Strickland* in arguing that "[i]t is unnecessary

to review counsel's performance 'from counsel's perspective at the time,' to avoid 'the distorting effects of hindsight[.]'" We point out that the highly deferential review to which the State refers is limited to the *Strickland* analysis of trial tactics pursued by counsel. *Lytle v. Jordan*, 2001-NMSC-016, ¶43, 130 N.M. 198, 22 P.3d 666 ("On appeal, we will not second guess the trial strategy and tactics of the defense counsel." (internal quotation marks and citation omitted)). To the extent that the State argues that *Paredez* and *Padilla* establish categorical rules not requiring a thorough review of the facts, the holdings in both cases require a thorough inquiry into the facts as to what advice the defendant should have been afforded, whether he was given it, and whether the defendant was prejudiced by not receiving the advice.

{14} Other aspects of the *Padilla* opinion indicate that the Supreme Court did not create a new rule. For example, the absence of a *Teague* analysis in *Padilla* alone indicates that this is not a new rule. In *Teague*, the United States Supreme Court stated that

> implicit in the retroactivity approach . . . is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review through one of the two exceptions we have articulated.

489 U.S. at 316. The Court shortly thereafter clarified in *Penry v. Lynaugh* that when a case is before the Court on collateral review, the Court "must determine, as a threshold matter, whether granting [the defendant] the relief he seeks would create a 'new rule.'" 492 U.S. 302, 313 (1989) (citation omitted). "Under *Teague*, new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions [specified in *Teague*]." *Penry*, 492 U.S. at 313. We note that the procedural posture in *Padilla* indicates that the defendant's conviction was final, and he was attacking it on collateral review. *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008), *overruled by Padilla*, 130 S. Ct. at 1486. Therefore, if the Supreme Court intended its holding in *Padilla* to create a new rule, it would have to determine as a threshold issue whether the rule was old or new under *Teague* because the conviction in *Padilla* was on collateral review. The Court clearly did not engage in this analysis, and we must conclude that the *Padilla* court did not believe it was establishing a new rule.

{15} Moreover, the *Padilla* court made clear references to the opinion's application to collateral proceedings attacking guilty pleas. In addressing Kentucky's concern that requiring defense counsel to provide information about immigration consequences would open the floodgates to collateral appeals of finalized convictions, the United States Supreme Court explained why it doubted a flood would follow in the wake of *Padilla*. The Supreme Court compared this issue to its holding in *Hill v. Lockhart*, requiring counsel to advise clients about their parole eligibility before pleading guilty. 474 U.S. 52, 62 (1985). The Supreme Court concluded that "[a] flood did not follow in that decision's wake" and explained that "to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 130 S. Ct. at 1485. The Supreme Court further stated:

> [P]leas are less frequently the subject of collateral challenges than convictions obtained after a trial. . .

> . The nature of relief secured by a successful collateral challenge to a guilty plea—an opportunity to withdraw the plea and proceed to trial—imposes its own significant limiting principle: Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea. Thus, a different calculus informs whether it is wise to challenge a guilty plea in a habeas proceeding because, ultimately, the challenge may result in a *less favorable* outcome for the defendant, whereas a collateral challenge to a conviction obtained after a jury trial has no similar downside potential.

Id. at 1485-86. From this, we conclude that the Supreme Court contemplated *Padilla*'s application on collateral attacks in making its decision.

{16} Based on the above analysis, we conclude that *Paredez* and *Padilla* do not establish a new rule and should be applied retroactively. We now apply *Paredez* and *Padilla* to the case at bar.

B. Application of *Paredez* and *Padilla* to the Facts of This Case

{17} A reviewing court must look at the individual facts of the case to establish what type of advice about immigration consequences should have been given to the defendant. Both misinforming and failing to inform a defendant of the immigration consequences of a plea are objectively unreasonable and constitute deficient performance. *Paredez*, 2004-NMSC-036, ¶¶ 15-16. Moreover, "general advice that a guilty plea 'could,' 'may,' or 'might' have an effect on immigration status" is equally unacceptable. *Id.* ¶ 17. Misadvice, no advice, and general advice all fail to provide the defendant with "information sufficient to make an informed decision to plead guilty." *Id.*

{18} In this case, Petitioner was facing definite deportation at the time of his conviction. Petitioner was convicted of several charges, including possession of drug paraphernalia on January 6, 1997. This date is significant because about nine months prior to his guilty plea, Congress removed any discretionary relief available to those who commit any offense related to a controlled substance, other than the possession of thirty grams or less of marijuana, by enacting the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(d)(2), 110 Stat. 1214 (1996).[1] If Petitioner had been convicted prior to April 24, 1996, when the AEDPA became effective, the Attorney General would have had the authority to grant discretionary relief from deportation under the 1952 Immigration and Nationality Act. *Padilla*, 130 S. Ct. at 1480; *Allen v. Siebert*, 552 U.S. 3, 4 (2007) (stating that "April 24, 1996 [is the] AEDPA's effective date"). This "authority . . . had been

[1]This section of the AEDPA amended the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1997) to state that the Attorney General's discretionary relief "shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in [S]ection 1251(a)(2)(A)(iii), (B), (C), or (D) of this title[.]" One of the deportable offenses that was no longer afforded discretion included "a violation of . . . any law or regulation of a [s]tate, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of [thirty] grams or less of marijuana." 8 U.S.C. 1251(A)(2)(B)(i) (1997).

exercised [by the Attorney General] to prevent the deportation of over 10,000 non[-]citizens during the [five]-year period prior to 1996[.]" *Padilla*, 130 S. Ct. at 1480. The United States Supreme Court has explained that "[p]rior to AEDPA . . . , aliens . . . had a significant likelihood of receiving [discretionary] relief." *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 325 (2001).

{19} Thus, it was clear that, at the time of his conviction, Petitioner had entered into a plea agreement that would almost certainly guarantee his deportation from the United States. We conclude that Petitioner should have been given advice about these likely consequences before entering into a plea agreement with the State.

{20} In his motion, Petitioner alleged that his counsel failed to inform him about any immigration consequences. A plea to time served in a magistrate court for offenses that are minor, under most other circumstances than this, makes Petitioner's story believable, and the State and the district court apparently took these facts at face value. At the hearing, Petitioner repeated the proffer of evidence laid out in his motion to prove that his attorney failed to instruct him about the immigration consequences and that this failure prejudiced him. When asked to respond to Petitioner's proffer, the State stated that it "defer[red] to what the [c]ourt wants to do. [T]he State will argue again that the [c]ourt had reviewed this previously [in a different case] and . . . rul[ed] that [*Paredez*] is not retroactive. As such, the testimony would be irrelevant." The district court responded that the testimony would not be irrelevant, but the court had nonetheless "found in reading the materials [provided by Petitioner that] there doesn't seem to be any factual dispute that [Petitioner's alleged] facts exist." The court then found that Petitioner's proffer was "essentially admitted [and] not disputed."

{21} We conclude that the district court found at the hearing that Petitioner had not received advice about immigration consequences from his attorney, and he was prejudiced because of this failure. To the extent the State argues that Petitioner failed to establish a prima facie case for ineffective assistance of counsel sufficient to justify a hearing, we determine that the State has waived this argument because, at the hearing, the State failed to contest the factual basis to Petitioner's claim of ineffective assistance of counsel. Thus, Defendant has met the requirements set forth in *Paredez*, 2004-NMSC-036, ¶ 19, and *Padilla*, 130 S. Ct. at 1486.

III. CONCLUSION

{22} We reverse the district court and hold that *Paredez* and *Padilla* are retroactive. In this case, Petitioner should have been advised that deportation would almost certainly result from his conviction of possession of drug paraphernalia. Because Petitioner has completely established ineffective assistance of counsel and prejudice, we remand this case to the district court for Petitioner to have an opportunity to withdraw his plea.

{23} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

CYNTHIA A. FRY, Judge

[redacted]

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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-058

Filing Date: April 18, 2012

Docket No. 30,540

LISA NASS-ROMERO, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

v.

VISA U.S.A. INC. and MASTERCARD INTERNATIONAL INCORPORATED,

Defendants-Appellees.

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OPINION

CASTILLO, Chief Judge.

{1} Plaintiff Nass-Romero, seeking to represent a class of New Mexico consumers, brought suit against two credit card companies alleging common law claims, violations of the New Mexico Antitrust Act (NMAA), NMSA 1978, Sections 57-1-1 through -15 (1891, as amended through 1987), and violations of the New Mexico Unfair Practices Act (UPA), NMSA 1978, Sections 57-12-1 through -26 (1967, as amended through 2009). The district court dismissed the complaint. Plaintiff appeals the dismissal of only those claims under the NMAA. We affirm.

I. BACKGROUND

{2} We begin by providing a short history of the events leading to the filing of this complaint. In 1996, merchants and retail trade associations sued Visa U.S.A. Inc., and MasterCard International Incorporated (Visa, MasterCard, or, together, Defendants) alleging that Defendants violated federal antitrust laws by forcing merchants who accepted their credit cards in the regular course of business to also accept the companies' debit cards. *See In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68, 73 (E.D.N.Y. 2000), *aff'd*, 280 F.3d 124 (2d Circ. 2001). The merchants claimed that such a "tying" arrangement was an attempt to monopolize the debit card market, forcing the merchants to pay debit card fees that were higher than those provided by other debit networks. *See id.* A class of more than four million merchants was certified in 2000. *See id.* at 73. In 2003, the parties settled, and Visa and MasterCard agreed to pay more than $3 billion into a settlement fund. *See In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503, 506-07 (E.D.N.Y. 2003). The settlement was approved by the court, *see id.* at 512, and affirmed at the appellate level. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 124 (2d Cir. 2005).

{3} On the heels of that massive lawsuit and settlement, consumers in eighteen other states and the District of Columbia filed class-action suits against Defendants alleging violations of the individual states' antitrust laws and, in some cases, violations of the states' consumer protection laws. The consumers claimed that the tying arrangements that resulted in higher debit processing fees for merchants forced those merchants to pass the cost along to all consumers in the form of higher prices for all retail goods subsequently sold. Courts dismissed the consumer cases in fourteen states and in the District of Columbia.[1] In two

[1] *See Consiglio-Tseffos v. Visa U.S.A., Inc.*, 2004 WL 3030043 (Ariz. Super. Ct., Dec. 8, 2004; *In re Credit/Debit Card Tying Cases*, 2004 WL 2475287 (Cal. Super. Ct., Oct. 14, 2004); *Goldberg v. Visa U.S.A., Inc.*, 2007 WL 2011732 (D.C. Super. Ct., March 2, 2007); *Peterson v. Visa U.S.A., Inc.*, 2005 WL 1403761 (D.C. Super. Ct., April 22, 2005); *Southard v. Visa U.S.A. Inc.*, 734 N.W.2d 192 (Iowa 2007); *Moore v. Visa U.S.A., Inc.*, 2004 WL 3030032 (Kan. Dist. Ct., Nov. 15, 2004); *Knowles v. Visa U.S.A. Inc.*, 2004 WL 2475284 (Me. Super. Ct., Oct. 20, 2004); *Stark v. Visa U.S.A., Inc.*, 2004 WL 1879003

states, Florida and Nevada, consumers voluntarily dismissed their complaints. In West Virginia, the state attorney general brought a *parens patriae* action on behalf of the state's consumers, and the attorney general decided to settle the case after the district court denied Defendants' motion for summary judgment. *See W. Va. v. Visa U.S.A., Inc.*, Civil Action No. 30-C-551 (Memorandum Order Denying Defendants' Motion for Summary Judgment, Oct. 14, 2005); Darrell V. McGraw, Jr., *2009 Annual Report: The West Virginia Attorney General's Report on the Activities of the Consumer Protection and Antitrust Divisions*, 62-63, http://www.wvago.gov/pdf/annualreports/2009_report.pdf.

{4} In New Mexico, Plaintiff filed a 186-paragraph complaint with essentially the same allegations as claimed in the suits filed by the merchants in the federal action and by other state consumers—that the anti-competitive behavior of Visa and MasterCard regarding their debit card fee-processing system forced merchants to pass on costs to consumers. Specifically, Plaintiff claims she bought retail goods from "one or more [m]erchants located in New Mexico who were forced by Visa and/or MasterCard to accept their customers' *Visa Check* and/or *MasterMoney* debit cards when those debit cards were presented by them for payment as a condition of being able to accept Visa and/or MasterCard credit cards." She also alleges that Visa and MasterCard's debit card transaction fees are significantly higher than the fees charged by providers of debit services and that the alleged debit card scheme imposes a hidden sales tax on every retail transaction affecting hundreds of thousands of consumers in New Mexico, regardless of whether a credit or debit transaction took place during a given purchase. Plaintiff also seeks class certification on behalf of "tens of thousands" of New Mexico consumers who have made purchases of any number of goods from merchants who accepted Visa and MasterCard's credit and debit cards as a form of payment.

{5} Six years into the proceedings, the district court granted Defendants' motion to dismiss. It ruled that Plaintiff did not have standing to bring a claim under either the NMAA or the UPA and that Plaintiff failed to state a claim under the UPA. The district court dismissed the common law claims of unjust enrichment and of money had and received, finding that Defendants realized no benefit in the alleged scheme. In this appeal, Plaintiff limits her challenge to the dismissal of her claims under the NMAA. Specifically she argues that the district court erred (1) in determining that Plaintiff's injuries were too remote to provide standing to bring suit under the NMAA; and (2) in failing to find that Plaintiff was within the target area of the actions of Visa and MasterCard.

(Mich. Cir. Ct., July 23, 2004); *Smith v. Visa U.S.A., Inc.*, 2005 WL 1936336 (Minn. Dist. Ct., July 12, 2005); *Gutzwiller v. Visa U.S.A., Inc.*, 2004 WL 2114991 (Minn. Dist. Ct., Sept. 15, 2004); *Tackitt v. Visa U.S.A., Inc.*, 2004 WL 2475281 (Neb. Dist. Ct., Oct. 19, 2004); *Kanne v. Visa U.S.A. Inc.*, 723 N.W.2d 293 (Neb. 2006); *Ho v. Visa U.S.A., Inc.*, 793 N.Y.S.2d 8 (N.Y. App. Div. 2005); *Crouch v. Crompton Corp.*, 2004 WL 2414027 (N.C. Super. Ct., Oct. 28, 2004); *Beckler v. Visa U.S.A., Inc.*, 2004 WL 2475100 (N.D. Dist. Ct., Sept. 21, 2004); *Cornelison v. Visa U.S.A., Inc.*, No. 03-1350 (S.D. Cir. Ct., Sept. 29, 2004); *Bennett v. Visa U.S.A. Inc.*, 198 S.W.3d 747 (Tenn. Ct. App. 2006); *Fucile v. Visa U.S.A., Inc.*, 2004 WL 3030037 (Vt. Super. Ct., Dec. 27, 2004); *Strang v. Visa U.S.A., Inc.*, 2005 WL 1403769 (Wis. Cir. Ct., Feb. 8, 2005).

II. DISCUSSION

A. Standard of Review

{6} A motion to dismiss "is infrequently granted because its purpose is to test the law of the claim, not the facts that support it." *Envtl. Improvement Div. v. Aguayo*, 99 N.M. 497, 499, 660 P.2d 587, 589 (1983). In reviewing a district court's decision to dismiss for failure to state a claim, "we accept as true all well-pleaded factual allegations in the complaint and resolve all doubts in favor of the complaint's sufficiency." *N.M. Pub. Schs. Ins. Auth. v. Arthur J. Gallagher & Co.*, 2008-NMSC-067, ¶ 11, 145 N.M. 316, 198 P.3d 342. "A Rule [1-0]12([B])(6) [NMRA] motion is *only* proper when it appears that plaintiff can neither recover nor obtain relief under any state of facts provable under the claim." *Valdez v. State*, 2002-NMSC-028, ¶ 4, 132 N.M. 667, 54 P.3d 71 (internal quotation marks and citation omitted). "A district court's decision to dismiss a case for failure to state a claim under Rule 1-012(B)(6) is reviewed de novo." *Valdez*, 2002-NMSC-028, ¶ 4. "Whether a party has standing to litigate a particular issue is a question of law, which we review de novo." *City of Sunland Park v. Santa Teresa Servs. Co.*, 2003-NMCA-106, ¶ 39, 134 N.M. 243, 75 P.3d 843.

B. Plaintiff Lacks Standing to Bring a Claim Under the NMAA

{7} We turn first to Plaintiff's assertion of error in the district court's dismissal of the action for lack of standing. "Dismissals under Rule 1-012(B)(6) are proper when the claim asserted is legally deficient." *Delfino v. Griffo*, 2011-NMSC-015, ¶ 9, 150 N.M. 97, 257 P.3d 917. A plaintiff's standing is a "jurisdictional prerequisite to an action." *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶ 9 n.1, 144 N.M. 471, 188 P.3d 1222 (internal quotation marks and citation omitted).

{8} To evaluate whether Plaintiff has standing sufficient to assert a claim here, we look at the text of the NMAA. Antitrust legislation barring monopolistic restraint of trade began with the federal Sherman Antitrust Act (Sherman Act), enacted by Congress in 1890. *See* 15 U.S.C. §§ 1 through 7 (2004). One year later, in 1891, the New Mexico Territorial Legislature enacted the NMAA that is based on the Sherman Act. *See* §§ 57-1-1 through -19. In 1914, Congress enacted a follow-up statute, the Clayton Act, to bolster the original act's enforcement mechanisms. *See* 15 U.S.C. § 15(a). The NMAA contains a similar provision and allows recovery to "any person threatened with injury or injured in his business or property" by a violation of the NMAA. Section 57-1-3.

{9} Our determination regarding standing involves a question of statutory interpretation that in turn involves an understanding of the interplay between federal and state antitrust law. The NMAA "shall be construed in harmony with judicial interpretations of the federal antitrust laws. This construction shall be made to achieve uniform application of the state and federal laws prohibiting restraints of trade and monopolistic practices." Section 57-1-15. According to our Supreme Court, "[t]he underlying purposes behind both the federal and state [l]aws are the same, to establish a public policy of first magnitude; that is, promoting the national interest in a competitive economy." *United Nuclear Corp. v. Gen. Atomic Co.*, 93 N.M. 105, 125, 597 P.2d 290, 310 (1979) (internal quotation marks and citation omitted). Recently, the Court reaffirmed that the state and federal antitrust statutes should be read in harmony: "It is therefore the duty of the courts to ensure that New Mexico antitrust law does not

deviate substantially from federal interpretations of antitrust law." *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 18, 148 N.M. 713, 242 P.3d 280. New Mexico courts therefore look to federal antitrust law to determine the meaning of provisions of the NMAA. *See State v. Ray Bell Oil Co.*, 101 N.M. 368, 370, 683 P.2d 50, 52 (Ct. App. 1983).

{10} With this as a background, we now turn to Plaintiff's challenge to the district court's finding that she lacked standing under the NMAA. New Mexico has adopted a three-part test to address standing in general: "To acquire standing to litigate a particular issue, a party must demonstrate (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." *City of Sunland Park*, 2003-NMCA-106, ¶ 40 (internal quotation marks and citations omitted). Plaintiff here asks us to break the standing question into several parts—the above three-step analysis as well as a discussion of whether consumers were in the "target area" of Defendants' actions or whether the harm to Plaintiff that flowed from Defendants' actions was "foreseeable" enough to create standing in Plaintiff. We decline Plaintiff's invitation because her suggested tangents are subsumed into the basic analysis of standing. "Even where a party demonstrates these three elements, standing may be denied if the interest the complainant seeks to protect is not within the 'zone of interests' protected or regulated by the statute or constitutional provision the party is relying upon. The concepts of injury and zone of interest are thus intertwined." *Id.* In support of her position, Plaintiff cites *Key v. Chrysler Motors Corp.*, 1996-NMSC-038, 121 N.M. 764, 768, 918 P.2d 350, 354, for the proposition that a claimant must show "that the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute[,]" and she contends that she meets this test. *Id.* (internal quotation marks and citation omitted). We first observe that this is not an antitrust case. And while we agree that the cited statement is contained in *Key*, there is more. *Key* goes on to state that in order to assess a plaintiff's standing "we must look to the Legislature's intent as expressed in the [applicable] Act or other relevant authority." *Id.* Here, the Legislature has clearly spoken, requiring that the NMAA be interpreted in harmony with federal law.

{11} Plaintiff also argues that she should have standing because the economic effect on her and other consumers was foreseeable. This argument has been considered elsewhere and, like those other courts, we decline to adopt such a standard for antitrust cases. *See Reibert v. Atlantic Richfield Co.*, 471 F.2d 727, 731 (10th Cir. 1973) ("Antitrust violations admittedly create foreseeable ripples of injury to individual stockholders, consumers[,] and employees, but the law has not allowed all of these standing to sue for treble damages."); *Southard*, 734 N.W.2d at 197 (stating in a parallel case against Visa and MasterCard that "[t]he remoteness doctrine is not based upon a factual inquiry to determine whether the damages claimed were foreseeable or whether they were a proximate cause; rather, it is a legal doctrine incorporating public policy considerations" (internal quotation marks and citation omitted)); *Fucile*, 2004 WL 3030037, at *4 (stating in a parallel case against Visa and MasterCard that "[t]he defendants could not be expected to foresee an antitrust violation affecting merchants to result in increased cost of goods throughout the entire consumer base and to so injure that consumer base as to result in liability to every consumer in the country"). Instead, we follow the direction of the NMAA

itself, rely on the general guidance regarding standing found in *Key*, and conduct a standing analysis for the NMAA that is in harmony with federal court interpretations of antitrust jurisprudence. *See City of Sunland Park*, 2003-NMCA-106, ¶ 41 ("Cases in New Mexico are clear that injury—whether actual or threatened—is not enough by itself to confer standing. To be accorded standing on a particular issue the party must show that the statute or constitutional provision relied on reaches or provides protection against the injury.").

{12} Having rejected the alternative approaches put forth by Plaintiff, we proceed to evaluate whether Plaintiff has standing based on the provisions of the NMAA and on federal antitrust jurisprudence. Both parties agree that the relevant precedent guiding a standing analysis in federal antitrust litigation is *Associated Gen. Contractors v. California State Council of Carpenters* (*AGC*), 459 U.S. 519 (1983). There, the United States Supreme Court suggested that the loose concepts of "zone of interest" and "foreseeability" are not adequate to confer standing.

> An antitrust violation may be expected to cause ripples of harm to flow through the [n]ation's economy; but despite the broad wording of [15 U.S.C.] § 4 there is a point beyond which the wrongdoer should not be held liable. It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.
>
> It is plain, therefore, that the question whether the [plaintiff] may recover for the injury it allegedly suffered by reason of the defendants' coercion against certain third parties cannot be answered simply by reference to the broad language of [15 U.S.C.] § 4.

Id. at 534-35 (internal quotation marks and citations omitted).

{13} In *AGC*, the Court was concerned with "keeping the scope of complex antitrust trials within judicially manageable limits." *Id.* at 543. In this regard, the *AGC* Court set out five factors to consider in analyzing the issue of standing: (1) whether the plaintiffs were participants in the allegedly restrained market; (2) the directness of the plaintiff's alleged harm; (3) whether there is a better potential plaintiff; (4) whether the plaintiff's theory of damages is speculative; and (5) the complexity of apportioning damages and the risk of duplicative liability. *Id.* at 538-45. We now turn to each of the factors and evaluate them based on Plaintiff's allegations.

1. Market Participation

{14} The market at issue is the debit processing service of Visa and MasterCard that involves Defendants, their member banks, and the merchants who honor their cards. Plaintiff is neither a consumer nor a competitor in the market allegedly being restrained by Defendants and does not appear in that chain of distribution; thus, she cannot be identified as a consumer of the service provided by Visa and MasterCard. Plaintiff, instead, is a consumer of goods sold by merchants who happen to be part of the affected market. Other jurisdictions agree. *See, e.g.*, *Kanne*, 723 N.W.2d at 298 (concluding that the consumer-plaintiffs were "not competitors in the allegedly affected market, which is the business of providing debit network processing services to

merchants . . . [n]or . . . consumers of those services"); *Southard*, 734 N.W.2d at 199 (characterizing consumer plaintiffs as "neither consumers of the defendants' products nor competitors of the defendants").

2. Directness of Harm

{15} Here, Plaintiff alleges that Defendants' tying arrangements led to "exorbitant fees . . . passed on to . . . Plaintiff and [c]lass members in the form of artificially higher and advanced prices." Plaintiff's allegations do not show that she was directly harmed by the actions of Visa and MasterCard; nor do they show that she was indirectly harmed through the chain of distribution of the debit card services. The alleged harm caused by Defendants' tying scheme takes an abrupt left turn after reaching the merchants and branches off into supposed higher prices for all goods throughout New Mexico, mutating into a different form of harm to consumers. Plaintiff's injury is better characterized as remote or derivative. *See Southard*, 734 N.W.2d at 199 ("Clearly, the injuries alleged by the plaintiffs are not even indirect, as the plaintiffs are not in the chain of distribution. Their injuries are better described as derivative."); *Ho*, 793 N.Y.S.2d at 9 ("Those injuries are too remote and derivative to countenance such a cause of action.").

3. A Better Plaintiff

{16} In the case before us, Plaintiff is a consumer who is not directly affected by the alleged tying arrangement. The better plaintiffs to challenge Defendants' business practices have already come forward. They are the merchants themselves, led by Wal-mart, who first brought suit in 1996 and who settled with Visa and MasterCard in 2003, setting up a $3.1 billion fund to make whole the merchants affected by debit card transaction fees. Preventing Plaintiff here from bringing a claim under the NMAA will not "leave a significant antitrust violation undetected or unremedied." *AGC*, 459 U.S. at 542; *see Ho*, 793 N.Y.S.2d at 9 (finding that Visa and MasterCard "have been subjected to judicial remediation for their wrongs, and any recovery here would be duplicative").

4. Speculative Damages

{17} We now evaluate the nature of Plaintiff's alleged damages. Plaintiff asserts that her damages are based on the overcharges she paid on every retail item she bought from every merchant in New Mexico that accepted Visa and MasterCard credit and debit cards over the course of several years. By way of example, Plaintiff would ask a court to find that paying, say, $1.99 for a dozen eggs rather than $1.89 during a random shopping trip to a particular grocer was the indirect result of the excessive debit card transaction fees paid by the grocer to the member banks of Visa and MasterCard. Plaintiff would be alleging that for this particular purchase, and for the millions of small purchases made by "tens of thousands" of New Mexicans at dozens or perhaps hundreds of retail outfits throughout the state, the merchant chose not to absorb the debit card transaction fee but rather passed that cost on to the consumer. Such a calculation would ignore the countless considerations that go into the set price of any given product at any given store on any given day. *See Kanne*, 723 N.W.2d at 299 (stating that "the claimed price increases over a period of years could have resulted from myriad independent reasons unrelated to the alleged violation" (internal quotation marks and citation omitted)). Because the alleged damages could have been produced by numerous independent factors, Plaintiff's damage claim is speculative.

5. Complexity of Apportioning Damages; Risk of Duplicative Liability

{18} The United States Supreme Court has emphasized "the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." *AGC*, 459 U.S. at 543-44. The Court feared that such damage calculations "would often require additional long and complicated proceedings involving massive evidence and complicated theories." *Id.* at 544 (internal quotation marks and citation omitted). As the Maine Superior Court stated in a parallel case against Defendants,

> [t]o determine what portion of any overcharge was passed on by any given merchant, with respect to which products, and to which consumers is a task of monumental uncertainty and complexity. Depending on their other costs, their competitive position in the market, their profit margins, and the specific products they sold, some merchants could have absorbed a substantial portion of any overcharge instead of passing it on.

Knowles, 2004 WL 2475284, at *6. "For any given consumer, the issue is even more complicated and speculative because the inquiry would involve what items that particular consumer purchased, what that consumer paid for each item, and what percentage of overcharge, if any, was contained in that price." *Id.*; *see* Kellen S. Dwyer, *With the* Illinois Brick *Wall Down, What's Left? Determining Antitrust Standing Under State Law*, 3 J. Bus. Entrepreneurship & the Law 255, 279 (2010) (hereinafter Dwyer) ("Showing the pass-on would require an estimation of the elasticity of demand for almost every product sold in the state. Even if that feat were possible, it is hard to imagine how the funds could be apportioned."). In addition, the risk of duplicative liability is apparent. Defendants settled with merchants nine years ago for more than $3 billion and thus were made to pay for the alleged antitrust violations. Under Plaintiff's theory of the case, merchants who benefitted from the settlement could conceivably have turned around and lowered the prices of their goods, thus providing consumers with relief from any previously passed-along costs emanating from the debit card transaction fees. Apportioning damages would be a complex task, and there is a risk of duplicative damages.

{19} The *AGC* factors do not fall in Plaintiff's favor. Taking the factors in sum, we conclude that Plaintiff's claim fails the test and fails to prove she has standing to bring a claim under the NMAA.

{20} As an alternative, Plaintiff argues that *AGC* should not apply to her claim at all because the facts of *AGC* can be distinguished from the facts of her case. Plaintiff points out that she is a consumer facing overcharges, whereas the plaintiff labor union in *AGC* was not a consumer and was not subject to overcharges. However, the Court in *AGC* made it clear that its five-factor analysis applied to the broad spectrum of antitrust claims, including those involving consumers. *See* 459 U.S. at 538 (stating that "the Sherman Act was enacted to assure customers the benefits of price competition, and our prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market"). And the author of *AGC*, Justice Stevens, more recently reiterated the broad application of that five-factor analysis. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 416 (2004) (Stevens, Souter & Thomas, JJ.,

concurring) (applying the *AGC* factors and reasoning that "we have eschewed a literal reading of [15 U.S.C.] § 4, particularly in cases in which there is only an indirect relationship between the defendant's alleged misconduct and the plaintiff's asserted injury"); *see also Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 n.14 (1972) ("The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation."). We conclude that *AGC* is applicable to the case before us even though its facts are distinguishable.

{21} Plaintiff further argues, though, that the NMAA offers a broader basis for consumers to bring an antitrust action and that it diverges from federal law by allowing suits to be brought by those "indirectly" harmed by monopolistic behavior. Section 57-1-3. The NMAA was modified in 1979 to counteract the U.S. Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which had barred antitrust suits by "indirect" purchasers in a distribution scheme. New Mexico, as did other states, responded by clarifying its statute to allow suits by those claiming to have been harmed indirectly. Plaintiff thus suggests that the revised NMAA deserves an expansive reading that finds a broad legislative intent to protect consumers.

{22} First, as stated above, we reject Plaintiff's claim that she is an indirect purchaser in the distribution scheme at hand; rather, her claim is distinct from and derivative of a distribution network for debit card services that involves Defendants, their member banks, and merchants. Further, Plaintiff misreads the Supreme Court's opinion in *Illinois Brick* and conflates its statutory analysis with an analysis of standing. The *Illinois Brick* Court was focused not on standing but rather on a straight interpretation of the statute amid the Court's concerns about allowing multiple treble damages liability throughout a given chain of distribution of goods. *Id.* at 736-37. The Court was careful to distinguish between the issue presented—the question of whether the federal antitrust act allows an indirect purchaser to bring suit—and the broader issue of standing: "[W]e do not address the standing issue, except to note . . . that the question of which persons have been injured by an illegal overcharge . . . *is analytically distinct* from the question of which persons have sustained injuries too remote to give them standing to sue for damages under [15 U.S.C.] § 4." *Illinois Brick*, 431 U.S. at 728 n.7 (emphasis added). Even the *Illinois Brick* dissent by Justice Brennan acknowledged that "there is a point beyond which the wrongdoer should not be held liable." *Id.* at 760 (Brennan, Marshall, & Blackmun, JJ., dissenting). The dissent continued: "Courts have therefore developed various tests of antitrust 'standing' . . . to define that point." *Id.* The full Court, in a subsequent case, reiterated that standing requirements and questions of "which persons have sustained injuries that are too remote" remain "[a]nalytically distinct" from *Illinois Brick*'s bar against indirect purchasers. *Blue Shield v. McCready*, 457 U.S. 465, 476 (1982) (emphasis, internal quotation marks, and citation omitted). Thus, "[b]ecause *Illinois Brick* did not alter the Court's antitrust standing jurisprudence, *Illinois Brick*'s repeal should imply nothing about standing." Dwyer, *supra*, at 263 (emphasis added).

{23} Plaintiff can point to only one other jurisdiction that has ruled in favor of consumers in a similar case against Defendants: *W. Virginia*, Civil Action No. 30-C-551. This is an unpublished decision in which the court prefaces its discussion by

stating that it was not conducting a full analysis of the issue of standing. *Id.* Further, the West Virginia district court's discussion of *Illinois Brick* repealer statutes suffers from lack of nuance and falls short of a full assessment of standing in such cases. Thus, it stands alone as an unreliable outlier against every other jurisdiction that has denied standing to similarly situated plaintiffs bringing derivative actions against Visa and MasterCard. *See, e.g.*, *Kanne*, 723 N.W.2d at 299-300; *Knowles*, 2004 WL 2475284 at *3; *Stark*, 2004 WL 1879003 at *3-4. The Minnesota Supreme Court, in a follow-up case to its consumer suits against Defendants, observed that "*Illinois Brick* addressed the scope of antitrust injury, not standing, under the Clayton Act." *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 629 (Minn. 2007). The court concluded: "Whatever the precise prudential limits on Minnesota antitrust standing, we do not believe that the legislature intended to create 'consumer standing' by allowing every person in the state to sue for an antitrust violation simply by virtue of his or her status as a consumer." *Id.* at 632. We similarly conclude that Plaintiff lacks standing to bring a claim against Visa and MasterCard under the NMAA for the alleged tying scheme that forced merchants to accept Defendants' debit cards at inflated transaction-fee rates.

III. CONCLUSION

{24} For the foregoing reasons, we affirm the decision of the district court.

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

CELIA FOY CASTILLO, Chief Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

RODERICK T. KENNEDY, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-059

Filing Date: April 19, 2012

Docket No. 30,726

MARIA RODRIGUEZ,

Plaintiff-Appellant,

v.

NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS,

Defendant-Appellee.

Law Offices of E. Justin Pennington
E. Justin Pennington
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for Appellant

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for Appellee

OPINION

SUTIN, Judge.

{1} This appeal pits the New Mexico Personnel Act against the New Mexico Human Rights Act on the question of which law is controlling when a discharged probationary state employee with no property interest in continuing employment seeks relief under the Human Rights Act for sex and age discrimination. The district court dismissed the employee's Human Rights Act claim on the ground that, under the Personnel Act, the State agency was permitted to terminate the probationary employee's employment without cause even if the termination was based on sex or age discrimination. We disagree and hold that the employee can pursue a claim under the Human Rights Act.

BACKGROUND

{2} Plaintiff Maria Rodriguez was hired by Defendant New Mexico Department of Workforce Solutions (the Department) first as a temporary employee and then as a probationary employee. While she was a probationary employee, she was given a notice of dismissal from her position pursuant to the New Mexico Personnel Act, NMSA 1978, §§ 10-9-1 to -25 (1961, as amended through 2009).

{3} Under the Personnel Act, "'employee' means a person in a position . . . who has completed his probationary period[.]" Section 10-9-3(I). A probationary employee is referred to as a "probationer," meaning "a person . . . who is still in the probationary period for that position." Section 10-9-3(J). State Personnel Board Regulation 1.7.1.7(CC) NMAC (3/31/2006) (amended 10/15/2008) states that "probationer" means "an employee in the classified service who has not completed the one-year probationary period." And 1.7.11.11 NMAC (11/14/2002), as it relates to probationers, states that "[p]robationers . . . may be suspended, demoted, or dismissed effective immediately with written notice and without right of appeal to the board."

{4} Following her discharge, Plaintiff filed a claim with the New Mexico Department of Labor, Human Rights Division and the Equal Employment Opportunity Commission against the Department alleging discrimination and retaliation based on her sex and age. After exhaustion of her administrative remedies, Plaintiff filed a notice of appeal and complaint in the district court asserting discrimination and retaliation under the New Mexico Human Rights Act, NMSA 1978, §§ 28-1-1 to -15 (1969, as amended through 2007). *See* § 28-1-10(A), (D), (J) (setting out grievance procedures); § 28-1-13 (setting out appeal procedure).

{5} The Department filed a motion for summary judgment, asserting that, because Plaintiff was a probationary employee and therefore had no property interest in continuing employment, the court lacked jurisdiction to consider Plaintiff's constitutional claims. In its memorandum in support of its motion, the undisputed facts

upon which the Department relied for summary judgment were: (1) Plaintiff was hired on a temporary basis to fill a ninety-day position; (2) Plaintiff willingly accepted temporary and part-time employment and her exclusions from the Public Employee Retirement Benefit Association (PERA); (3) Plaintiff was selected for a second ninety-day part-time temporary position and again willingly accepted the temporary, part-time position and exclusions from PERA benefits; (4) Plaintiff later accepted a temporary position for an additional thirty days or until a permanent position was filled; (5) Plaintiff was then hired on a full-time basis to fill an administrative position; and (6) during her probationary period, Plaintiff was notified of her dismissal.

{6} In its summary judgment documents, the Department pointed to no particular "constitutional claims." Its "concise statement" of the issues was that the district court "lack[ed] jurisdiction to consider Plaintiff's claim as Plaintiff was a probationary employee for all times pertinent to this litigation and therefore has no property interest in continued employment with [the] Department[.]" The court granted the Department's motion for summary judgment based on findings that Plaintiff was a probationary employee at the time her employment was terminated and that the Department was permitted to terminate Plaintiff's employment without cause during her probationary period.

{7} Plaintiff appeals from the summary judgment in the Department's favor. On appeal, Plaintiff argues that the district court erred in concluding that the protections against discrimination and retaliation contained in the Human Rights Act do not apply to probationary employees of the State of New Mexico who have been discharged pursuant to the Personnel Act. We agree with Plaintiff.

DISCUSSION

{8} No factual issues are disputed. We review the grant of the motion for summary judgment de novo. *Beggs v. City of Portales*, 2009-NMSC-023, ¶ 10, 146 N.M. 372, 210 P.3d 798. The critical issue is one of first impression. The issue as stated by the Department is whether the district court had jurisdiction to consider discrimination and retaliation claims asserted under the Human Rights Act when a probationary state employee claimant who is discharged under the Personnel Act has no property interest in continuing employment.

{9} The Department primarily bases its lack of jurisdiction position on two federal cases involving claims under 42 U.S.C. § 1983 (1996). *See Lighton v. Univ. of Utah*, 209 F.3d 1213, 1221 (10th Cir. 2000) (stating that § 1983 claims are actionable only where the employee possesses a property or liberty interest in the employment); *Russillo v. Scarborough*, 935 F.2d 1167, 1170, 1174 (10th Cir. 1991) (affirming the district court's grant of summary judgment in favor of the employer as to the plaintiff's § 1983 claim because, as an "at-will" employee, the plaintiff had no protected property interest in his employment).

{10} Tied into *Russillo*, the Department relies on *Lovato v. City of Albuquerque*, 106 N.M. 287, 742 P.2d 499 (1987), a mandamus action seeking to require the defendant to grant a hearing on the merits of the plaintiff's transfer and pay reduction. The language on which the Department relies from *Lovato*, and which was contained in *Russillo*, 935 F.2d at 1170, is the statement that the plaintiff's "employment status was a protected property

interest only if he had an express or implied right to continued employment." *Lovato*, 106 N.M. at 289-90, 742 P.2d at 501-02.

{11} In addition, the Department relies on *Cockrell v. Bd. of Regents of N.M. State Univ.*, 1999-NMCA-073, 127 N.M. 478, 983 P.2d 427. *Cockrell* involved a claim for damages under 42 U.S.C. § 1983, a defense of qualified immunity, and an issue of whether the plaintiff was deprived of a property interest without due process of law when his employment was terminated. *Id.* ¶ 3. The Court in *Cockrell* stated:

> The key dispute under the [employee] [m]anual is whether [the employee] was still a probationary employee at the time of his termination. Probationary employees have no expectancy of continued employment and may be terminated without cause and without procedural protections such as notice and a hearing. Non-probationary employees, on the other hand, do have such an expectancy in that they can only be discharged for good cause and by way of due process grievance procedures. There is no dispute that if [the employee] was still a probationary employee at the time of his termination, then his discharge satisfied the [m]anual. However, if by then, he was more than a mere probationary employee, then it is equally settled that he did not receive the protections owed him under the [m]anual. More importantly, for purposes of this appeal, as a non-probationary employee [the employee] would have an expectancy of continued employment which cannot be eliminated arbitrarily without due process of law.

Id. The Department further relies on *Clark v. Children, Youth & Families Dep't*, 1999-NMCA-114, 128 N.M. 18, 988 P.2d 888, a decision that solely involved a probationary employee's status under the Personnel Act, and also relying on *Lovato*, 106 N.M. at 289, 742 P.2d at 501, for the proposition that Plaintiff cannot state a substantive claim for relief because she did not have a property interest in continuing employment.

{12} The Department also attempts to squeeze in an argument that a probationary state employee cannot state a claim under the Human Rights Act because the Department's termination action is based on a "statutory prohibition" created by the Personnel Act and excluded from the definition of discriminatory practice under the Human Rights Act. *See* § 28-1-7(A) (stating that it is an unlawful discriminatory practice for an employer "to discharge . . . or to discriminate . . . against any person otherwise qualified because of race, age, religion, color, [or] national origin . . ." unless the employer's action is "based on a bona fide occupational qualification or other statutory prohibition"). The statutory prohibition, according to the Department, is the composite of provisions in the Personnel Act that distinguish an employee from a probationary employee, that permit a probationary employee to be discharged without cause, and that forbid the discharged probationary employee any appeal right. Sections 10-9-3(I), (J); 1.7.2.8 NMAC (7/15/2005); 1.7.11.11 NMAC. Thus, the Department argues that to allow a probationary employee to bring a cause of action under the Human Rights Act is contrary to the Personnel Act's limitation on a probationary employee's right to make a claim for wrongful discharge. According to the Department, allowing a probationer to bring a

cause of action under the Human Rights Act is contrary to Section 28-1-7(A)'s exclusion of "other statutory prohibition" from the definition of "unlawful discriminatory practices[.]"

{13} We reject the Department's arguments. The Department fails to present any authority that persuades us that a jurisdictional bar exists under the circumstances here. The case before us is not one solely under the Personnel Act. We are not addressing a claim under § 1983, and § 1983 is not at issue. Neither constitutional violations nor liberty or property interests are at issue. Plaintiff's claim is under the Human Rights Act. No authority on which the Department relies persuades us that a person in Plaintiff's position must prove a property interest in continuing employment as a jurisdictional prerequisite to assertion of a claim under the Human Rights Act for discrimination and retaliation based on sex or age. Nor are we presented with any authority to support the district court's determination that Plaintiff is barred from seeking relief under the Human Rights Act simply because the Personnel Act permits discharge of a probationary state employee without cause.

{14} The Human Rights Act, like its federal analog, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1991), was "designed to encourage employees to report when they or others are being subjected to illegal workplace discrimination[.]" *Mitchell v. Zia Park, LLC*, No. CV 10-1206 WPL/GBW, 2012 WL 310824, at *1, *9, __ F. Supp. 2d__ (D.N.M. Feb. 1, 2012). Owing to the similarities between the Human Rights Act and Title VII, our Supreme Court has noted that our analysis of claims under the Human Rights Act is guided by the federal courts' interpretation of unlawful discrimination under Title VII. *Garcia-Montoya v. State Treasurer's Office*, 2001-NMSC-003, ¶ 39, 130 N.M. 25, 16 P.3d 1084.

{15} We are guided by two federal cases in which the plaintiffs, who lacked a property interest in employment, filed complaints alleging violations of both § 1983 and Title VII. *See Walters v. City of Atlanta*, 803 F.2d 1135 (11th Cir. 1986); *Henderson v. City of New York*, 818 F. Supp. 2d 573 (E.D.N.Y. July 20, 2011). In each case, the respective courts determined that the plaintiff's § 1983 claim could not stand because the plaintiffs had no property interest in the employment, however, in each case, the court permitted the plaintiff's Title VII claim. *See Walters*, 803 F.2d at 1140, 1142, 1144-45 (stating that because the plaintiff did not have a property interest in the employment that he sought to obtain, the district court properly granted the defendants' motion for directed verdict on the plaintiff's § 1983 claim and also holding that the district court properly found that the plaintiff prevailed on his Title VII discrimination and retaliation claims); *Henderson*, 818 F. Supp. 2d at 575-78, 583-84 (explaining that the plaintiff, who was a probationary employee when he retired (which he claimed was a "constructive discharge"), unlike a permanent employee he had no property interest in his position and therefore could not establish a § 1983 claim, and further, denying the defendant's motion for summary judgment on the plaintiff's Title VII retaliation claim, as well as the claims under the state's and city's human rights acts).

{16} Furthermore, we cannot give the Personnel Act an enforcement status superior to the exceptionally important public policy against discrimination set out in the Human Rights Act. We will not lend credence to a view that a probationary state employee can be discharged based on the employee's sex or age. *See Bottijliso v. Hutchison Fruit Co.*, 96

N.M. 789, 792, 635 P.3d 992, 995 (Ct. App. 1981) (stating that under the doctrine of abusive discharge, "implied by operation of law as an additional condition of the contract similar to the restrictions imposed by the Equal Employment Opportunity provisions of the Civil Rights Act of 1964 . . . the interest of the employer in the exercise of his unfettered right to terminate the employee under a contract at will is balanced against the interest of the community in upholding its laws in public policy"), *overruled on other grounds by Boudar v. E.G. & G., Inc.*, 105 N.M. 151, 730 P.2d 454 (1986); *see also Been v. N.M. Dep't of Info. Tech.*, 815 F. Supp. 2d 1222, 1236 n.5 (D.N.M. 2011) (stating that, in the face of the defendant's argument that the plaintiff was a probationer under the Personnel Act, "[a]lthough an employee at will may be terminated without cause, she is still entitled to the protections of Title VII and the [Human Rights Act]"); *Vigil v. Arzola*, 102 N.M. 682, 688-89, 699 P.2d 613, 619-20 (Ct. App. 1983) (stating that "a cause of action should exist when the discharge of an employee contravenes some clear mandate of public policy" and that the Human Rights Act falls within the category of "clearly mandated public policy" (internal quotation marks and citation omitted)), *overruled on other grounds by Chavez v. Manville Prods. Corp.*, 108 N.M. 643, 777 P.2d 371 (1989). The Human Rights Act forbids an employer to discriminate against "any person otherwise qualified[.]" Section 28-1-7(A).

{17} We hold that the district court erred in concluding that, owing to Plaintiff's status as a probationary employee under the Personnel Act, her claim under the Human Rights Act could not stand because the Department "was permitted to terminate [her] employment without cause[.]" On remand, the district court shall determine whether Plaintiff can establish a prima facie case of discrimination and retaliation pursuant to the Human Rights Act and proceed under the analytical framework as discussed in *Garcia-Montoya*, 2001-NMSC-003, ¶ 39, and *Juneau v. Intel Corp.*, 2006-NMSC-002, ¶¶ 9, 23, 139 N.M. 12, 127 P.3d 548, to resolve the claims on their merit.

{18} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

J. MILES HANISEE, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMCA-060

Filing Date: April 26, 2012

Docket No. 30,405

GENE N. CHAVEZ,

Plaintiff/Petitioner-Appellee,

v.

STATE OF NEW MEXICO WORKERS' COMPENSATION ADMINISTRATION,

Defendant/Respondent-Appellant.

Chavez Law Offices, P.A.
Gene N. Chavez
Albuquerque, NM

Pro Se Appellee

Keleher & McLeod, P.A.
Sean Olivas
Albuquerque, NM

for Appellant

OPINION

VIGIL, Judge.

{1} This case presents us with an issue of first impression: whether the Workers' Compensation Administration (WCA) has authority to suspend an attorney from practicing before it. We conclude that the WCA has such authority. This authority arises out of the power of the WCA to control the proceedings before it, and an attorney who violates its rules of practice and procedure may properly be sanctioned by the WCA. Furthermore, the power to suspend the attorney is separate and apart from, and does not infringe upon, the Supreme Court's exclusive authority to discipline attorneys. The district court having concluded otherwise, we reverse in part, and affirm in part.

I. BACKGROUND

{2} This case commenced when the Director of the WCA filed a pleading in the WCA entitled, "In the Matter of Enforcement of the Workers' Compensation Act With Respect to: Gene Chavez, Esq." Chavez is an attorney who practices before the WCA, and the Director proposed that Chavez be assessed administrative penalties for seventeen (17) separate violations of the Workers' Compensation Act (the Act), NMSA 1978, §§ 52-1-1 to -70 (1929, as amended through 2007), and Rules. Specifically, the Director alleged that Chavez willfully refused to participate in the mediation process in three (3) different instances; that Chavez willfully disregarded the rights of the parties in eight (8) different instances; that Chavez advocated meritless claims in four (4) separate instances; and that Chavez behaved in a non-courteous and disrespectful manner in two (2) separate

instances, all in violation of applicable Rules of the WCA. The Director proposed assessing a penalty of seventeen thousand dollars ($17,000), and a three (3) month suspension of the right to practice before the WCA. *See* § 52-1-61 (authorizing a $1000 fine for each violation of the Act or any rule or regulation adopted pursuant to the Act); 11.4.3.13(B) NMAC (11/30/2004) (authorizing the WCA to suspend an attorney for engaging in or advocating meritless claims or defenses before the WCA).

{3} Chavez hired counsel, and the parties ultimately entered into a Settlement Agreement. Pursuant to the Settlement Agreement, Chavez agreed to: (1) engage in professional conduct and adhere to the Rules of Professional Conduct and the Act and Rules; (2) successfully complete a three-month monitoring period by retired District Judge Diane Dal Santo who would act as an independent observer or monitor to evaluate and/or investigate any complaints against Chavez for any conduct prohibited by the Act or Rules; (3) complete a professionalism course approved by the New Mexico State Bar in addition to the usual professionalism credit that is already required; (4) pay an administrative assessment of $2,750 to the WCA; and (5) voluntarily refrain from handling workers' compensation cases for thirty (30) days.

{4} Chavez further agreed "if any of the terms set forth above are not completed that the WCA has the right to file that certain Stipulated Order executed contemporaneously with this Settlement Agreement and incorporated herein." The Stipulated Order recites that the WCA and Director have personal and subject matter jurisdiction; that a material breach of the Settlement Agreement has occurred; and that Chavez does not dispute the allegations contained in the Director's initial filing alleging seventeen (17) separate violations of the Act and Rules. The Stipulated Order then orders that Chavez is "suspended from the practice of workers' cases, which includes appearing/attending mediations, hearings, trials, etc., or generating any fees associated with workers' compensation matters, which will become effective and begin on the date of the filing of this Order."

{5} Chavez entered into a Professional Services Agreement with Judge Dal Santo, agreeing that she would monitor his professional conduct before the WCA for a period of three months. During the observation period, three complaints were filed against Chavez with the WCA, and the WCA forwarded them to Judge Dal Santo. After investigating the complaints, Judge Dal Santo submitted two reports to the WCA setting forth her conclusions that Chavez had committed numerous violations of the Rules of Professional Conduct. The violations included making false statements to a tribunal, failing to allow a client to make the decision regarding settlement, failing to communicate with clients, failing to give notice to a client he was withdrawing, and failing to return the client's papers to him. Upon its receipt of Judge Dal Santo's reports, the WCA filed the Stipulated Order suspending Chavez from practicing before the WCA.

{6} Chavez filed a petition for writ of certiorari and petition for stay in the district court. The district court ultimately determined that the WCA did not have authority to suspend Chavez and ordered that the Stipulated Order be reversed on grounds that the Settlement Agreement was ultra vires and void ab initio. The WCA appeals.

III. ANALYSIS

{7} The WCA presents two arguments on appeal. First, the WCA asserts that the district court erred in denying its motion to dismiss when Chavez failed to file a statement of review issues as required by Rule 1-075(J) NMRA. Secondly, the WCA contends that the district court erred in concluding that the Settlement Agreement is void on the grounds that the WCA did not have authority to suspend Chavez from practicing before the agency. We address each argument in turn.

A. WCA's Motion to Dismiss Chavez's Appeal

{8} No statutory right is provided to review the WCA order in this case. Accordingly, Rule 1-075 governed the proceedings in the district court. Rule 1-075(A) ("This rule governs writs of certiorari to administrative officers and agencies pursuant to the New Mexico Constitution when there is no statutory right to an appeal or other statutory right of review.").

{9} Chavez failed to file a "statement of review issues" in the district court as required by Rule 1-075(J), which states that a statement of review issues "shall be filed with the district court." The WCA therefore filed a motion to dismiss Chavez's appeal, and the district court denied the motion. Our review of this ruling is limited to whether the district court abused its discretion. *See* Rule 1-075(W)(1), (4) (stating that the failure to file a statement of review issues "may be deemed sufficient grounds for dismissal of the appeal by the district court" and further providing that for any failure to comply with the rules, the district court may "take such action as it deems appropriate").

{10} The district court reasoned that dismissal of the appeal was not warranted because "[Chavez] complied with the substance of Rule 1-075[, and b]oth parties sufficiently briefed the issues in this matter when the Petition for Writ of Certiorari and Request for Stay were filed." The court also noted that "[t]he parties' briefing amply addressed the relevant issues and therefore, Petitioner's failure to file 'Statement of Review Issues' is not a material breach mandating dismissal." Thus, although Chavez failed to file a "statement of review issues" as required, we cannot conclude that the district court abused its discretion in denying the WCA's motion to dismiss under these circumstances. *See Sims v. Sims*, 1996-NMSC-078, ¶ 65, 122 N.M. 618, 930 P.2d 153 ("An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case.").

B. Authority of the WCA to Suspend Chavez From Practicing Before the Agency

{11} The district court ruled that the Settlement Agreement entered by the WCA and Chavez is void because the WCA had neither inherent, nor statutory authority to suspend an attorney from its court. The court reasoned that because the Supreme Court has exclusive authority to impose discipline on practicing attorneys in New Mexico, the WCA has no inherent authority to enter into a Settlement Agreement to suspend an attorney from practicing before the WCA. Further, the district court concluded that in suspending Chavez, the WCA exceeded the statutory authority granted to it by the Legislature. Finally, the district court declared that the terms of the Settlement Agreement do not comply with existing case law granting courts inherent power to suspend attorneys and that the Settlement Agreement was filed without granting him an opportunity to be heard, and without notice to him, in violation of his right

to due process of law. Our review of these statutory and constitutional issues is de novo. *See State ex rel. Jud. Standards Comm'n v. Espinosa*, 2003-NMSC-017, ¶ 5, 134 N.M. 59, 73 P.3d 197.

1. Inherent Authority and the Supreme Court's Exclusive Authority to Discipline Attorneys

{12} The Supreme Court has exclusive jurisdiction to discipline attorneys in New Mexico. *See In re Treinen*, 2006-NMSC-013, ¶ 6, 139 N.M. 318, 131 P.3d 1282 (noting that the Supreme Court "has the sole authority to direct what constitutes grounds for the discipline of lawyers"); *In re Patton*, 86 N.M. 52, 54, 519 P.2d 288, 290 (1974) (stating that the power of suspension or disbarment of an attorney is a judicial power to be ultimately exercised by the Supreme Court), *abrogated on other grounds by In re Bristol*, 2006-NMSC-041, 140 N.M. 317, 142 P.3d 905. Rule 17-201 NMRA codifies the Supreme Court's exclusive jurisdiction in providing that every attorney who practices law in New Mexico "is subject to the exclusive disciplinary jurisdiction of the Supreme Court." This authority emanates from the New Mexico Constitution, Article VI, Section 3, which grants the Supreme Court "superintending control over all inferior courts," which includes the inherent power to regulate all pleading, practice, and procedure affecting the judicial branch. *In re Treinen*, 2006-NMSC-013, ¶ 6 (internal quotation marks and citation omitted). The district court ruled that the WCA had no inherent authority to enter into the Settlement Agreement with Chavez, because by doing so, it infringed upon the exclusive jurisdiction of the Supreme Court to discipline attorneys. We disagree.

{13} While Rule 17-201 explicitly states that the Supreme Court has "exclusive disciplinary jurisdiction" over all attorneys practicing law in New Mexico, the rule also provides, in pertinent part, "Nothing herein contained shall be construed to deny any other court such powers as are necessary for that court to maintain control over proceedings conducted before it[.]" As such, we have specifically held that a district court judge has authority to suspend an attorney from practicing in the judge's own courtroom. *State v. Ngo*, 2001-NMCA-041, ¶ 25, 130 N.M. 515, 27 P.3d 1002 (holding that the district court judge "had the power to suspend defense counsel from his own courtroom"); *see In re Byrnes*, 2002-NMCA-102, ¶ 23, 132 N.M. 718, 54 P.3d 996 ("We read *Ngo* as recognizing the authority of trial courts, albeit limited, to take disciplinary action against an attorney who appears before them as a means to control the proceedings in their courtrooms."); *In re Jade G.*, 2001-NMCA-058, ¶ 27-28, 130 N.M. 687, 30 P.3d 376 ("[E]ven though specific judicial authority is not delineated by statute, or stated in a rule of court, a court may exercise authority that is essential to the court's fulfilling its judicial functions. This authority embraces the ability of a court to control its docket and the proceedings before it. . . . Under its inherent authority, a court may sanction parties and attorneys to ensure compliance with the proceedings of the court.").

{14} Without question, suspension by a trial judge and suspension by the Supreme Court are both disciplinary in nature. *See In re Byrnes*, 2002-NMCA-102, ¶ 23 ("Just as a Supreme Court suspension is disciplinary in nature, a trial court's suspension is disciplinary in nature."). However, there is a material distinction on the effect of the discipline. Discipline by the Supreme Court affects the attorney's status in all courts of the State of New Mexico. Rule 17-212(C) NMRA (providing that a disbarred or

suspended attorney "shall not accept any new retainer or engage as attorney for another in any new case or legal matter of any nature"). On the other hand, suspension by a district court judge only has an effect on the attorney's ability to practice before that specific judge. Likewise, the WCA's actions in this case were undertaken to control its own proceedings, separate and independent, and separate of the Supreme Court's power to institute disciplinary proceedings against Chavez affecting his status as an attorney. The actions taken by the WCA in this case do not infringe upon the exclusive power of the Supreme Court to discipline attorneys because the WCA took no action against Chavez's status as an attorney as such. Instead, its action was directed at protecting and controlling proceedings held before the WCA. This is consistent with *Ngo*, 2001-NMCA-041, ¶¶ 23-25, *In re Byrnes*, 2002-NMCA-102, ¶ 24, and *In re Jade G.*, 2001-NMCA-058, ¶ 27, as well as with the authority reserved to courts by Rule 17-201.

{15} We have not heretofore addressed whether the WCA, an administrative agency, has inherent authority to control quasi-judicial proceedings held before it. We conclude the WCA has such authority. Because the WCA, as created by the Legislature, has characteristics and qualities similar to courts in fulfilling its functions, we see no reason why its ability to control its own proceedings should differ from a trial judge's ability. *See In re Timofai Sanitation Co.*, 600 A.2d 158, 162-63 (N.J. Super. Ct. App. Div. 1991) (noting that administrative law judges are entitled to sanction attorneys for misconduct before the agency because the administrative agency retains "powers somewhat comparable to those of the judiciary in regard to controlling the conduct of persons who appear before their judges" due to its quasi-judicial and adjudicative functions). Moreover, we see no conflict with the Supreme Court's power in recognizing that the WCA has such power. *See Carrillo v. Compusys, Inc.*, 1997-NMCA-003, ¶ 9, 122 N.M. 720, 930 P.2d 1172 (determining that the WCA is not a part of the judiciary to which the Supreme Court's superintending control over "inferior courts" applies, and the authority of the WCA to appoint pro tem workers' compensation judges "runs parallel to, and does not conflict with, the unchallenged power of our Supreme Court over New Mexico's judiciary").

{16} In one respect, the Stipulated Order goes beyond the boundaries of our case law. Specifically, the Stipulated Order prohibits Chavez from "generating any fees associated with workers' compensation matters[.]" This prohibition is overly broad. Specifically, we fail to see how such a prohibition is necessary for the WCA to control proceedings conducted before it, and it seems more like a sanction which infringes upon Chavez's ability to act as an attorney as such. For example, prohibiting Chavez from merely advising workers of their rights under the Act, without him actually filing pleadings, appearing in, or participating in, any proceedings or hearings in the WCA seems unnecessary to the WCA to control the proceedings conducted before it. To this limited extent, we therefore conclude that the Stipulated Order is over broad and infringes upon the Supreme Court's exclusive jurisdiction.

{17} The district court erred in ruling that by making the Settlement Agreement with Chavez, the WCA infringed upon the exclusive jurisdiction of the Supreme Court to discipline attorneys, except to the extent that it prohibits Chavez from "generating any fees associated with workers' compensation matters[.]"

2. Statutory Authority

{18} The district court also concluded that the WCA does not have statutory authority to suspend attorneys. Thus, the court determined that the WCA exceeded the scope of its statutory authority in promulgating 11.4.3.13(B) NMAC (authorizing the WCA director to suspend, terminate, or limit the right of an attorney to practice before the WCA who engages in or advocates meritless claims or defenses before the WCA). *See Gonazles v. N.M. Educ. Ret. Bd.*, 109 N.M. 592, 595, 788 P.2d 348, 351 (1990) ("An agency may not create a regulation that exceeds its statutory authority."). The district court's reasoning rested on its determination that because the Legislature limited the WCA's power to conduct criminal contempt proceedings, the WCA's authority to suspend an attorney from practicing before the WCA agency is likewise limited.

{19} The power to control and conduct proceedings in the WCA are set forth in NMSA 1978, Section 52-5-6(B), (C), and (D) (2001), as follows:

> B. *The workers' compensation judge shall have the power* to preserve and enforce order during hearings; administer oaths; issue subpoenas to compel the attendance and testimony of witnesses, the production of books, papers, documents and other evidence or the taking of depositions before a designated individual competent to administer oaths; examine witnesses; *enter noncriminal sanctions for misconduct; and do all things conformable to law which may be necessary to enable him to discharge the duties of his office effectively.*
>
> C. *In addition to the noncriminal sanctions* that may be ordered by the workers' compensation judge, any person committing any of the following acts in a proceeding before a workers' compensation judge may be held accountable for his conduct in accordance with the provisions of Subsection D of this section:
>
> (1) disobedience of or resistance to any lawful order or process;
>
> (2) misbehavior during a hearing or so near the place of the hearing as to obstruct it;
>
> (3) failure to produce any pertinent book, paper or document after having been ordered to do so;
>
> (4) refusal to appear after having been subpoenaed;
>
> (5) refusal to take the oath or affirmation as a witness; or
>
> (6) refusal to be examined according to law.
>
> D. The director may certify to the district court of the district in which the acts were committed the facts constituting any of the acts specified in Paragraphs (1) through (6) of Subsection C of this section. The court shall hold a hearing and if the evidence so warrants may punish the offending person in the same manner and to the same extent as for contempt committed before the court, or it may commit the person upon the same conditions as if the doing of the forbidden act had

occurred with reference to the process of or in the presence of the court.

(Emphasis added.)

{20} Despite the statutory limitation on the agency's ability to conduct criminal contempt proceedings, Section 52-5-6(B) explicitly grants power to the workers' compensation judge to "enter noncriminal sanctions for misconduct[,] and do all things conformable to law which may be necessary to enable him to discharge the duties of his office effectively." Moreover, the Legislature has empowered the Director to "adopt reasonable rules and regulations . . . for effecting the purposes of the . . . Act." NMSA 1978, § 52-5-4(A) (2003). The purpose of the Act is stated as follows: "[i]t is the intent of the legislature in creating the workers' compensation administration that the laws administered by it to provide a workers' benefit system be interpreted to assure the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to the employers." NMSA 1978, § 52-5-1 (1990). Pursuant to this directive, 11.4.3.13(B) NMAC was adopted, providing that the Director may sanction attorneys for engaging in or advocating meritless claims before the WCA, including the right to enter a sanction involving "suspension, termination or limitation of the right to practice before the WCA." 11.4.3.13(B) NMAC. The regulation is directed at the purpose of the Act in preventing meritless claims from overburdening the WCA, which would delay the "quick and efficient delivery" of benefits, and in preventing unreasonable costs to be expended by employers in defending meritless claims. § 52-5-1. Finally, the Legislature has explicitly granted the Director the authority to impose penalties upon "any person" for violations of the Act. *See* § 52-1-61 ("The director shall impose a penalty on any person who . . . violates any provision of, the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978] or any rule or regulation adopted pursuant to that act."). *See Lucero v. City of Albuquerque*, 2002-NMCA-034, ¶ 20, 132 N.M. 1, 43 P.3d 352 (stating that while the statutory directive is that while any penalties must be levied by the director, a worker's compensation judge has the inherent authority to enforce the obligations of a party). The adoption of 11.4.3.13(B) NMAC was well within the statutory authority granted to the WCA. *See Tri-State Generation & Transmission Ass'n, v. D'Antonio*, 2011-NMCA-015, ¶ 35, 149 N.M. 394, 249 P.3d 932 ("The authority of an administrative body to enact regulations extends not only to the powers expressly provided by the Legislature, but also to those that can be fairly implied from such powers[.]"), *cert. granted*, 2011-NMCERT-002, 150 N.M. 617, 264 P.3d 129.

{21} For the foregoing reasons, we disagree with the district court that by adopting 11.4.3.13(B) NMAC, the WCA acted in excess of the statutory authority granted to it by the Legislature.

3. Suspension From the Entire WCA

{22} In *Ngo*, we stated that the authority of a court to suspend an attorney is limited to the judge's own courtroom. 2001-NMCA-041, ¶ 25. We reasoned that allowing one judge to suspend an attorney from an entire judicial district would infringe on the inherent authority of other judges to control their own courtrooms. *Id.* Since Chavez was suspended from practicing in the WCA as a whole, the district court found that the Stipulated Order violates *Ngo*. We conclude that *Ngo* is inapplicable.

{23} Here, Chavez entered into a

Settlement Agreement in which he agreed that if he violated its terms, the Stipulated Order, suspending him from the WCA, would be filed. The Stipulated Order was signed by the Director of the WCA, acting on behalf of the WCA. *See* NMSA 1978, § 52-5-2(A) (2004) ("The workers' compensation administration shall be in the charge of a director[.]"). Thus, this case is distinguishable from *Ngo* in that the Director was acting within his authority to enforce an agreement made with Chavez on behalf of the WCA as a whole. The concerns expressed in *Ngo* regarding one judge infringing on the inherent authority of another judge are not at issue here. Accordingly, we conclude that this aspect of *Ngo* was not violated.

4. Due Process Concerns

{24} The district court concluded that because Chavez was denied an opportunity to respond to Judge Dal Santo's findings, he was denied due process of law and deprived of his constitutionally protected property interest vested in his professional license to practice law. *See In re Byrnes*, 2002-NMCA-102, ¶ 25 (stating that specific notice of the charges is due when an attorney is suspended by a single district court judge, because it involves the loss of a valuable property right and that notice must include some prior warning that the attorney's actions put the attorney at risk for suspension); *Ngo*, 2001-NMCA-041, ¶ 27 (stating that before suspending an attorney, the court is required to hold a separate hearing to give the attorney an opportunity to defend himself); *see also Mills v. N.M. Bd. of Psychologist Exam'rs*, 1997-NMSC-028, ¶ 15, 123 N.M. 421, 941 P.2d 502 ("The right to practice a profession is a constitutionally protected property interest.").

{25} The Director proposed imposing sanctions upon Chavez, based upon seventeen (17) alleged violations of the WCA and Rules. Chavez had a right to contest the allegations. Instead, Chavez entered into the Settlement Agreement in which he agreed that the Stipulated Order would be filed in the event he did not comply with the Settlement Agreement. The Stipulated Order in turn expressly states that Chavez "does not dispute the allegations" contained in the Director's initial proposal to impose sanctions. Chavez had a right to contest the allegations, and he gave up that right.

{26} As to the claim that Chavez never had a right to contest Judge Dal Santo's findings, the record reflects that Judge Dal Santo informed Chavez of the matters she was investigating, that she gave him an opportunity to dispute those matters, which he did, and that she took his assertions into account in making her reports. In addition, after the Stipulated Order was filed in the WCA, Chavez filed a motion to set it aside. A hearing was held on Chavez's motion, and the Director made a finding that Chavez "failed to present evidence of misrepresentation or fraudulent intent on the part of the WCA." The Director made a further finding that Chavez "failed to present evidence of mistake, inadvertence, surprise or excusable neglect." Significantly, we can find no allegation in the record on appeal that Chavez ever disputed Judge Dal Santo's findings that he violated the terms of the Settlement Agreement.

{27} In light of the foregoing facts, we hold that Chavez was given all the process he was due. *See D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972) ("The due process rights to notice and hearing prior to a civil judgment are subject to waiver."); *State v. Guthrie*, 2011-NMSC-014, ¶ 11, 150 N.M. 84, 257 P.3d 904 ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands and not all

situations calling for procedural safeguards call for the same kind of procedure." (emphasis, internal quotation marks, and citation omitted)). In *Overmyer*, the United States Supreme Court expressly ruled that a party properly waived procedural due process protections by signing a contract which provided that a judgment could be entered without notice or a hearing because it was a sophisticated party represented by counsel, and it was not a contract of adhesion. *Id.* at 185-86. Chavez presents us with no facts or authorities distinguishing this reasoning.

{28} Thus, we disagree with the district court's conclusion that the Stipulated Order "lacks validity" on the grounds that it was entered without giving Chavez further notice and an opportunity to be heard.

IV. CONCLUSION

{29} The order of the district court reversing the Stipulated Order suspending Chavez from "generating any fees associated with workers' compensation matters" is affirmed, and in all other respects, the order of the district court is reversed. The case is remanded for further proceedings consistent with this Opinion.

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

MICHAEL E. VIGIL, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

RODERICK T. KENNEDY, Judge