2001-NMSC-030

33 P.3d 1

STATE of New Mexico, Plaintiff-Respondent,

v.

JAVIER M., Defendant-Petitioner.

No. 26,593.

Supreme Court of New Mexico.

Sept. 26, 2001.

[redacted]

[redacted]

[redacted]

Patricia Madrid, Attorney General, Anita Carlson, Assistant Attorney General, Santa Fe, NM, for Plaintiff–Respondent.

Phyllis H. Subin, Chief Public Defender, Carolyn R. Glick, Assistant Appellate Defender, Santa Fe, NM, for Defendant–Petitioner.

OPINION

BACA, Justice.

{1} The Child, Javier M., appeals his adjudication for minor in possession of alcoholic beverages contrary to NMSA 1978, § 60–7B–1(C) (1998) ("It is a violation of the Liquor Control Act for a minor to ... possess or permit himself to be served with alcoholic beverages."). The Child asserts that the incriminating statements he made to a police officer while he was detained and not free to leave were obtained in violation of NMSA 1978, § 32A–2–14 (1993). Hence, the Child argues that his statements should not have been admitted as evidence to support his adjudication. We granted certiorari pursuant to Rule 12–502 NMRA 2001 to address whether Section 32A–2–14 provides children with broader rights than those guaranteed by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). After careful analysis, we find that Section 32A–2–14 evinces a legislative intent to expand the rights of children beyond those embodied in *Miranda* jurisprudence. Thus, we conclude that a child need not be under custodial interrogation in order to trigger the protections of the statute. Instead, we find that the protections are triggered when a child is subject to an investigatory detention. Therefore, Section 32A–2–14 requires that, prior to questioning, a child who is detained or seized and suspected of wrongdoing must be advised that he or she has the right to remain silent and that anything said can be used in court. If a child is not advised of the right to remain silent and warned of the consequence of waiving that right, any statement or confession obtained as a result of the detention or seizure is inadmissible in any delinquency proceeding. *See* § 32A–2–14(D). In the present case, since Javier M. was subject to an investigatory detention and not advised of his right to remain silent, we hold that the incriminating statements he made in response to police questioning are inadmissible and should not have been used to support the Children's Court's finding of delinquency. Accordingly, we reverse the Child's adjudication.

I.

{2} On or about September 17, 1999, at approximately 2:00 a.m., Officer Helton and his partner were dispatched to an apartment in Hobbs, New Mexico, in response to a loud music complaint. As the officers approached the building, they could hear loud music coming from inside the apartment and observed a female sitting on the stairwell outside the open door of the apartment. When the female saw the officers approaching, she yelled "Five O" (slang for police), ran into the apartment, and closed the door. The music was turned off and as the officers approached they could hear people "scuffling" around inside. Officer Helton also testified that he

could smell alcohol and marijuana coming from inside the apartment. The officers knocked on the apartment door, but no one answered. They called for backup and continued to wait outside the apartment for approximately twenty minutes until someone answered the door. When the door was finally opened, Officer Helton testified that he could smell a stronger odor of alcohol and marijuana and saw several empty beer cans around the apartment. There were approximately ten to fifteen individuals inside. Officer Helton, his partner, and other officers who had arrived,[1] entered the apartment and began separating those individuals who were under eighteen from the adults. The officers determined that all of the individuals who were seventeen and younger would receive citations for curfew violations and be taken home.[2]

{3} Officer Helton first had contact with the Child, Javier M., in the living room of the apartment. The Child was sitting on the couch and neither appeared to be intoxicated nor possessed any beer or other alcoholic beverage. Officer Helton testified, however, that he detected the smell of alcohol on the Child's breath or clothing. In Officer Helton's opinion, there was no question that the Child had consumed alcohol. Officer Helton then asked the Child to step outside onto the stairwell of the apartment. Once on the stairwell, the officer asked the Child his name, his age, and whether he had consumed any alcohol. The Child answered the officer's questions and admitted that he had consumed two beers. Officer Helton issued the Child citations for violating the curfew ordinance and for minor in possession of alcohol. The officer did not recall in what order he asked the Child the questions or which citation he issued first. After the Child was issued the citations he was taken home by another officer.

{4} Officer Helton testified that once contact was made at the apartment, the Child was not free to leave and would not be released until he was taken to his home and a parent or guardian could be contacted. The officer, however, did not recall telling the Child that he was not free to leave. At no time was the Child placed under formal arrest, given *Miranda* warnings, advised of his basic rights pursuant to Section 32A–2–14(C), or asked to waive his rights.

{5} The Child was fifteen years old at the time of the incident. A Petition was filed in Children's Court alleging a violation of Section 60–7B–1C, minor permitting himself to receive and be served alcoholic beverages. The Child filed a motion to suppress his statements admitting that he had consumed alcohol, arguing that the officer interrogated him prior to giving him *Miranda* warnings and prior to advising him of his basic rights under the Children's Code. Following the hearing on the motion, the Children's Court concluded that the Child's *Miranda* rights were not violated because the protections of *Miranda* were not triggered since the Child was not subject to custodial interrogation. The Child was thereafter found to be delinquent by a special master and committed to a youth facility for one year. The Child appealed the finding of delinquency to the Court of Appeals, asserting that his statements should not have been admitted as evidence to support his delinquency since the officer did not advise him of his basic rights pursuant to Section 32A–2–14(C) of the Children's Code. *See State v. Javier M.*, NMCA 21,568, slip op. (Sept. 20, 2000).

{6} The Court of Appeals agreed with the Children's Court and held that there was "no violation of the Child's right to *Miranda* warnings as he was never in custody and there was no custodial interrogation." *Id.* at 1–2. Moreover, the court rejected the Child's argument that Section 32A–2–14(C) required that a child suspected of a crime must be given *Miranda* warnings even if the child is not in custody or under arrest. *Id.* at 2. Instead, the Court of Appeals held that

1. It is unclear from the record how many officers arrived on the scene after Officer Helton and his partner called for backup.

2. At the time of the incident, Hobbs Police Department was enforcing the Hobbs curfew ordinance. Since the incident, such curfew ordinances have been declared unconstitutional. *See generally ACLU v. City of Albuquerque*, 1999–NMSC–044, ¶ 19, 128 N.M. 315, 992 P.2d 866.

Section 32A–2–14 "is really nothing more than a codification of *Miranda* ... [and][t]hus, there is no requirement that the child be given *Miranda* warnings when the police initiate contact and are trying to determine whether there has been a violation of law." *Id.* The Child sought certiorari in this Court.

II.

{7} The Child presents two issues on appeal in this Court. First, the Child asserts that Section 32A–2–14(C) of the Children's Code "requires that a child be given *Miranda* warnings before being questioned regarding suspected delinquent activity even if the child is not under arrest." Alternatively, the Child argues that even if the Children's Code does not provide him with greater protection than is afforded under *Miranda*, under a pure *Miranda* analysis the Child's statements should have been suppressed because he was subject to custodial interrogation without first being admonished of his constitutional rights under *Miranda*. The State argues that the Child failed to preserve these issues for appeal and, therefore, requests that this Court decline review of this case.

{8} Initially, the State asserts that the Child failed to adequately preserve whether Section 32A–2–14(C) provides greater protection to juveniles because the Child merely cited both *Miranda* and Section 32A–2–14 without arguing that there was any distinction between them. As support for its argument, the State cites *State v. Gomez*, 1997–NMSC–006, ¶ 22, 122 N.M. 777, 932 P.2d 1, and *State v. Paul T.*, 1999–NMSC–037, ¶ 13, 128 N.M. 360, 993 P.2d 74. Unlike the present case however, the defendants in *Gomez* and *Paul T.* sought greater constitutional protection of their individual liberties under the New Mexico Constitution than would be available under the federal Constitution. In contrast, the Child in the instant case does not seek greater constitutional protection under our state constitution, but instead simply asserts that the Legislature, by enacting Section 32A–2–14(C), intended to provide children with broader rights under the statute. Therefore, the Child's claim is not subject to the more stringent preservation requirement required by *Gomez*. 1997–NMSC–006, ¶¶ 22–23, 122 N.M. 777, 932 P.2d 1 (holding that when a party seeks greater protection under the state constitution, the party must also assert in the trial court that "the state constitutional provision at issue should be interpreted more expansively than the federal counterpart *and* provide reasons for interpreting the state provision differently from the federal provision"). Instead, the Child is subject to our general preservation requirement as set forth in Rule 12–216(A) NMRA 2001 that requires only that a "ruling or decision by the district court was fairly invoked."

{9} The facts and arguments presented in the Children's Court were sufficient to meet the basic requirements of Rule 12–216(A). In the Child's motion to suppress, which was timely filed in the Children's Court, the Child asserted that: (1) "the police officer interrogated Child prior to giving the *Miranda* warnings;" *and* (2) "the police officer interrogated Child prior to giving the Children['']s Basic Rights." Moreover, during Officer Helton's testimony, the officer was asked whether he had advised the child of his *Miranda* rights *or* of his basic rights under the Children's Code. Because the Child cited both *Miranda* and Section 32A–2–14 as grounds for suppressing the Child's statements, we conclude that the Children's Court was sufficiently alerted to the nature of the claimed error and was able to issue an intelligent ruling. *See State v. Lucero*, 104 N.M. 587, 590, 725 P.2d 266, 269 (Ct.App. 1986) ("[T]he objection must be sufficiently timely and specific to apprise the trial court of the nature of the claimed error and to invoke an intelligent ruling by the court."). Therefore, we find that the issues presented and briefed in this Court were properly preserved for appellate review.

{10} The State also argues that the Child abandoned the issue of whether the Child was in "custodial interrogation" under *Miranda* since he waived the argument in the Court of Appeals and did not specifically seek certiorari with respect to that issue in this Court. We recognize that on appeal the

Child primarily rests the error in this case on the lower court's refusal to find that Section 32A–2–14(C) provides greater protection to children by eliminating *Miranda's* custodial interrogation requirement. We also recognize that Rule 12–502(C)(2) NMRA 2001 states that "only the questions set forth in the petition will be considered by the Court." However, in order to fully analyze whether Section 32A–2–14 provides greater protection than is mandated by *Miranda*, we must consider the minimum protections available to the Child. Therefore, the issue of whether the Child is subject to custodial interrogation is a foundational issue which is integral to a complete and thorough analysis of the specific question presented in the petition for writ of certiorari. Consequently, we do not expand our inquiry beyond the limited issue presented or broaden our review in contradiction to Rule 12–502(C)(2). Accordingly, we review in full the issues briefed by the Child which include both the underlying constitutional question of whether the Child was subject to custodial interrogation and whether Section 32A–2–14 provides greater protection to children than is mandated by *Miranda*.

III.

{11} In this case, we are asked to evaluate the admissibility of the Child's statements made in response to police questioning. We begin our analysis with the United States Supreme Court's decision in *Miranda*. Only after assessing the minimum constitutional guarantees available to the Child under *Miranda* can we adequately interpret Section 32A–2–14 and determine what, if any, additional protections are available to the Child under the statute.

A.

{12} The Child challenges the admissibility of his statements on the basis of the Fifth Amendment, claiming that his privilege against self-incrimination was violated when Officer Helton questioned him without first advising him of his rights under *Miranda*. The Fifth Amendment mandates that, "No person shall be . . . *compelled* in any criminal case to be a witness against himself. . . ." U.S. Const. amend. V (emphasis added). "[T]he privilege has consistently been accorded a liberal construction." *Miranda*, 384 U.S. at 461, 86 S.Ct. 1602. Therefore, " 'a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise.' " *Id.* at 462, 86 S.Ct. 1602 (quoting *Ziang Sung Wan v. United States*, 266 U.S. 1, 14, 45 S.Ct. 1, 69 L.Ed. 131 (1924)).

{13} Generally, "the constitutional privilege against self-incrimination is available only if it is invoked as the ground for refusing to speak." *State v. Gutierrez*, 119 N.M. 618, 620, 894 P.2d 395, 397 (Ct.App. 1995). The United States Supreme Court has long acknowledged that:

> The [Fifth] Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment.

Minnesota v. Murphy, 465 U.S. 420, 427, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984) (quoting *United States v. Monia*, 317 U.S. 424, 427, 63 S.Ct. 409, 87 L.Ed. 376 (1943)). Hence, the Fifth Amendment neither prohibits the government from asking questions nor does it forbid an individual from volunteering incriminating statements. *See id.* The Constitution only prohibits government practices and procedures that compel individuals to incriminate themselves. Therefore, as a general rule individuals are not deemed to be "compelled" to speak in violation of the Fifth Amendment unless the individual invokes the privilege, refuses to answer, and is thereafter forced to answer. *See Gutierrez*, 119 N.M. at 620, 894 P.2d at 397.

{14} The United States Supreme Court in *Miranda*, however, recognized that there are certain situations where the circumstances surrounding the asking of a question by law enforcement are so inherently coercive that any answer is "compelled" under the Fifth Amendment. *See id.* at 621, 894 P.2d at 398

(recognizing that *Miranda* is an "exception[ ] to the general rule that the privilege is not available unless invoked as a ground for refusal to answer"); *see generally Miranda*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. The Court identified that there exist such compelling pressures when a person is subject to custodial police interrogation. *See Miranda*, 384 U.S. at 467–68, 86 S.Ct. 1602. Because of the compelling pressures present during custodial police interrogation, the Court imposed a prophylactic protection by requiring that suspects be advised of their rights under the Fifth Amendment prior to any questioning. *See id.*

{15} Custodial interrogation occurs when "[a]n individual [is] swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion ... [so that the individual feels] under compulsion to speak." *Id.* at 461, 86 S.Ct. 1602. The Court has reasoned that "custodial police interrogation, by its very nature, isolates and pressures the individual," *Dickerson v. United States*, 530 U.S. 428, 435, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000), and that it "convey[s] to the suspect a message that he has no choice but to submit to the officers' will and to confess," *Murphy*, 465 U.S. at 433, 104 S.Ct. 1136. To ensure that accused or suspected individuals do not speak out of compulsion, *Miranda* held that the Fifth Amendment requires that prior to questioning, a person "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444, 86 S.Ct. 1602; *see Dickerson*, 530 U.S. at 439, 120 S.Ct. 2326 (holding that the procedural safeguards pronounced in *Miranda* are constitutionally mandated). If an individual is not apprised of his rights, the Fifth Amendment prohibits the use of any "statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant." *Miranda*, 384 U.S. at 444, 86 S.Ct. 1602 ("[U]nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant]."). *Id.* at 479, 86 S.Ct. 1602. Therefore, the *Miranda* protections and the notion of "custodial interrogation" are inextricably intertwined.

{16} In 1967, a year after *Miranda* was decided, the United States Supreme Court held that the Fifth Amendment privilege against self-incrimination is similarly applicable to juveniles. *In re Gault*, 387 U.S. 1, 55, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). Therefore, at a minimum, if the Child in this case was subject to custodial interrogation, the officer was constitutionally required to advise the Child of his rights under *Miranda* and obtain a voluntary, knowing, and intelligent waiver.

B.

{17} The Child contends that he was subject to custodial interrogation because: (1) as Officer Helton testified, the Child was not free to leave until he was released into the care of his parent or guardian; (2) there were numerous officers at the scene; (3) "[a]ll of the persons under seventeen were lined up on the balcony where several officers were keeping control of them and issuing them citations;" and (4) in questioning the Child, Officer Helton knew that his questions were reasonably likely to elicit an incriminating response from the Child. The State argues that the Child was not entitled to *Miranda* warnings because he was subject only to a brief investigatory detention which did not rise to the level of custodial interrogation. Whether a person is subject to custodial interrogation and entitled to the constitutional protections of *Miranda* is a mixed question of law and fact. *United States v. Galindo–Gallegos*, 255 F.3d 1154, 1154 (9th Cir.2001). "[W]e review mixed questions of law and fact de novo, particularly when they involve constitutional rights." *State v. Hernandez*, 1997–NMCA–006, ¶ 18, 122 N.M. 809, 932 P.2d 499.

{18} An individual is subject to custodial interrogation when he or she lacks the freedom to leave to an extent equal to formal arrest. *See California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983). The lack of freedom to leave, however, is not the only fact that renders an

interrogation custodial. *State v. Cooper*, 1997–NMSC–058, ¶ 36, 124 N.M. 277, 949 P.2d 660. Additionally,

> *Miranda* was focused upon the private and secret interrogation of a suspect in an isolated environment completely controlled by law enforcement officials. [Citation omitted]. Isolation is the key aspect of the custodial interrogation under *Miranda*. [Citation omitted]. "In this setting, the police have immediate control over the suspect-they can restrain him and subject him to their questioning and apply whatever psychological techniques they think will be most effective." [Citation omitted]. It is much easier, in such a setting, for investigators, intent upon obtaining a confession, to crush a suspect's will.

Id. (quoting *United States v. Mesa*, 638 F.2d 582, 586 (3rd Cir.1980)). Thus, it is the lack of the freedom to leave, as well as isolation, which implicates the protections of the Fifth Amendment.

{19} In contrast, investigatory detentions, which are Fourth Amendment seizures of limited scope and duration, are generally public, temporary, and substantially less coercive than custodial interrogations. Therefore, investigatory detentions do not implicate the Fifth Amendment in the same way as custodial interrogations. *See Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). Police officers are not constitutionally mandated to forewarn citizens subject to investigatory detentions that they have the right not to answer the officer's questions. *See id.* The Fourth Amendment permits a police officer to approach an individual and ask him a moderate number of questions "in order to investigate possible criminal behavior when the officer has 'a reasonable suspicion that the law has been or is being violated.' " *State v. Taylor*, 1999–NMCA– 022, ¶ 7, 126 N.M. 569, 973 P.2d 246 (quoting *State ex rel. Taxation & Revenue Dep't, Motor Vehicle Div. v. Van Ruiten*, 107 N.M. 536, 538, 760 P.2d 1302, 1304 (Ct.App.1988)). During such investigatory detentions, the detainee is not obliged to respond and, therefore, there is no violation of the privilege against self-incrimination. *Berkemer*, 468 U.S. at 439, 104 S.Ct. 3138. For instance, the Fourth Amendment permits an officer to pull a motorist over to investigate a possible traffic violation. When a motorist is pulled over for a traffic stop, the motorist is subject only to an investigatory detention because the stop is presumptively temporary and brief. *Id.* at 437, 104 S.Ct. 3138. The motorist expects that he will only be obliged to spend a short period of time answering questions and then be allowed to continue on his way. *Id.* The temporariness of such a stop is different from a station house interrogation which "is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek." *Id.* at 437–38, 104 S.Ct. 3138. Moreover, a traffic stop is typically public and therefore "reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements." *Id.* at 438, 104 S.Ct. 3138. Because the atmosphere surrounding such investigatory detentions is not so inherently coercive that the detainee feels compelled to speak, "persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of *Miranda*." *Id.* at 440, 104 S.Ct. 3138.

{20} We agree that the Child in this case was not free to leave at the time that Officer Helton questioned him; however, because the detention was temporary, non-coercive, and public we find that the Child was subject only to an investigatory detention and not custodial interrogation. First, Officer Helton reasonably suspected that the Child had committed or was committing a crime. The Child was present at an apartment where it appeared that the occupants of the apartment, by closing the door when the officers approached and not answering the door for approximately twenty minutes, were attempting to conceal some activity from the approaching officers. Additionally, once the officers gained access they could smell alcohol and marijuana and observed empty beer cans around the apartment. Although Officer Helton did not observe the Child with any alcoholic beverages, the officer specifically smelled alcohol on the Child's person. These instances amount to "specific articulable facts, together with rational inferences

from those facts, that, when judged objectively, would lead a reasonable person to believe criminal activity occurred or was occurring." *Taylor*, 1999–NMCA–022, ¶ 7, 126 N.M. 569, 973 P.2d 246 (internal quotation marks and citation omitted). Accordingly, the officer reasonably suspected that the Child had committed or was committing a crime and, therefore, it was permissible for the officer to briefly detain the Child to investigate the situation further by asking the Child a few questions to confirm or dispel his suspicions. *See Berkemer*, 468 U.S. at 439, 104 S.Ct. 3138.

{21} The detention of the Child did not rise to the status of a custodial interrogation. At the outset, the fact that the Child was issued a citation during the detention does not elevate the investigatory seizure to custodial interrogation. *See Taylor*, 1999–NMCA–022, ¶ 9, 126 N.M. 569, 973 P.2d 246 ("[The officer] could have cited Defendant . . . without actually arresting him."). Moreover, there is nothing in the record to indicate that the Child was overpowered by police presence. It is true that there were numerous officers at the apartment, but Officer Helton was the only officer who questioned the Child directly. Thus, the Child's detention was not overly "police dominated" as is the case in custodial interrogation. *See Berkemer*, 468 U.S. at 438, 104 S.Ct. 3138 ("The fact that the detained motorist typically is confronted by only one or at most two policemen further mutes his sense of vulnerability."); *cf. Murphy*, 465 U.S. at 433, 104 S.Ct. 1136 ("[C]ustodial arrest thrusts an individual into 'an unfamiliar atmosphere' or 'an interrogation environment . . . created for no purpose other than to subjugate the individual to the will of his examiner.' ") (quoting *Miranda*, 384 U.S. at 457, 86 S.Ct. 1602).

{22} Likewise, it appears from the record that only a short period of time elapsed between the initial contact with the Child and the issuing of the citation, after which the Child was released into the care of another officer who took the Child home. *See Berkemer*, 468 U.S. at 437, 104 S.Ct. 3138. We recognize that Officer Helton testified that the Child was not free to leave until he was escorted home by law enforcement; however, at no point during the exchange between Officer Helton and the Child was the Child ever informed that his detention would not be temporary. *See id.* at 442, 104 S.Ct. 3138 ("A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time. . . ."). Additionally, the police further detained the Child, not because he was under formal arrest, but because, according to Officer Helton, the Hobbs curfew ordinance in effect at the time required the police to assume a caretaker role over the Child until the Child could be released into the care and custody of his parent or guardian. This continued detention was to ensure the safety of the Child and was not adversarial as is the case when an individual is in custodial interrogation. *See ACLU v. City of Albuquerque*, 1999–NMSC–044, ¶ 18, 128 N.M. 315, 992 P.2d 866 ("The stated purposes of the Curfew are to protect minors from each other and others, to enforce parental control, and to protect the public from juvenile criminal activities.").

{23} Last, because the detention occurred in the presence of ten to fifteen other suspects and the questioning occurred on the stairwell of an apartment complex, it was sufficiently public to quell any potential illegitimate tactics the police may have used to elicit self-incriminating statements from the Child. There is nothing in the record to indicate that the "balcony" was confined and isolated away from the public. In fact, the area where the Child was questioned by Officer Helton was continuously referred to as a "stairwell," which was not enclosed. Additionally, the Child was questioned in the presence of ten to fifteen other individuals. "Where officers apprehend a substantial number of suspects and question them in the open prior to arrest, this is ordinarily . . . not custodial questioning. . . ." *United States v. Galindo–Gallegos*, 244 F.3d 728, 732 (9th Cir. 2001) (holding that the presence of large numbers of other suspects made stop "public" for purposes of *Miranda* custody analysis). Therefore, we find that although the Child was not free to leave, he was not in custodial interrogation at the time Officer Helton inquired as to whether the Child had

consumed any alcohol. Since the Child was not subject to custodial interrogation, we hold that the officer was not required to "*Mirandize*" the Child before questioning him. Therefore, under a pure constitutional analysis, the Child's statements were admissible and properly used as a basis for his adjudication.

IV.

{24} As the Child was not entitled to the protections guaranteed by *Miranda*, we turn now to the Children's Code to determine whether the Code provides the Child with any additional protection. "[W]hile the federal constitution provides a minimum level of protection below which the states may not descend, states remain free to provide greater protection." *Jewell v. NYP Holdings, Inc.*, 23 F.Supp.2d 348, 375 (S.D.N.Y.1998) (recognizing that as a matter of state law, a state could require greater protection of liberty interest than the minimum adequate to survive scrutiny under the federal Constitution); *Morgan v. Rabun*, 128 F.3d 694, 697 (8th Cir.1997) ("State law . . . may recognize more extensive liberty interests than the Federal Constitution."). Hence, it is completely within the Legislature's authority to provide greater statutory protection than accorded under the federal Constitution.

{25} In order to determine whether the Legislature intended to provide greater protection to children with respect to the admissibility of a child's statement, we must construe Section 32A–2–14 which governs the basic rights of juveniles in delinquency matters. *See Doe v. State*, 100 N.M. 579, 581, 673 P.2d 1312, 1314 (1984). In interpreting this statute, three necessary issues must be addressed. First, we must determine whether the statute is merely a codification of *Miranda*, requiring that a child be in custodial interrogation to trigger the protections of the statute. Second, if the statute is not a codification of *Miranda*, but an act by the Legislature to grant children greater statutory protection, we must assess at what point during a police/child encounter the protections of the statute are triggered. Last, we must define the scope of the protections afforded under the statute so that both children and law enforcement are aware of their rights and obligations. We review these issues de novo. *See State v. Rowell*, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995) (recognizing that the standard of review for issues of statutory interpretation and construction is de novo).

A.

{26} As a threshold inquiry, we must first determine whether the Legislature in enacting Section 32A–2–14, intended simply to codify the Court's holding in *Miranda* or whether they intended to provide greater statutory protection to children when they are questioned by law enforcement. If the statute is merely a codification of *Miranda*, the Child's statements were properly admitted as a basis for the Children's Court's finding of delinquency because the Child was not in custodial interrogation, and therefore not entitled to *Miranda* warnings at the time he was questioned by Officer Helton. To establish whether the Legislature intended to provide additional protections to children than are afforded under *Miranda*, we look to the plain language of the statute, as well as the history and evolution of Section 32A–2–14. *Draper v. Mountain States Mut. Cas. Co.*, 116 N.M. 775, 777, 867 P.2d 1157, 1159 (1994).

1.

{27} Generally, in order to be constitutionally admissible a suspect's statement must be voluntary and must not have been obtained through compulsion or coercion. *See, e.g., Dickerson*, 530 U.S. at 444, 120 S.Ct. 2326 (recognizing that a statement or confession made during custodial interrogation is constitutionally admissible only when warnings are given *and* the statements are shown to have been knowingly, intelligently, and voluntarily made); *Cooper*, 1997–NMSC–058, ¶¶ 31–32, 124 N.M. 277, 949 P.2d 660 ("[I]t is possible for a suspect to voluntarily waive his or her *Miranda* rights and still make an involuntary confession because police used fear, coercion, hope of reward, or some other improper inducement."). Section 32A–2–14 states in pertinent part:

(A) A child subject to the provisions of the Delinquency Act [this article] is entitled to the same basic rights as an adult, except as otherwise provided in the Children's Code [this chapter].

. . .

(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 or confession offered in evidence was elicited only after a knowing, intelligent and voluntary waiver of the child's rights was obtained.

(E) In determining whether the child knowingly, intelligently and voluntarily waived the child's rights, the court shall consider the following factors:

(1) the age and education of the respondent;

(2) *whether or not the respondent is in custody;*

(3) the manner in which the respondent was advised of his rights;

(4) *the length of questioning and circumstances under which the respondent was questioned;*

(5) the condition of the quarters where the respondent was being kept at the time he was questioned;

(6) the time of day and the treatment of the respondent at the time that he was questioned;

(7) the mental and physical condition of the respondent at the time that he was questioned; and

(8) whether or not the respondent had the counsel of an attorney, friends or relatives at the time of being questioned.

(Emphasis added.). We read this legislation in its entirety and "construe each part in connection with every other part to produce a harmonious whole" and find that taken together, Subsections (C), (D), and (E) adopt the general rule governing admissibility of a suspect's statements. *State ex rel. Klineline v. Blackhurst,* 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988). Subsection (C) provides children with the right to be advised of their constitutional rights when they are alleged or suspected of delinquent behavior. *See* Section 32A–2–14(C). Subsection (D) provides the remedy for a violation of the rights granted in Subsection (C) and places the burden on the State to prove that a statement obtained from the child was voluntary. *See* § 32A–2–14(D). Finally, Section 32A–2–14(E) is " 'essentially a codification of the totality-of-circumstances test' applied in evaluating a waiver of constitutional rights by an adult, though emphasizing some of the circumstances that may be particularly relevant for a juvenile." *State v. Martinez,* 1999–NMSC–018, ¶ 18, 127 N.M. 207, 979 P.2d 718 (quoting *State v. Setser,* 1997–NMSC–004, ¶ 13, 122 N.M. 794, 932 P.2d 484). We must next analyze the plain language of the statute to determine whether the Legislature merely codified the constitutional rule or whether additional statutory protections were intended.

{28} "The starting point in every case involving the construction of a statute is an examination of the language utilized by [the Legislature]." *State v. Wood,* 117 N.M. 682, 685, 875 P.2d 1113, 1116 (Ct.App.1994). Words in the statute should be given their "ordinary meaning unless the legislature indicates a different intent." *State v. Rodriguez,* 101 N.M. 192, 194, 679 P.2d 1290, 1292 (Ct.App.1984). The Child asserts that the unambiguous plain language of Section 32A–2–14 confirms that the Legislature did not intend to codify *Miranda.* We agree.

{29} In looking to the plain language of Section 32A–2–14(C), we conclude that a child need not be subject to custodial interrogation in order to be afforded the right to be advised of his or her constitutional rights prior to police questioning. Instead of using *Miranda* triggering terms such as "custody" or "custodial interrogation," the Legislature used much broader terms, such as, "alleged," "suspected," "interrogated," and "questioned." Section 32A–2–14(C). First, "alleged" is a specific legal term which pertains to the time period after which a formal peti-

tion alleging delinquency has been filed in the Children's Court. *See* Black's Law Dictionary 74 (7th ed.1999) (defining "alleged" as "[a]ccused but not yet tried"). Also, the plain meaning of the term "suspected" refers to a period prior to the filing of a petition when a child is believed to have committed a crime or offense but has not yet been formally charged. *See* Webster's Ninth New Collegiate Dictionary 1189 (1985) (defining "suspect" as "to imagine (one) to be guilty or culpable on slight evidence or without proof"); *Weiland v. Vigil,* 90 N.M. 148, 152, 560 P.2d 939, 943 (Ct.App.1977) ("The legislature is presumed to have used no surplus words."). Therefore, "suspected" and "alleged" are two different words with two separate meanings. *See State ex rel. Helman v. Gallegos,* 117 N.M. 346, 355, 871 P.2d 1352, 1361 (1994) ("[E]ach word is to be given meaning."). Under its ordinary meaning, we find that a person can be "suspected" of criminal activity regardless of whether the person is subject to custodial interrogation. Moreover, the term "interrogated" is not synonymous with "custodial interrogation." Rather, "interrogated" generally means express questioning which can be either custodial or investigatory. *See* Black's Law Dictionary 825 (recognizing that interrogation can be either investigatory or custodial; "[t]he formal or systematic questioning of a person . . . [usually] of a person *arrested* for *or suspected* of committing a crime") (emphasis added). Last, "questioned" is a very broad term which means "[a] query directed to a witness." *Id.* at 1259. Given the inclusion of these broad terms within Subsection (C), we conclude that the Legislature did not intend to merely codify *Miranda,* but instead intended to provide protection to children in areas outside the narrow context of custodial interrogation.

{30} The factors in Subsection (E) further support the conclusion that custodial interrogation is not a prerequisite to warnings under the statute. For example, Subsection (E)(2) states that in determining whether the Child voluntarily waived his rights, the court should consider "whether or not [the child] is in custody." Section 32A–2–14(E)(2). Additionally, "the length of questioning and circumstances under which [the child] was questioned" should also be considered. Section 32A–2–14(E)(4). Analyzing Section 32A–2–14 as a whole, we agree that the Legislature would not have included these factors if it intended merely to codify *Miranda* and require custodial interrogation as a predicate to a child being afforded statutory protection. Therefore, although the inclusion of (E)(2) and (E)(4) does not conclusively decide the issue, we agree that these factors lend support to the conclusion that Section 32A–2–14 is not a simple codification of the constitutional rule.

2.

{31} Further, the history and evolution of Section 32A–2–14 also support the finding that the Legislature did not intend to merely codify *Miranda.* Although we primarily look to the plain language, we may also consider the history and background of the statute to determine the Legislature's intent. *See Blackhurst,* 106 N.M. at 735, 749 P.2d at 1114; *cf. Vigil v. Thriftway Mktg. Corp.,* 117 N.M. 176, 179, 870 P.2d 138, 141 (Ct.App.1994) ("When dealing with a statute or rule which has been amended, the amended language must be read within the context of the previously existing language, and the old and new language, taken as a whole, comprise the intent and purpose of the statute or rule."). For instance, unlike the modern version of Section 32A–2–14, its 1972 predecessor specifically included the term "custody" in pronouncing when a child must be advised of his or her constitutional rights. *See* 1972 N.M. Laws, ch. 97, § 25(A) (Repealed 1981) ("A child alleged to be a delinquent child or a child in need of supervision shall from the *time of being taken into custody* be accorded *and advised* of the privilege against self-incrimination . . . .") (emphasis added). When the statute was significantly revised in 1981, however, the term "custody" was omitted. *See* 1981 N.M. Laws, ch. 36, § 21 (codified at NMSA 1978, § 32–1–27) (Repealed 1993). The State argues that it was unnecessary to include the term "custody" in the 1981 and current revision of the statute because the Legislature also included Subsection (A) which did not appear in the 1972 version. Subsection (A) states: "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...." Section 32A–2–14(A) (emphasis added). The State asserts that the inclusion of this subsection "is clearly a reference to *Miranda* rights, and that the Legislature had therefore already shown that it intended to apply the whole of *Miranda* jurisprudence to children." According to the State, "[i]f the Legislature intended to apply 'the same basic rights' to children as adults ... no explicit reference to custody is necessary in Subsection (C)." We disagree.

{32} The State's argument is unsupported by the rules of statutory interpretation, the language of the statute, or the history of Section 32A–2–14. Under the State's interpretation of Subsection (A), Subsection (C) would be redundant and unnecessary. In essence, if the Legislature incorporated "the whole *Miranda* jurisprudence" in Subsection (A), there would be no reason for the Legislature to again codify *Miranda* in Subsection (C). The State's interpretation renders Subsection (C) superfluous. This construction is inconsistent with the rules of statutory interpretation since "[a] statute must be construed so that no part of the statute is rendered surplusage or superfluous." *Katz v. New Mexico Dep't of Human Servs., Income Support Div.,* 95 N.M. 530, 534, 624 P.2d 39, 43 (1981). To the contrary, we conclude that the "same basic rights" referred to in Subsection (A) are those basic rights such as the right to be free from unreasonable search and seizure, and the Sixth Amendment right to confront witnesses. *See, e.g.,* 1972 N.M. Laws, ch. 97, § 25(C) and (J). These rights were specifically enumerated in the 1972 predecessor to Section 32A–2–14, but were omitted in the revised and current version, having been replaced by the all-encompassing Subsection (A).[3] Therefore, to give all subsequent subsections of the statute effect, we find that Subsection (C) is an exercise of the Legislature's "except as otherwise provided" authority under Subsection (A).[4] *See* § 32A–2–14(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* ....") (emphasis added). Accordingly, we hold that Subsection (C) is an exception to Subsection (A)'s general recognition that children are "entitled to the same basic rights as adults." *Id.* We conclude Section 32A–2–14 is not a mere codification of *Miranda,* but was intended instead to provide children with greater statutory protection than constitutionally mandated. Therefore, we hold that Section 32A–2–14 does not require that a child be subject to custodial interrogation in order for the protections of the statute to come into force.

B.

{33} Because we hold that the statute is not a codification of *Miranda* but an act by the Legislature to grant children greater statutory protection, we must assess at what point during a police/child encounter the protections of the statute are triggered. The Child argues that Section 32A–2–14 requires police officers to advise a child of his or her "constitutional rights" prior to the officer asking any question that is likely to lead to an incriminating response. The State counters that this standard is unworkable and would present a number of practical difficulties which would conflict with the need for

3. The 1972 predecessor to Section 32A–2–14 included the following sections which were omitted in the 1981 and most recent revision of the statute.

(C) In a proceeding on a petition alleging delinquency or need of supervision:

...

(2) evidence illegally seized or obtained shall not be received in evidence to establish the allegations of a petition against a child over objection; and

...

(J) In a proceeding on a petition, a party is entitled to the opportunity to introduce evidence and otherwise be heard on the party's own behalf and to confront and cross-examine witnesses testifying against the party, and to admit or deny the allegations against the party in a petition.

1972 N.M. Laws, ch. 97, § 25(C) and (J).

4. Consistent with our conclusion, we find that the subsections following Subsection (A) are written specifically to provide added protection to children or to emphasize some circumstances that may be particularly relevant to juveniles. *See, e.g.,* § 32A–2–14(F)–(H).

law enforcement to adequately investigate crime. The State maintains that without custodial interrogation to serve as the basis for requiring law enforcement to give constitutional warnings, an officer would have to advise every child of his or her constitutional rights, including juveniles who have done nothing wrong and who are not suspected of any wrongdoing. We agree that the standard proposed by the Child is unworkable; however, we do not agree that the omission of custodial interrogation from the statute will have the effect of which the State is concerned. Instead, the language of the statute provides a standard to determine when the protections of the statute are triggered which falls between the two extremes proposed and anticipated by the parties.

{34} As a prerequisite to requiring that a child be advised of his or her rights under Subsection (C), the Child must be either "alleged" or "suspected" of being a delinquent child. *See* § 32A-2-14(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.") (emphasis added). As previously stated, "alleged" pertains to a time period after which a formal petition alleging delinquency has been filed in the Children's Court. Therefore, police officers may not question children who have had formal charges filed against them without first advising them of their constitutional rights under the statute. Of significance to this case, however, is the term "suspected." "Suspected" means "to imagine (one) to be guilty or culpable." Webster's Ninth New Collegiate Dictionary 1189. Hence, the statute is also triggered when a child is imagined to be engaged in some wrongdoing. Despite the State's contention, therefore, the statute is not triggered when officers are questioning eyewitnesses and other juveniles who could not be suspected of any delinquent behavior.

{35} Furthermore, it is clear, because an officer's suspicion will almost always cause the encounter with the child to be an investigatory detention, that an objective standard would be used in evaluating whether the child is suspected of delinquent activity and therefore entitled to the statute's protections. We believe that determining whether a child is "suspected" of wrongdoing by evaluating the subjective intentions of the officer poses evidentiary difficulty and can be subject to abuse. *See, e.g., Whren v. United States,* 517 U.S. 806, 814, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (recognizing that there is evidentiary difficulty in determining subjective intent); *Massachusetts v. Painten,* 389 U.S. 560, 565, 88 S.Ct. 660, 19 L.Ed.2d 770 (1968) (White, J., dissenting) ("[S]ending ... courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources."). Therefore, we find that whether a child is "suspected" of wrongdoing should be measured by an objective standard. Such an objective standard already exists in our law.

{36} Police/citizen encounters fall within one of three categories. *State v. Jason L.,* 2000-NMSC-018, ¶ 34, 129 N.M. 119, 2 P.3d 856 (Baca, J., dissenting); *United States v. Hill,* 199 F.3d 1143, 1147 (10th Cir.1999). At one end of the spectrum are consensual encounters which do not generally implicate any constitutional protections. *See Hill,* 199 F.3d at 1147. On the other end are arrests, which are the most intrusive of seizures, and generally trigger both the Fourth Amendment and *Miranda* protections. *See id.* In between are investigatory detentions, or *Terry* stops, which are "Fourth Amendment seizures of limited scope and duration and must be supported by reasonable suspicion of criminal activity[.]" *Id.* We find that, by including the term "suspected" in Section 32A-2-14(C) to describe when the statute's protections are triggered, the Legislature intended to draw the line at investigatory detentions.

{37} Most often, when an officer approaches a child to ask the child questions because the officer "suspects" the child of delinquent behavior, the officer is performing an investigatory detention. The Fourth Amendment allows an officer who has reasonable articulable suspicion of wrongdoing to briefly detain individuals whom he suspects of criminal activity and ask them ques-

tions in an attempt to confirm or dispel his suspicions. *Taylor*, 1999-NMCA-022, ¶ 7, 126 N.M. 569, 973 P.2d 246; *see State v. Werner*, 117 N.M. 315, 317, 871 P.2d 971, 973 (1994). Given a child's possible immaturity and susceptibility to intimidation, a child who is subject to an investigatory detention may feel pressures similar to those experienced by adults during custodial interrogation. Accordingly, using investigatory detentions as the point at which the statute's protections are triggered furthers the Legislature's intent to be:

> consistent with the protection of the public interest, to remove from children committing delinquent acts the adult consequences of criminal behavior, but to still hold children committing delinquent acts accountable for their actions *to the extent of the child's age, education, mental and physical condition, background and all other relevant factors* [.]

NMSA 1978, § 32A-2-2(A) (1993) (emphasis added); *see In re Doe*, 88 N.M. 481, 482, 542 P.2d 61, 62 (Ct.App.1975) ("Those sections of the Children's Code [referring to a child's constitutional and statutory rights] must be read in light of the legislative purposes expressed in the Code.").

{38} In addition to conforming to the language and purpose of Section 32A-2-14, the "reasonable suspicion" standard places no additional burden on either the courts or law enforcement since the standard is already used to assess whether law enforcement has conformed to the protections of the Fourth Amendment. Hence, it is simple to require that officers who have reasonable suspicion to detain a child, also advise the child of his or her "constitutional rights" under Section 32A-2-14 prior to questioning. Therefore, we hold that the protections of the statute are triggered in two circumstances: (1) after formal charges have been filed against a child; and (2) when a child is seized pursuant to an investigatory detention and not free to leave.

{39} Although we conclude that the Legislature intended to provide children with greater statutory protection by requiring that law enforcement advise children of their constitutional rights prior to questioning during an investigatory detention, we do not find that the Legislature intended to hamper the traditional function of police officers in investigating crime. Accordingly, we reject the Child's proposed standard of requiring warnings whenever an officer asks a question which is likely to lead to an incriminating response. Such a standard unduly burdens a police officer's required duties. For example, under the Child's proposed standard, a preliminary question pertaining to a child's identity or age may lead to an incriminating response and therefore be prohibited without first advising the child of his or her "constitutional rights." *See, e.g., State v. Loo*, 94 Hawai'i 207, 10 P.3d 728, 730 (2000) (illustrating a circumstance in which a minor responding to an officer's inquiry as to his age revealed that the minor had violated the state statute prohibiting a minor from being in possession of alcohol). Police officers must be free to ask a child questions that are related to the officer's administrative concerns. *See Pennsylvania v. Muniz*, 496 U.S. 582, 601-02, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990) (holding that the defendant's answers to questions regarding his name, address, height, weight, eye color, date of birth, and current age posed to him during custodial interrogation were admissible because the questions fell within a "routine booking questions" exception which exempts from *Miranda's* coverage questions to secure the biographical data necessary to complete booking or pretrial services). The "likely to lead to an incriminating response" standard would be impractical since it would essentially prohibit officers from ascertaining whether a particular individual requires special attention as a juvenile under the Children's Code. *See Doe*, 100 N.M. at 582-83, 673 P.2d at 1315-16 (holding that the predecessor to Section 32A-2-14 is not applicable to threshold questioning). Therefore, we reject the Child's proposed standard and conclude that a child is not entitled to any protections under the statute when an officer asks administrative questions such as those pertaining to a child's name or age.

{40} The statute's protections also do not apply when a child, not subject to investigatory detention, answers general

on-the-scene questions or when the child makes a voluntary statement. "It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement." *Miranda*, 384 U.S. at 477–78, 86 S.Ct. 1602. As such, "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected" by our interpretation of Section 32A–2–14. *Id.* at 477, 86 S.Ct. 1602. Moreover, volunteered statements of any kind are also not subject to the protections of Section 32A–2–14 since such statements are generally not in response to any "questioning" or "interrogation." *See Doe*, 100 N.M. at 581, 583, 673 P.2d at 1314, 1316 (concluding that a child's statement admitting that he had shot a rifle after police picked up the rifle was volunteered and therefore admissible). We hold, therefore, that the statute does not require that officers give children constitutional warnings prior to: (1) questions pertaining to a child's age or identity; (2) general on-the-scene questioning; or (3) volunteered statements made by a child. The statute only protects against a child's statements which are made during an investigatory detention in response to a police officer's questioning that could not be mere administrative questions and that is intended to confirm or dispel the officer's suspicions that the child is or has committed a delinquent act. Since the Child in this case was subject to investigatory detention, Section 32A–2–14(C) required Officer Helton to advise the Child of his "constitutional rights" prior to questioning.

C.

{41} This brings us to our final task of defining what "constitutional rights" a child must be advised of under Section 32A–2–14(C) when a child is subject to an investigatory detention. Both the State and the Child assume that, by requiring that a child be advised of his or her "constitutional rights" prior to being interrogated or questioned, the Legislature intended the term "constitutional rights" to be synonymous with *Miranda* warnings. *See* § 32A–2–14(C); *see, e.g., Miranda*, 384 U.S. at 444, 86 S.Ct. 1602 (holding that prior to questioning a person must be warned that "he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed."). However, since the Legislature intended to apply the protections of the statute beyond the narrow context of custodial interrogations, we do not assume that the term "constitutional rights" in Subsection (C) refers to the required warnings enumerated in *Miranda*. Instead, we hold that pursuant to Section 32A–2–14, 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.

{42} In the absence of custodial interrogation an officer is not constitutionally mandated to give any warnings. Custodial interrogation was the essential predicate to the Court's decision in *Miranda*. *See State v. Nieto*, 2000–NMSC–031, ¶ 22, 129 N.M. 688, 12 P.3d 442 (holding that the general right to receive *Miranda* warnings attaches only during custodial interrogation); *see also State v. Chambers*, 84 N.M. 309, 312, 502 P.2d 999, 1002 (1972) (holding that statements made prior to any type of custodial interrogation within the meaning of *Miranda* are voluntary). The inherently coercive atmosphere present during custodial interrogation provides the constitutional justification for mandating that suspects be given warnings, advising them of their right to remain silent and their right to counsel. *See, e.g., Dickerson*, 530 U.S. at 435, 120 S.Ct. 2326 (concluding that the "coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself") (internal quotation marks omitted). Absent custodial interrogation the constitutional procedural safeguards pronounced in *Miranda* do not apply. Therefore, in enacting Section 32A–2–14(C), the Legislature is providing juveniles with a separate statutory right, not codifying a constitutional mandate. We must now assess the

scope of this statutory right when a child is in an investigatory detention.

{43} Although not constitutionally entitled to *Miranda* warnings in the absence of custodial interrogation, individuals continue to possess the constitutional privilege against self-incrimination during investigatory detentions. The Fifth Amendment privilege against self-incrimination is continuously present although at most times remaining un-invoked. For instance, the privilege releases an individual from the obligation to answer questions posed by law enforcement during an investigatory detention. *See Berkemer,* 468 U.S. at 439, 104 S.Ct. 3138 (recognizing that a person detained pursuant to an investigatory detention is not obliged to respond to police questioning). However, if questioning persists and the individual desires the protection of the privilege, " 'he must claim it or he will not be considered to have been 'compelled' within the meaning of the [Fifth] Amendment.' " *Murphy,* 465 U.S. at 427, 104 S.Ct. 1136 (quoting *Monia,* 317 U.S. at 427, 63 S.Ct. 409); *see also Gutierrez,* 119 N.M. at 620, 894 P.2d at 397 ("[T]he constitutional privilege against self-incrimination is available only if it is invoked as the ground for refusing to speak."). Therefore, as a general rule individuals are not deemed to be "compelled" to speak in violation of the Fifth Amendment unless the individual invokes the privilege, refuses to answer, and is thereafter forced to answer. *See Gutierrez,* 119 N.M. at 620, 894 P.2d at 397.

{44} We conclude that the Legislature intended to provide a statutory exception to the general requirement that the child affirmatively invoke the privilege during an investigatory detention in order to be availed of its protection. *See id.* at 621, 894 P.2d at 398 (recognizing that *Miranda* is an "exception[ ] to the general rule that the privilege is not available unless invoked as a ground for refusal to answer"). By enacting Section 32A-2-14, the Legislature intended to shift the burden to law enforcement to remind the child during an investigatory detention that the child has no obligation to answer the officer's questions. In accordance with a child's age, immaturity, and inability to appreciate certain rights available to them, advising them that they have the right to remain silent simply makes them aware of it. *See, e.g., Miranda,* 384 U.S. at 468, 86 S.Ct. 1602. As a corollary to the advisement of the right to remain silent, we also conclude that under the statute, law enforcement must advise children of the consequences of waiving that right. *See id.* at 469, 86 S.Ct. 1602. Law enforcement must also explain that anything the child says may be used against the child in court. *See id.* "This warning is needed in order to make [the child] aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege." *Id.*

{45} Even though individuals maintain a right to remain silent when questioned by police during an investigatory detention, individuals do not have a right to have an attorney present during such questioning. There are two constitutional provisions that grant the right to counsel, the Fifth Amendment and the Sixth Amendment, neither one of which attach during an investigatory detention. "The [S]ixth [A]mendment right to counsel does not attach ... until judicial proceedings have been initiated against the suspect, such as by way of indictment or preliminary hearing." *See State v. Chamberlain,* 109 N.M. 173, 176, 783 P.2d 483, 486 (Ct.App.1989). Additionally, the Fifth Amendment right to counsel pronounced in *Miranda* is so intertwined with the coercive pressures inherent in custodial interrogation that the right does not attach until the suspect is subject to custodial interrogation. *See id.*

> The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process.... *With a law-*

> *yer present the likelihood that the police will practice coercion is reduced,* and if coercion is nevertheless exercised the lawyer can testify to it in court.

Miranda, 384 U.S. at 469–70, 86 S.Ct. 1602 (emphasis added). As previously discussed, the circumstances surrounding an investigatory detention are not inherently coercive as they are during custodial interrogation. Consequently, the right to counsel does not attach when an individual is subject to a detention that never escalates to a custodial interrogation.

{46} Moreover, to interpret the term "constitutional rights" in Section 32A–2–14(C) to include the right to counsel during an investigatory detention would present unworkable situations that would greatly infringe on a child's fundamental rights. For example, if an officer was mandated to advise a child that he has the right to counsel during an investigatory detention, which is constitutionally justified only if limited in scope and duration, and the child invokes, the officer would have to further detain the child so that an attorney may be either retained or appointed. This would be a severe infringement on the child's Fourth Amendment rights since a further detention would likely be unlawful under the Fourth Amendment's "reasonable suspicion" requirement. To interpret the term "constitutional rights" to include the right to counsel during investigatory detention would lead to an unreasonable and absurd result. *See State v. Wyrostek,* 108 N.M. 140, 142, 767 P.2d 379, 381 (Ct.App. 1988) ("[A] court will not give a statute a literal reading when to do so leads to absurd and unreasonable results, or requires useless acts.").

{47} Therefore, we find that the term "constitutional rights" in Subsection (C), as it applies to investigatory detentions, refers to the right to remain silent. By enacting Section 32A–2–14, we conclude that the Legislature intended to exempt children from the general rule of self invocation by requiring that children be reminded of their right not to incriminate themselves and be advised of the consequences of waiving that right. Accordingly, we conclude that when a child is subject to an investigatory detention, law enforcement must advise the child of his or her right to remain silent and that if the right is waived anything that the child says can be used against them in any delinquency hearing.

V.

{48} In the instant case, we agree that the Child's rights under *Miranda* were not violated since the Child was not in custodial interrogation and was, therefore, not entitled to *Miranda* warnings. However, we disagree that Section 32A–2–14(C) is merely a codification of *Miranda.* Instead, we conclude that in enacting Section 32A–2–14(C), the Legislature intended to provide greater protection to juveniles than is afforded to adults in the area of police questioning. As such, we hold that under the Children's Code a child who is detained or seized and suspected of wrongdoing must be advised of his or her right to remain silent and that if the child waives that right, anything said can be used against them. Because Javier M. was subject to an investigatory detention and was not advised by Officer Helton that he had a right not to answer the officer's questions, we conclude that the statements made by Javier M. should have been suppressed pursuant to Section 32A–2–14(D). Since the Children's Court did not suppress the Child's statements, but instead used the statements as the basis for its finding of delinquency, we reverse the Child's adjudication.

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

WE CONCUR: PATRICIO M. SERNA, Chief Justice, and PETRA JIMENEZ MAES, Justice.

PAMELA B. MINZNER, Justice, and GENE E. FRANCHINI, Justice (specially concurring).

MINZNER, Justice (specially concurring).

{50} I concur in the result reached by the majority opinion; the Children's Court erred when it did not suppress the Child's statements and we should reverse the Child's adjudication of delinquency. I am persuaded that in enacting NMSA 1978, § 32A–2–14 (1993), the Legislature did not intend only to

codify *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), but also intended to grant a further statutory right to a child who is "alleged or suspected of being a delinquent child," to be advised of his or her constitutional rights before being "interrogated or questioned." Section 32A–2–14(C). Therefore, Officer Helton was required by Section 32A–2–14(C) to advise the Child of his constitutional rights prior to questioning him. I write separately because I would reverse the Children's Court without reaching all of the issues addressed by the majority.

{51} Officer Helton testified that he detected the odor of alcohol on the Child, and that in his opinion there was no question that the Child had consumed alcohol. Majority Opinion ¶ 3. Additionally, Officer Helton directly asked the Child whether he had consumed any alcohol, and he confessed that he drank two beers. *Id.* On these facts it seems clear that Officer Helton questioned the Child, whom he suspected to be delinquent. Therefore, under Section 32A–2–14(C), Officer Helton should have informed the Child of his constitutional rights and obtained a valid waiver before any response was admitted at trial. We therefore need not determine in this case whether the warnings required by statute should have been given at an earlier time.

{52} Although it is not necessary in order to decide this case, it might be helpful to propose a test for future cases in which the application of Section 32A–2–14 is less clear. The Child proposed the test of whether the questioning was likely to elicit an incriminating response. That test seems to me to capture the Legislature's intent in enacting Section 32A–2–14(C). That test provides objective proof of the law enforcement officer's subjective state of mind-that is, whether he or she suspects that the Child was delinquent. The majority proposes an alternative query: whether the child is the subject of an investigatory detention. The question of whether the defendant is subject to an investigatory detention, as a midpoint between a full arrest and a purely consensual encounter, is determined by balancing the degree of the intrusion into a person's privacy against the government's interest in investigating and preventing crime. *State v. Jason L.*, 2000–NMSC–018, ¶ 14, 129 N.M. 119, 2 P.3d 856. That question has proved difficult to analyze. *See id.* ¶¶ 16–19. The Child's test seems simpler and thus easier for law enforcement to apply; furthermore, it seems more consistent with the text of Section 32A–2–14(C).

{53} The majority expresses concern that the Child's test would unduly hamper law enforcement by requiring warnings prior to questions of a child's age or identity, general on-the-scene questioning, and statements volunteered by the child. Majority Opinion ¶¶ 39–40. I am not convinced that this is the case. The Child's test looks at the officer's question-prior to any response—and asks whether the question itself objectively evinces the officer's suspicion. If it does, Section 32A–2–14(C) requires prior warnings. Thus understood, the Child's test would not unduly hamper law enforcement. The officer can ask the age and identity of a child even though the circumstances of the case may make those questions likely to elicit an incriminating response because, for example, the child is in possession of alcohol. In that case, the sole remedy provided by Section 32A–2–14(D) is suppression of the child's statement in the absence of an informed waiver. The State would be free to prove the child's age by any other means, and the officer could still testify that he or she observed the child drinking. Volunteered statements do not come as a result of questioning and would thus not require warnings under either test. Finally, on-the-scene questioning ordinarily would not seem to evince the officer's suspicion of a child. If it ever did, I believe the Legislature concluded in Section 32A–2–14 that any responses to those questions should be suppressed.

{54} I also am not persuaded we ought to reach the further question of what advice Officer Helton should have provided the Child. We are agreed that the adjudication must be reversed; the parties appear to agree that if notice of constitutional rights was required, that requirement was not satisfied.

{55} Both parties assumed in their briefing that if the Child was entitled to any warnings, it would be the full set required by *Miranda*. It might be helpful to confirm or dispel that assumption, even though it is not necessary in order to decide this case. Because we are concerned with a statutory right to notice or warnings, the answer depends on what the Legislature intended. Considering the relationship between Section 32A–2–14(C) and *Miranda*, it seems natural to assume the full set of *Miranda* warnings is required, regardless of the stage of the encounter.

{56} The Legislature mandated "advising the child of the child's constitutional rights," and did not limit the scope of the advice. Section 32A–2–14(C). *Miranda* itself describes the right to counsel as "a right to consult with counsel *prior to* questioning," as well as the right to "have counsel present *during any questioning* if the defendant so desires." 384 U.S. at 470, 86 S.Ct. 1602 (emphases added). The *Miranda* court clearly tied the right to have counsel present to the right to remain silent: "Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege [against self-incrimination] we delineate today." *Id.* at 471, 86 S.Ct. 1602.

{57} As the majority notes, "a child who is subject to an investigatory detention may feel pressures similar to those experienced by adults during custodial interrogation." Majority Opinion ¶ 37. Because *Miranda* so clearly tied the right to counsel with the right to remain silent, and because the Legislature declared the intent of the Children's Code to hold children accountable for their actions "*to the extent of* the child's age, education, mental and physical condition, background and all other relevant factors," NMSA 1978, § 32A–2–2(A) (1993) (emphasis added), I see no reason to exclude from the warnings given to a child some mention of the child's right to counsel as further protection of the child's privilege against self-incrimination. In advising of the right to counsel under Section 32A–2–14, to be consistent with *Miranda*, an officer would not need to describe the right as a right to counsel at the time the advice is given; the officer, for example, might advise a child that he or she has the right to consult counsel prior to any further questioning.

{58} For the reasons stated above, I respectfully concur in Sections IV(A)(1) and (2), and in the result of Section IV(B). I agree that we should reverse the Child's adjudication. I would do so without reaching the analyses contained in Section III, IV(B) and IV(C).

I CONCUR: GENE E. FRANCHINI, Justice.

2001–NMCA–073

33 P.3d 22

STATE of New Mexico, Plaintiff–Appellee,

v.

Tex HERRERA, Defendant–Appellant.

No. 21,192.

Court of Appeals of New Mexico.

June 20, 2001.

Certiorari Denied, No. 27,027, Sept. 19, 2001.

Patricia A. Madrid, Attorney General, James O. Bell, Assistant Attorney General, Santa Fe, NM, for Appellee.

Ray Twohig, Ray Twohig, P.C., Albuquerque, NM, for Appellant.

OPINION

WECHSLER, Judge.

{1} Defendant entered a guilty plea, pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), to two counts of attempted first-degree child abuse, a second-degree felony. He later moved to withdraw the plea, to evaluate his competency to enter the plea, and to reconsider his sentence. The trial court denied the motions. On appeal, Defendant argues that (1) the trial court erred in denying his motion to withdraw the plea because (a) the plea was to an offense that does not exist; (b) the plea was without a factual basis; and (c) the trial court did not properly advise him concerning the nature of an *Alford* plea; (2) the trial court erred in failing to first determine the issue of his competency to enter the plea before addressing his other motions attacking the plea and sentence; (3) court-appointed counsel was ineffective in failing to properly investigate the child abuse charge against him; and (4) the trial court erred in refusing to order the State to pay expert witness fees and costs. We affirm.

Facts and Procedural Background

{2} On May 6, 1998, Defendant's six-month old daughter, Angel, was admitted to the emergency room of the Gallup Indian Medical Center because she had apparently stopped breathing and gone into a seizure. She was airlifted to the University of New Mexico Hospital in Albuquerque for further medical treatment. Medical personnel diagnosed the infant as having suffered from severe and permanent brain damage, subdural hematomas, and retinal detachment in her eyes, resulting from Shaken Baby Syndrome. Defendant admitted shaking the infant. The State filed a criminal information charging Defendant with one count of child abuse resulting in great bodily harm, a first-degree felony, contrary to NMSA 1978, § 30-6-1(C)(1)(1997).

{3} Defendant entered into a plea and disposition agreement with the advice of court-appointed counsel. Defendant agreed to plead guilty, pursuant to *Alford*, to two counts of attempt to commit first-degree felony child abuse, a second-degree felony. In exchange, the State agreed to dismiss the first-degree child abuse charge. There was no agreement as to sentencing. The trial court accepted the plea agreement, and, after a sentencing hearing, imposed two nine-year sentences, to run consecutively, and suspended three years, for an effective sentence of fifteen years.

{4} After entry of judgment and sentence, Defendant, who was then still represented by court-appointed counsel, filed three motions attacking his plea and sentence: a motion for competency evaluation, a motion to withdraw the plea, and a motion for rehearing on sentencing. Defendant claimed that he was so distraught and traumatized by the child abuse charge that he did not know what he was doing when he entered the guilty plea. He also argued that he was not fully advised of the consequences of the plea. As a result, court-appointed counsel moved to withdraw as counsel because she had become a potential witness in the case. Defendant's family then hired private counsel to represent Defendant.

{5} With private counsel, Defendant filed a second motion to vacate the guilty plea and to set aside the sentence. He also filed a request for an evidentiary hearing, stating that there was an inadequate factual basis for the guilty plea, that he was misinformed concerning the nature of the guilty plea, that the plea was to two offenses which were not lesser-included offenses of the crime charged, and that the plea was not knowing and voluntary. In addition, Defendant claimed that although his family was paying for the services of his new attorney, he was still indigent, and therefore, the New Mexico Public Defender Department was required to pay expert witness fees and costs associated with litigating the motion to vacate the guilty plea.

{6} The trial court held a hearing only on the issue of expert witness fees and costs and

entered an order denying the motion as to that issue. The trial court later denied Defendant's motion to withdraw his plea without a hearing.

Motion to Withdraw the Guilty Plea

A. *Standard of Review*

{7} "On appeal, we review the trial court's denial of a defendant's motion to withdraw his guilty plea for an abuse of discretion." *State v. Barnett,* 1998–NMCA–105, ¶ 12, 125 N.M. 739, 965 P.2d 323. The "trial court abuses its discretion when it acts unfairly or arbitrarily, or commits manifest error." *Id.* "A denial of a motion to withdraw a guilty plea constitutes manifest error when the undisputed facts establish that the plea was not knowingly and voluntarily given." *State v. Garcia,* 1996–NMSC–013, 121 N.M. 544, 546, 915 P.2d 300, 302.

B. *Attempted First–Degree Child Abuse*

{8} Defendant argued to the trial court that he was entitled to withdraw his guilty plea because he pleaded guilty to an offense which is not a lesser-included offense of child abuse resulting in great bodily harm. On appeal, Defendant makes the more expansive argument that because there is no such crime as attempted negligent child abuse in New Mexico, he entered into an invalid plea agreement which the trial court had a duty to set aside. Both arguments are premised on the assumption that one cannot be convicted of attempt to commit child abuse because an attempt to commit a felony requires specific intent to commit the felony, whereas child abuse is a strict liability crime that does not require proof of criminal intent. *See* NMSA 1978, § 30–28–1 (1963); § 30–6–1(C); *State v. Ungarten,* 115 N.M. 607, 609, 856 P.2d 569, 571 (Ct.App.1993) (stating that statute has been "characterized as a strict liability statute" and discussing nature of child abuse offense).

{9} Insofar as Defendant continues to argue that attempt to commit first-degree child abuse is not a lesser-included offense of first-degree child abuse, we do not believe such a distinction makes any difference. Under the Rules of Criminal Procedure, a district attorney is specifically authorized to negotiate a guilty or no contest plea with a defendant "to a charged offense or to a lesser or related offense." Rule 5–304(A)(1) NMRA 2001. Thus, according to the plain language of the rule, a plea agreement can include an agreement regarding not only the original offense charged but also "a lesser or related offense." *Id.*

{10} Although a "lesser" offense may encompass a lesser-included offense, the rule does not mandate that the lesser offense be necessarily included in the more serious offense charged. *See Burroughs v. Bd. of County Comm'rs,* 88 N.M. 303, 306, 540 P.2d 233, 236 (1975) (stating that appellate court "will not read into a statute or ordinance language which is not there, particularly if it makes sense as written"); *State v. Michael S.,* 120 N.M. 617, 618, 904 P.2d 595, 596 (Ct.App.1995) (explaining that a reviewing court ordinarily should give effect to plain language of statute or rule). As a result, a lesser offense may also include an uncharged, lesser-degree offense that is reasonably related to a charged offense. *See State v. Harrell,* 182 Wis.2d 408, 513 N.W.2d 676, 680 (Ct.App.1994) (explaining that in the context of a plea bargain, a defendant can enter a no contest or guilty plea to a crime which is reasonably related to a more serious crime for which a factual basis exists, "even when a true greater- and lesser-included offense relationship does not exist" between the two offenses).

{11} In this case, Defendant entered a guilty plea, not to the original charged offense, but to the lesser-related offense of attempt to commit first-degree child abuse. *Compare* § 30–6–1(C) (providing that child abuse that "results in great bodily harm or death to the child" is a first-degree felony) *with* § 30–28–1(A) (providing that one who attempts a first-degree felony is guilty of a second-degree felony). Because the plea was permissible under the rule, the issue of whether it was to a lesser-included offense has no bearing on the validity of Defendant's plea agreement.

{12} We thus turn to Defendant's contention on appeal that attempt to commit negligent child abuse is not a crime in New

Mexico. In this regard, Defendant particularly argues that attempted negligent child abuse is an oxymoron and a legal impossibility because one cannot have specific intent to commit negligent child abuse.

{13} Defendant correctly points out that the crime of attempt to commit a felony requires a specific intent to commit the underlying felony. *See* § 30–28–1; UJI 14–2801 NMRA 2001; *State v. Johnson*, 103 N.M. 364, 369, 707 P.2d 1174, 1179 (Ct.App. 1985). By contrast, child abuse is a strict liability crime that does not require proof of criminal intent because it may be committed "knowingly, intentionally or negligently." Section 30–6–1(C); *Ungarten*, 115 N.M. at 609, 856 P.2d at 571; *see also State v. Mascarenas*, 2000–NMSC–017, ¶¶ 16, 21, 129 N.M. 230, 4 P.3d 1221 (determining that negligent child abuse conviction requires instruction on criminal negligence standard and that failure to so instruct constitutes fundamental error); UJI 14–602 NMRA 2001 (incorporating concept of criminal negligence into instruction by including the term "reckless disregard," defined as when defendant "knew or should have known the defendant's conduct created a substantial and foreseeable risk, the defendant disregarded that risk and the defendant was wholly indifferent to the consequences of the conduct and to the welfare and safety of [the child]"). Because there is an inherent conflict between the elements of attempt and negligent child abuse, Defendant argues that he pleaded guilty to a non-existent offense and is thus entitled to withdraw his guilty plea, relying on *Johnson*, 103 N.M. at 369, 707 P.2d at 1179 (holding that the crime of attempted depraved mind murder does not exist because of the logical impossibility of intending to commit an unintentional crime) and *State v. Price*, 104 N.M. 703, 706, 726 P.2d 857, 860 (Ct.App.1986) (refusing to recognize crime of attempted felony murder where felony murder contains no mens rea requirement and is a result-oriented doctrine), *holding limited by State v. Ortega*, 112 N.M. 554, 560–63, 817 P.2d 1196, 1202–05 (1991). We do not agree.

{14} The State did not pursue a theory of prosecution based exclusively on negligent child abuse. Instead, it charged Defendant in the alternative with "knowingly, intentionally or negligently" committing child abuse resulting in great bodily harm, a first-degree felony. Defendant ultimately entered an *Alford* plea to two counts of "attempt to commit first degree felony child abuse," a second-degree felony. He did not plead specifically to "[a]ttempted negligent child abuse." Because child abuse may be committed "knowingly, intentionally or negligently," the guilty plea necessarily included a plea to attempted intentional child abuse resulting in great bodily harm.

{15} As Defendant appears to concede in his brief in chief, attempted intentional child abuse resulting in great bodily harm does not have the same legal inconsistency as attempted negligent child abuse. Although not bound by a party's concession on appeal, *see State v. Palmer*, 1998–NMCA–052, ¶ 12, 125 N.M. 86, 957 P.2d 71, we believe that there is such a crime as attempt to commit child abuse when the theory of the case is intentional child abuse.

{16} Intentional child abuse resulting in great bodily harm requires proof that: (1) the defendant intentionally and without justification placed the child in a situation which endangered the life or health of the child; (2) the defendant's acts or failure to act resulted in great bodily harm to the child; and (3) the child was under eighteen years of age. Section 30–6–1(C); UJI 14–602. "Intentionally," in child abuse cases, is defined as "purposely" doing an act. UJI 14–610 NMRA 2001. The definition of intent required for intentional child abuse closely tracks the definition of general criminal intent. *See* UJI 14–141 NMRA 2001; *State v. Brown*, 1996–NMSC–073, ¶ 22, 122 N.M. 724, 931 P.2d 69 (explaining that general intent crime requires only "conscious wrongdoing" or purposely doing an act that is defined as a crime); *cf. State v. Mann*, 2000–NMCA–088, ¶ 12, 129 N.M. 600, 11 P.3d 564 (concluding, for purposes of double jeopardy analysis, that both intentional child abuse resulting in death and second-degree murder require that defendant intentionally committed an act that resulted in death), *cert. granted*, 129 N.M. 599, 11 P.3d 563 (2000).

{17} In comparison, an attempt to commit a felony requires that (1) the defendant intend to commit the felony and (2) the defendant begin to do an act which constitutes a substantial part of the felony but fails to commit the offense. Section 30–28–1; UJI 14–2801. Although an attempt to commit a felony is a specific intent crime, *Johnson,* 103 N.M. at 367, 707 P.2d at 1177, the intent required for attempt is not necessarily inconsistent with the intent required for intentional child abuse.

{18} Defendant, however, contends that "attempt to commit a felony, specifically intending to do so, where the felony is itself a general intent crime, is logically inconsistent" and thus cannot be a crime. Although this statement may be true as a general proposition, Defendant fails to acknowledge the existence of crimes, such as second-degree murder, that may be committed intentionally and thus are capable of being attempted, even though they are ordinarily regarded as general intent crimes. *See generally State v. Campos,* 1996–NMSC–043, ¶ 32, 122 N.M. 148, 921 P.2d 1266 (indicating that New Mexico continues to recognize second-degree murder as a general intent crime).

{19} In *Johnson,* 103 N.M. at 369–70, 707 P.2d at 1179–80, this Court held that although there is no such crime as attempted depraved mind murder, attempted second-degree murder of the intentional variety does exist. The rationale for this conclusion was that "while second degree murder can be committed without a specific intent, all cases of intentional killing are not necessarily excluded from second degree murder." *Id.* at 370, 707 P.2d at 1180. Thus, "a perpetrator could conceivably commit attempted second degree murder if he [or she] intended to kill someone, and did an act placing the person in danger, but the person did not die." *Id.; see also State v. Hernandez,* 1998–NMCA–167, ¶ 15, 126 N.M. 377, 970 P.2d 149.

{20} The same reasoning applies to the crime of intentional child abuse. Although child abuse is a strict liability offense that does not require criminal intent or even actual injury to be committed, *Ungarten,* 115 N.M. at 609, 856 P.2d at 571, the statutory offense of child abuse expressly includes intentional child abuse. Section 30–6–1(C). Intentional child abuse may include circumstances in which the defendant entertains a specific intent to inflict death or great bodily harm upon a child. As a result, it is possible for a defendant to attempt first-degree child abuse by intending to inflict death or great bodily harm upon a child, as in performing an act which places the child in danger, but failing to cause serious injury or death to the child. *Cf. Johnson,* 103 N.M. at 370, 707 P.2d at 1180. Therefore, attempted first-degree child abuse is a crime in New Mexico. Defendant entered a plea to an existing offense.

C. *Factual Basis for Defendant's Guilty Plea*

{21} Defendant additionally argues that his guilty plea must be vacated because there is no factual basis for the plea. In particular, he contends that the State did not present any evidence at the plea hearing to support an attempt to commit child abuse, whether negligent or intentional. *See* Rule 5–304(G) (requiring factual basis for guilty plea before trial court enters judgment on such plea).

{22} Initially, we note that Defendant does not assert on appeal that there is no factual basis for the charged offense of child abuse resulting in great bodily harm. As we have already determined, Defendant was not required to plead to a charged offense or to a lesser-included offense, but could plead "to a lesser or related offense." Rule 5–304(A)(1); *see Harrell,* 513 N.W.2d at 680. When a defendant, in the context of a plea bargain, enters a plea to a lesser offense that is reasonably related to the more serious charged offense, courts from other jurisdictions have determined that the factual basis may support a finding that the defendant is guilty of either the crime charged or the crime which is the subject of the plea. *Id.; People v. Genes,* 58 Mich.App. 108, 227 N.W.2d 241, 243 (1975). Our review of the record in this case indicates that the prosecutor articulated a sufficient factual basis for the offense of child abuse resulting in great bodily harm as charged in the criminal information.

{23} At the hearing on the plea agreement, when the trial court asked for the factual basis for the plea, the prosecutor explained that Defendant's daughter, Angel, was hospitalized for injuries and was diagnosed with Shaken Baby Syndrome. The prosecutor further stated that Angel suffered severe neurological damage as a result of the alleged incident. He indicated that Defendant was in the sole position to have inflicted the injuries and that the injuries were the result of (1) Defendant's actions in shaking the infant and (2) Defendant's delay in reporting the manner in which the injuries occurred to medical authorities. The trial court specifically asked Defendant whether the facts asserted by the prosecutor could be presented to a jury and support a conviction, and Defendant admitted that they could. The prosecutor's narrative of the facts at the plea hearing and Defendant's admission presented an adequate factual basis for the higher underlying crime charged, and Defendant does not claim otherwise.

{24} Furthermore, Defendant, after consultation with counsel, knowingly and voluntarily agreed to plead guilty to the lesser offense of attempt to commit first-degree child abuse. *See State v. Jonathan B.*, 1998–NMSC–003, ¶ 11, 124 N.M. 620, 954 P.2d 52 (noting that the requirement in Rule 5–304 of a written plea agreement provides "evidence that a plea is knowing and voluntary"). During the plea proceeding, the prosecutor, in explaining why an *Alford* plea was being offered, specifically informed the trial court that Defendant wished to "avail himself of the lesser offense of attempt" even though it includes an element of intent to commit the offense, which might not be required to prove the more serious charged offense of child abuse resulting in great bodily harm. Defendant did not object or state anything to contradict the prosecutor's comments during the plea proceeding. Indeed, Defendant admitted that the facts presented by the prosecutor were sufficient to convict him. He then acknowledged that his plea was knowing and voluntary and entered the plea, pursuant to *Alford*, to two counts of attempted first-degree child abuse. The plea agreement, which was unconditional and contained a standard waiver provision, was accepted by the trial court and was filed of record.

{25} Because the record establishes that Defendant knowingly and voluntarily entered the plea to the lesser attempt offense as part of a bargain struck for his benefit, Defendant waived any challenge to the validity of the plea based on the alleged lack of evidence to support the element of intent. *See generally State v. Hodge*, 118 N.M. 410, 414, 882 P.2d 1, 5 (1994) (stating that "a plea of guilty or nolo contendere, when voluntarily made after advice of counsel and with full understanding of the consequences, waives objections to prior defects in the proceedings and also operates as a waiver of statutory or constitutional rights, including the right to appeal"); *cf. State v. Padilla*, 104 N.M. 446, 450–51, 722 P.2d 697, 701–02 (Ct.App.1986) (determining that defendant, who requested and was given an instruction on lesser offense of voluntary manslaughter, which was not supported by the evidence at trial, would not be heard to complain on appeal that evidence was insufficient to convict him); *State v. Handa*, 120 N.M. 38, 45–46, 897 P.2d 225, 232–33 (Ct. App.1995) (concluding that when defendant agreed that a prior conditional discharge could be used as a prior conviction for enhancement purposes, he could not later contend that the prior conditional discharge was not a prior conviction); *State v. Muniz*, 2000–NMCA–089, ¶ 19, 129 N.M. 649, 11 P.3d 613 (acknowledging that upon remand juvenile may knowingly waive the right to challenge the legality of an adult sentence imposed as part of a plea agreement), *cert. granted*, 129 N.M. 599, 11 P.3d 563 (2000). As noted above, the denial of a motion to withdraw a guilty plea constitutes manifest error only when the undisputed facts show that the plea was not knowingly and voluntarily given. *Garcia*, 1996–NMSC–013, 121 N.M. at 546, 915 P.2d at 302; *see also State v. Lozano*, 1996–NMCA–075, ¶ 18, 122 N.M. 120, 921 P.2d 316 (noting that defendant should not be allowed to withdraw his guilty plea unless he lacked information relevant to decision-making process). In this case, Defendant had all the information relevant to making a knowing and voluntary plea to the lesser attempt offense.

{26} Additionally, Defendant claims that because he pleaded guilty to two counts of attempted first-degree child abuse, while being charged with only one count of first-degree child abuse, his sentencing exposure on the guilty plea was no different from his sentencing exposure on the original charge. Therefore, he suggests that he did not receive any benefit from his plea agreement. We disagree.

{27} Had Defendant been convicted of one count of first-degree child abuse, he would have been sentenced to a mandatory eighteen years of incarceration. *See* NMSA 1978, § 31–18–15(A)(1) (1999). Because Defendant entered his guilty plea to two counts of attempted first-degree child abuse, a second-degree felony, the trial court imposed two consecutive nine-year sentences and suspended three years, for an actual sentence of fifteen years. *See* § 30–28–1; § 31–18–15(A)(3). Thus, Defendant received the benefit of a reduced felony conviction and a lesser sentence. *See Jonathan B.*, 1998–NMSC–003, ¶ 17, 124 N.M. 620, 954 P.2d 52 ("There is no prejudice to a defendant's substantial rights if the defendant receives a sentence equal to or less than the maximum as represented by the State or the court.").

{28} Moreover, although Defendant may have been charged with only one count of first-degree child abuse, the record of the plea hearing, as described above, established a factual basis for two counts of first-degree child abuse. Thus, had Defendant declined to accept the State's plea offer, the State would have had grounds to amend the criminal information to add a second count of first-degree child abuse, thereby subjecting Defendant to an additional eighteen years or a mandatory thirty-six-year sentence, if convicted. *See* § 31–18–15(A)(1). Having received the benefit of the plea agreement, Defendant can not now contend that his plea lacks a factual basis due to the absence of evidence to support his intent to commit the offense. *See generally State v. Trujillo*, 117 N.M. 769, 772, 877 P.2d 575, 578 (1994) (recognizing "that both parties to a plea bargain make various concessions and gain certain advantages during plea negotiations"); *State v. Gallegos*, 91 N.M. 107, 110, 570 P.2d 938, 941 (Ct.App.1977) (noting that a defendant who benefits from a plea agreement "should not be permitted to welch on his part of the bargain").

D. *Trial Court's Advice Concerning the Meaning of an Alford Plea*

{29} Defendant also argues that the trial court misinformed him concerning the meaning of an *Alford* plea. Under *Alford*, an accused may plead guilty while simultaneously maintaining his innocence. *Alford*, 400 U.S. at 37, 91 S.Ct. 160; *Hodge*, 118 N.M. at 412 n. 1, 882 P.2d at 3 n. 1. In this case, the trial court advised Defendant at the plea hearing that an *Alford* plea "means that you are entering a plea of guilty, but acknowledging only that you believe that, if this case was presented to a jury, that the jury could find you guilty of these charges." Although the trial court did not specifically inform Defendant that he was maintaining his innocence by entering the plea, it adequately explained the effect of the plea and did not prejudice Defendant because it necessarily had to find a factual basis for the plea before entering judgment upon the plea. *See* Rule 5–304(G); *cf. State v. Guerro*, 1999–NMCA–026, ¶¶ 5, 19, 126 N.M. 699, 974 P.2d 669 (noting counsel's statement that plea was an assertion of innocence but an acknowledgment that the state would likely have enough evidence to convict defendant and holding that defendant received "a fairly standard explanation of the *Alford* plea").

Failure to Initially Determine Defendant's Competency

{30} Defendant next argues that the trial court erred in failing to consider the issue of his competency to enter the plea before addressing his other motions attacking the plea and sentence. Following the entry of the plea and sentencing, Defendant moved for a mental examination for purposes of challenging his competency to enter the guilty plea. Although the trial court apparently did not expressly rule on the motion for a competency evaluation, it implicitly denied the motion by expressly denying Defendant's related motion to withdraw the plea. *See Stinson v. Berry*, 1997–NMCA–076, ¶ 8, 123 N.M. 482,

943 P.2d 129 ("Where there has been no formal expression concerning a motion, a ruling can be implied by entry of final judgment or by entry of an order inconsistent with the granting of the relief sought.").

{31} The standard to determine competency to enter a guilty plea is the same as the standard to determine competency to stand trial. *State v. Lucas,* 110 N.M. 272, 275, 794 P.2d 1201, 1204 (Ct.App.1990). "A criminal defendant is competent to stand trial if he 'understands the nature and significance of the proceedings, has a factual understanding of the charges, and is able to assist his attorney in his defense.'" *State v. Garcia,* 2000–NMCA–014, ¶ 20, 128 N.M. 721, 998 P.2d 186 (quoting *State v. Najar,* 104 N.M. 540, 542, 724 P.2d 249, 251 (Ct.App. 1986)). In requesting a mental evaluation to support a claim of incompetency, the defendant must demonstrate "good cause" for the evaluation. Rule 5–602(C) NMRA 2001; *Najar,* 104 N.M. at 542, 724 P.2d at 251. We review the district court's denial of the motion for a competency evaluation for an abuse of discretion. *Garcia,* 2000–NMCA–014, ¶ 28, 128 N.M. 721, 998 P.2d 186 (stating that limiting the court's requirement in ordering a mental examination to a showing of good cause effectively invokes the district court's exercise of its discretion).

{32} Defendant's court-appointed counsel asserted in the motion for competency evaluation that there was "some question" regarding whether Defendant was competent during the plea proceeding. The motion alleged that, during the criminal proceedings, Defendant had ceased eating, was hiding in his room, was crying uncontrollably, and was taking antidepressants. In a separate request for evidentiary hearing, Defendant's subsequently-retained counsel asserted that, in the weeks prior to the entry of the guilty plea, Defendant was drinking heavily, talked about committing suicide to family and friends, attempted suicide once by slashing his wrists, and was often heard talking to himself in an incoherent and disjointed manner.

{33} A "question" regarding a defendant's competency, however, is not raised "by an assertion of that issue, even though the assertion is in good faith." *State v. Hovey,* 80 N.M. 373, 375, 456 P.2d 206, 208 (Ct.App.1969). When a defendant or his counsel asserts a claim of competency, "the assertions must be substantiated," *Najar,* 104 N.M. at 543, 724 P.2d at 252, and must also establish reasonable cause for the belief that the defendant is not competent. *Hovey,* 80 N.M. at 375, 456 P.2d at 208; *see also State v. Chacon,* 100 N.M. 704, 706, 675 P.2d 1003, 1005 (Ct.App.1983) (holding that counsel's conclusions regarding defendant's competency, based on his drinking and refusal to agree to a plea bargain, without more, did not demonstrate good cause).

{34} Defendant's motions were not accompanied by any affidavits or other documentary evidence to substantiate his claim of incompetency. In addition, defense counsel did not assert to the trial court that Defendant did not understand the nature of the criminal charges against him or could not assist counsel in the defense of his case. *Cf. Hovey,* 80 N.M. at 376, 456 P.2d at 209. Indeed, as the State points out in its answer brief, Defendant himself maintained that he "constantly attempted to contact his attorney" regarding the defense of his case. As a result, we cannot say that the trial court abused its discretion in determining that there was not good cause to order a mental examination. Nor did the trial court err in failing to hold an evidentiary hearing on Defendant's competency. *See Guerro,* 1999–NMCA–026, ¶ 26, 126 N.M. 699, 974 P.2d 669 (noting that trial court has discretion to refuse an evidentiary hearing when defendant's claims do not state grounds for relief, are contradicted by occurrences on the record, or are within the court's personal knowledge).

Ineffective Assistance of Counsel

{35} Defendant contends that he was denied effective assistance of counsel because court-appointed counsel did not adequately investigate the case or retain an expert witness who could offer alternative explanations for the infant's injuries and testify fully concerning the shaken baby allegations. Defendant asks us to remand the ineffective assistance issue to the trial court for an

evidentiary hearing. A remand for an evidentiary hearing is appropriate only when the record on appeal establishes a prima facie case of ineffective assistance of counsel. *State v. Stenz*, 109 N.M. 536, 539, 787 P.2d 455, 458 (Ct.App.1990).

{36} The standard for effective assistance of counsel "is whether defense counsel exercised the skill, judgment, and diligence of a reasonably competent defense attorney." *State v. Hosteen*, 1996-NMCA-084, ¶ 5, 122 N.M. 228, 923 P.2d 595, *aff'd*, 1997-NMSC-063, 124 N.M. 402, 951 P.2d 619. "A prima facie case is made out when: (1) it appears from the record that counsel acted unreasonably; (2) the appellate court cannot think of a plausible, rational strategy or tactic to explain counsel's conduct; and (3) the actions of counsel are prejudicial." *State ex rel. Children, Youth & Families Dep't v. David F. Sr.*, 121 N.M. 341, 348, 911 P.2d 235, 242 (Ct.App.1995).

{37} Based on the record before us, we can not conclude that the court-appointed attorney acted unreasonably. It appears that she obtained a list of possible experts and consulted with one expert who apparently gave the opinion that the State's evidence was consistent with a finding that the child was a victim of Shaken Baby Syndrome. Moreover, because there is no evidence in the record that the outcome of the case would have been any different if counsel had interviewed additional experts, we cannot determine that Defendant was prejudiced by the attorney's performance. Therefore, Defendant has not established a prima facie case of ineffective assistance of counsel. When the record on appeal does not establish a prima facie case of ineffective assistance of counsel, this Court has expressed its preference for resolution of the issue in habeas corpus proceedings over remand for an evidentiary hearing. *Hosteen*, 1996-NMCA-084, ¶ 6, 122 N.M. 228, 923 P.2d 595.

Motion for Expert Witness Fees and Costs

{38} Finally, Defendant argues that the trial court erred in denying his motion to compel the State to pay expert witness fees and costs relating to the motions filed by private counsel. Because we conclude that the trial court properly denied Defendant's motions to withdraw the guilty plea and to evaluate his competency to enter the plea, we do not reach this issue.

Conclusion

{39} We affirm the trial court's denial of Defendant's motion to withdraw the guilty plea. We conclude that the trial court did not err in failing to address the issue of Defendant's competency to enter the guilty plea at the outset of the post-conviction proceedings and that Defendant did not establish a prima facie case of ineffective assistance of counsel based upon court-appointed counsel's investigation of the shaken baby charge. Because we affirm on Defendant's other issues, we do not reach the issue of expert witness fees and costs. Therefore, we affirm the judgment and sentence.

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

WE CONCUR: M. CHRISTINA ARMIJO, Judge and IRA ROBINSON, Judge.

2001-NMCA-068

33 P.3d 32

Cloyd ENNIS, Plaintiff-Appellee,

v.

KMART CORPORATION, Defendant-Appellant.

No. 20,977.

Court of Appeals of New Mexico.

June 21, 2001.

Certiorari Denied, No. 27,101, Sept. 6, 2001.

Geoffrey R. Romero, Law Offices of Geoffrey R. Romero, Albuquerque, NM, for Appellee.

Thomas C. Bird, David W. Peterson, Keleher & McLeod, P.A., Albuquerque, NM, for Appellant.

OPINION

PICKARD, Judge.

{1} This is a case involving error by a court clerk, neglect by a courier service, the result that a complaint was not file-stamped prior to the expiration of the statute of limitations, and a trial court's practical ruling permitting the case to proceed, which we affirm notwithstanding Defendant's several technical, procedural arguments. Defendant appeals from a judgment, finding it liable for personal injuries sustained by Plaintiff as the result of an accident at Defendant's store and awarding Plaintiff $700,000 for pain and suffering. On appeal, Defendant raises four issues: (1) whether the trial court had the authority to treat Plaintiff's complaint as timely filed when the court clerk refused to accept Plaintiff's original complaint due to an error in the caption and Plaintiff was unable to file a corrected complaint until after the limitations period had expired; (2) whether the trial court erred in denying Defendant's motion to dismiss, given that the complaint showed a filing date that was after the limitations period had expired; (3) if the trial court converted Defendant's motion to dismiss into a motion for summary judgment by considering material outside of the complaint, whether (a) the court erred by failing to give Defendant express notice that it intended to convert the motion and (b) the court committed plain error by considering hearsay evidence included in the affidavit and letter attached to Plaintiff's response; and (4) whether the $700,000 award for pain and suffering is excessive as a matter of law. We affirm the judgment in its entirety.

BACKGROUND

{2} This case arises from a slip-and-fall accident at Defendant's store, which resulted in Plaintiff suffering serious injuries to his neck and back, right leg, and right arm. The accident occurred on January 14, 1995. On January 12, 1998, Plaintiff delivered his complaint to a courier service to file in the First Judicial District. Although the body of the complaint correctly pleaded jurisdiction and venue as proper in the First Judicial District, the caption mistakenly identified Quay County. As a result of this error, the court clerk refused to file the complaint. The courier service failed to inform Plaintiff that the complaint had not been filed until January 16, 1998, which was after the statute of limitations period had run. *See* NMSA 1978, § 37-1-8 (1976) (stating that action for per-

sonal injury must be brought within three years). Upon learning of the error, Plaintiff corrected the mistaken county identification and immediately filed the complaint with the clerk. At the same time, Plaintiff's counsel wrote a letter to the court explaining the situation and asking the court to consider the complaint as timely filed.

{3} Defendant filed a motion to dismiss, alleging expiration of the limitations period. In his response to Defendant's motion, Plaintiff again requested that the court treat the complaint as timely filed, either by issuing an order *nunc pro tunc* or by expanding the limitations period under Rule 1–006 NMRA 2001. Plaintiff attached an affidavit from the courier service owner, as well as the letter Plaintiff's counsel had written to the court. Three weeks after Plaintiff filed his response, the court held a hearing on Defendant's motion. At the hearing, Defendant indicated that it had read Plaintiff's response, the affidavit, and the letter, and that it understood Plaintiff's claim that the clerk had erred in refusing to accept the complaint. Defendant did not challenge the truth of Plaintiff's claim, nor did it challenge the admissibility of the affidavit and letter. Instead, Defendant argued that the clerk's actions were irrelevant because Plaintiff had a duty to submit proper pleadings and because the court lacked the authority to grant the relief requested by Plaintiff. The court denied Defendant's motion to dismiss, but refused to give a reason for its ruling:

> I believe that there was a good faith attempt to comply with the statute of limitations and the motion to dismiss is denied. Here are your documents. It comes under the category of right for any reason....
>
> So I won't articulate a reason why I am denying the motion to dismiss and hopefully you can find a way to make it survive.

{4} At trial, Plaintiff sought damages for pain and suffering only. Plaintiff did not seek compensation for lost wages, because he had continued to work after suffering his injuries. In addition, Plaintiff did not seek damages related to medical costs, because Defendant had paid all medical costs through 1999.

{5} The jury found in favor of Plaintiff and awarded damages for pain and suffering in the amount of $700,000.

DISCUSSION

A. Court's Authority to Treat Complaint as Timely Filed

{6} Rule 1–005(E) NMRA 2001 prohibits a court clerk from refusing "to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices." The question of whether Rule 1–005(E) authorizes a court to treat as timely filed a pleading improperly rejected by a court clerk is an issue of first impression in New Mexico. Because the language of the rule mirrors its federal counterpart, Fed. R.Civ.P. 5(e), we find federal authority instructive. *See Doe v. Roman Catholic Diocese of Boise, Inc.*, 121 N.M. 738, 741, 918 P.2d 17, 20 (Ct.App.1996).

{7} The federal courts have consistently interpreted Rule 5(e) to allow this remedy. *See McDowell v. Delaware State Police*, 88 F.3d 188, 190 (3d Cir.1996); *McClellon v. Lone Star Gas Co.*, 66 F.3d 98, 101 (5th Cir.1995); *Dielsi v. Falk*, 916 F.Supp. 985, 990 (C.D.Cal.1996). These cases have recognized that Rule 5(e) removes from the clerk any discretion in the decision to accept a technically deficient pleading. *See McClellon*, 66 F.3d at 101. The advisory committee notes following the 1991 amendment of the federal rules describe this removal of discretion as necessary because the rejection of pleadings for technical violations or insufficiencies is "not a suitable role for the office of the clerk, and ... exposes litigants to the hazards of time bars[.]" Instead, the rule delegates to the trial court the task of evaluating the sufficiency of pleadings, and grants to the trial court the discretion to determine whether to permit a party to correct any defect or to order the pleading stricken if warranted under the circumstances. *Id.* at 101; *see also* Fed R. Civ. P. 5(e) advisory committee notes ("The enforcement of [the Federal Rules of Civil Procedure] and of the local rules is a role for a judicial officer."). "Accordingly, the clerk does not possess the power to reject a pleading for lack of conformity with form require-

ments, and a pleading is considered filed when placed in the possession of the clerk of the court." *McClellon,* 66 F.3d at 101.

{8} The federal cases are consistent with New Mexico case law, which recognizes that a document is deemed filed when it is delivered to the court clerk to be kept on file. *See Town of Hurley v. N.M. Mun. Boundary Comm'n,* 94 N.M. 606, 608, 614 P.2d 18, 20 (1980) (" '[T]o file' a paper, on the part of a party, is to place it in the official custody of the clerk."); *Gallagher v. Linwood,* 30 N.M. 211, 217–18, 231 P. 627, 629 (1924). It is not necessary for the clerk to endorse a pleading upon its receipt to effect the filing. *See Town of Hurley,* 94 N.M. at 608, 614 P.2d at 20. " '[A] person filing an instrument should not be responsible for the failure of a receiving public official to perform his duty.' " *Id.* (quoting *Thorndal v. Smith, Wild, Beebe & Cades,* 339 F.2d 676, 679 (8th Cir.1965)).

{9} In *Castillo v. Northwest Transport Service,* 113 N.M. 119, 119–20, 823 P.2d 919, 919–20 (Ct.App.1991), we held that a complaint was timely filed when a court clerk rejected a pro se complaint on the ground that the claimant was represented by counsel in another proceeding. The pro se complaint had been filed within the limitations period, but the second filing, made by the claimant's counsel, was filed six days late. *Id.* Because the first claim was timely filed, and the facts showed that the claimant had done everything necessary to file his pleading within the limitations period, we held that the claim was effectively filed within the limitations period. *Id.* Similarly, in *State v. Aaron,* 103 N.M. 138, 139–40, 703 P.2d 915, 916–17 (Ct.App. 1985), we considered a notice of appeal as timely filed where the defendant mailed the notice within the limitations period but the court clerk delayed filing the notice for another month. We held that these circumstances provided "a basis ... for avoiding the effect of the rules." *Id.* (quoting *State v. Martinez,* 84 N.M. 766, 767, 508 P.2d 36, 37 (Ct.App.1973)).

{10} We hold that, under Rule 1–005(E), a court clerk lacks the discretion to reject pleadings for technical violations and that a pleading will be considered filed when delivered to the clerk. It is then up to the trial court to decide whether to allow a party to correct any deficiencies or to strike the pleadings. Under this rule, Plaintiff's complaint was effectively filed on January 12, 1998, which was within the statute of limitations period.

{11} As a final note, Defendant argues that it would be improper for us to rely on Rule 1–005(E), because neither the trial court nor Plaintiff identified the rule as the basis for the trial court's denial of Defendant's motion to dismiss. However, a decision by a trial court will be upheld if it is right for any reason, *see Westland Dev. Co. v. Romero,* 117 N.M. 292, 293, 871 P.2d 388, 389 (Ct.App.1994), as long as it is fair to the parties to do so, *see Eldin v. Farmers Alliance Mut. Ins. Co.,* 119 N.M. 370, 376, 890 P.2d 823, 829 (Ct.App.1994). Under the circumstances of this case, we conclude that it would not be unfair to Defendant to affirm the trial court's denial of its motion based on Rule 1–005(E).

{12} In his letter to the court and at the hearing on Defendant's motion to dismiss, Plaintiff asked the court to acknowledge the complaint as filed in open court on the date the document was originally submitted to the clerk's office. In addition, at the hearing, Plaintiff argued that the clerk had acted unlawfully in rejecting the complaint. Although Plaintiff did not explicitly mention Rule 1–005(E), his argument before the court was substantially similar to the rule: namely, that (1) the clerk lacked the authority to reject the complaint for a technical violation of the rules of procedure and (2) the trial court had the authority to correct the clerk's error by treating the complaint as filed on the date it was originally presented to the clerk. For this reason, both Plaintiff and Defendant had the opportunity to develop facts relevant to application of the Rule 1–005(E), and Defendant has failed to indicate how it would have changed its presentation before the trial court had it known that Rule 1–005(E) was applicable.

B. Defendant's Motion to Dismiss

{13} Defendant complains that it is unclear whether the trial court considered

Plaintiff's affidavit and letter in denying Defendant's motion. Based on this confusion, Defendant asserts that we should treat the motion as a motion to dismiss and consider only the pleadings in reviewing the trial court's actions. After reviewing the transcript of the hearing on Defendant's motion to dismiss, we are confident that the trial court did rely on material outside of the pleadings.

{14} Prior to delivering its ruling, the court discussed at length the facts alleged in the affidavit and letter. In addition, the court based its decision to deny the motion on its conclusion that Plaintiff had made a good faith effort to file his complaint within the limitations period. This conclusion could only be reached by considering the affidavit and letter. For this reason, we conclude that the trial court converted Defendant's motion to dismiss into a motion for summary judgment, and will review the decision under the standard of review for summary judgment. *See Knippel v. N. Communications, Inc.*, 97 N.M. 401, 402, 640 P.2d 507, 508 (Ct.App. 1982).

C. Motion for Summary Judgment

{15} In challenging the trial court's conversion of its motion to dismiss into a motion for summary judgment, Defendant raises two arguments: (1) the trial court could not convert the motion without formal notice to the parties and (2) the trial court committed plain error by considering hearsay statements included in the affidavit and letter attached to Plaintiff's response. We will discuss each argument in turn.

1. *Conversion from Motion to Dismiss to Motion for Summary Judgment*

{16} Rule 1–012(B) NMRA 2001 provides:

> If, on a motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 1–056, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 1–056.

Under Rule 1–056(D)(1) NMRA 2001, motions for summary judgment must be filed "within a reasonable time prior to the date of trial to allow sufficient time for the opposing party to file a response and affidavits, depositions or other documentary evidence and to permit the court reasonable time to dispose of the motion." The opposing party must respond within 15 days after service of the motion. Rule 1–056(D)(2). Rule 1–056 differs substantially from the federal rule insofar as the federal rule requires the moving party to file its motion at least ten days prior to the hearing, and allows the opposing party to serve affidavits at any time prior to the day of the hearing. Fed.R.Civ.P. 56.

{17} Citing federal law, Defendant asks us to adopt a bright line rule that a trial court must give the parties express notice of its intent to convert a Rule 1–012(B)(6) motion to dismiss into a Rule 1–056 motion for summary judgment. Plaintiff counters that Defendant waived any right it had to notice of the conversion. It is unnecessary for us to consider whether Defendant waived the notice requirement because we reject Defendant's invitation to adopt the federal rule requiring express notice of intent to convert, and we hold that Defendant received adequate notice under the circumstances of this case.

{18} Although all federal courts require that the parties have at least constructive notice of a trial court's intention to convert under Fed.R.Civ.P. 12(b)(6) a motion to dismiss into a motion for summary judgment, the circuits vary as to whether express notice is required and, if it is required, how strictly this requirement is enforced. *See generally Jones v. Auto. Ins. Co. of Hartford*, 917 F.2d 1528, 1533 n. 5 (11th Cir.1990) (noting that 11th circuit applies notice requirement more strictly than other courts and listing cases demonstrating the various approaches). The majority of federal courts do not require express notice in all cases, but look to the facts and circumstances of each case to determine whether " 'the appellant should reasonably have recognized the possibility that the motion might be converted into one for summary judgment or was taken by surprise' " and deprived of a reasonable oppor-

tunity to respond. *Groden v. Random House, Inc.*, 61 F.3d 1045, 1052–53 (2d Cir. 1995) (quoting *In re G. & A. Books, Inc.*, 770 F.2d 288, 295 (2d Cir.1985)); *see also Salehpour v. Univ. of Tenn.*, 159 F.3d 199, 204 (6th Cir.1998); *Whiting v. Maiolini*, 921 F.2d 5, 6 (1st Cir.1990); *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1532–33 (9th Cir.1985). Some circuits have held that when a party is aware that material outside of the pleadings is before the court, the party is on notice that the motion to dismiss may be treated as a motion for summary judgment. *See David v. City & County of Denver*, 101 F.3d 1344, 1352 (10th Cir.1996); *Gay v. Wall*, 761 F.2d 175, 177 (4th Cir.1985).

{19} Even those circuits that strictly enforce the ten-day express notice rule recognize that the parties may waive the notice requirement and that failure to give notice is subject to harmless error review. *See, e.g., Jones*, 917 F.2d at 1532 n. 4; *Marine Coatings of Ala., Inc. v. United States*, 792 F.2d 1565, 1568 (11th Cir.1986) (recognizing that "when the parties are aware of the court's intent to consider matters outside the record and have presented all the materials and arguments they would have if proper notice had been given, failure to notify may be harmless error"); *see also Gibb v. Scott*, 958 F.2d 814, 816 (8th Cir.1992).

{20} We are not persuaded by the cases cited by Defendant in its brief. In *Brown v. Zavaras*, 63 F.3d 967, 969–70 (10th Cir.1995), the court refused to review a grant of summary judgment against a pro se plaintiff because the trial court failed to notify the plaintiff that it intended to treat the motion to dismiss as a motion for summary judgment, and there was no indication that the plaintiff had an opportunity to introduce evidence supporting his position. Most circuits apply the notice requirement more strictly when a party appears pro se than when a party is represented by counsel. *See, e.g., Corcoran v. N.Y. Power Auth.*, 935 F.Supp. 376, 383 (S.D.N.Y.1996). In the case at bar, Defendant was represented by counsel throughout the proceedings. In addition, since *Brown* was decided, the Tenth Circuit has held that the notice required under the rules may be actual or constructive, and that the submission of evidentiary materials by the movant, the non-movant, or both may be sufficient notice. *David*, 101 F.3d at 1352. We are equally unpersuaded by Defendant's citation to *Travel All Over the World, Inc. v. Saudi Arabia*, 73 F.3d 1423 (7th Cir.1996). In *Travel All Over the World, Inc.*, the court did not address whether the rules required express notice prior to conversion because it concluded that the trial court had treated the motion as a motion to dismiss. *Id.* at 1430. We note that the Seventh Circuit has expressly declined to adopt the bright line rule. *Bohac v. West*, 85 F.3d 306, 312 (7th Cir. 1996).

{21} Consistent with the majority approach, New Mexico cases require only that the opposing party have an opportunity to respond to the introduction of material outside of the pleadings, and that the requirements of Rule 1–056 are met. *Compare Santistevan v. Centinel Bank of Taos*, 96 N.M. 730, 732, 634 P.2d 1282, 1284 (1981) *and Aldridge v. Mims*, 118 N.M. 661, 664, 884 P.2d 817, 820 (Ct.App.1994) ("When the opposing party has reasonable notice of the issues underlying a summary judgment, together with the opportunity to be heard, and makes no specific allegation of prejudice at that time, summary judgment is an appropriate procedure."), *with Moody v. Town of Weymouth*, 805 F.2d 30, 31–32 (1st Cir.1986) ("Because plaintiff has not shown that he would have done something different had the district court taken him by the hand and told him defendants' motion had been converted . . . , we conclude plaintiff has not demonstrated prejudice and that therefore there would be no point in remanding."). We agree with the majority of the federal circuits that the notice requirement for "conversion of a Rule 12(b)(6) motion into one for summary judgment is governed by principles of substance rather than form." *In re G. & A. Books, Inc.*, 770 F.2d at 295.

{22} After reviewing the facts and circumstances of the case at bar, we conclude that Defendant had adequate notice of the trial court's intention to consider the affidavit and letter. Plaintiff served his response at least three weeks prior to the hearing, and defense counsel expressed an understanding that

Plaintiff would be relying on these documents to defeat the motion to dismiss. Most importantly, however, Defendant has not contested Plaintiff's assertion that he presented his original complaint to the clerk's office within the limitations period. As such, Defendant has failed to show how it was prejudiced or what it would have done differently had the trial court taken Defendant by the hand and told it that its motion had been converted. *See Aldridge,* 118 N.M. at 664, 884 P.2d at 820; *Moody,* 805 F.2d at 31–32. Defendant's assertion that it would have challenged the admissibility of the affidavit and letter is without merit for the reasons discussed later in this opinion.

2. Plain Error

{23} Defendant concedes that it failed to object to the admission of the affidavit or the letter attached to Plaintiff's response to Defendant's motion to dismiss. Nonetheless, Defendant argues that the trial court's consideration of the hearsay statements included in this material rise to the level of plain error. In particular, Defendant alleges that the trial court could not have reached its conclusion that Plaintiff's complaint was timely filed without considering the courier's statement that the clerk refused to accept the complaint because of the technical violation. We disagree.

{24} Generally, a party may not claim error predicated upon the admission of evidence unless the record shows a timely and specific objection. *State v. Paiz,* 1999–NMCA–104, ¶¶ 26, 28, 127 N.M. 776, 987 P.2d 1163. Rule 11–103(D) NMRA 2001 provides an exception to the preservation requirement where an error is plain and affects substantial rights. *See id.* ¶ 26. Defendant argues that its substantial right to enforcement of the limitations period was violated insofar as the court could not have reached its decision without considering the hearsay statements. We are not persuaded.

{25} Without reference to the challenged hearsay evidence, we conclude that the affidavit and letter contain sufficient admissible evidence to sustain the court's denial of Defendant's motion. The admissible evidence established the following: Plaintiff's attorney gave the complaint to the courier company on January 12, 1998, with instructions to file the complaint with the First Judicial District clerk's office. On January 16, 1998, the courier notified Plaintiff's attorney that the complaint had not been filed. The caption on the unfiled complaint incorrectly identified Quay County as the court of jurisdiction, although the body of the complaint set forth jurisdiction and venue as proper in the First Judicial District. Plaintiff's attorney corrected the error in the caption, and the complaint was accepted for filing on January 16, 1998. Given these facts, the trial court was entitled to infer that the complaint had been rejected due to the error in the caption.

{26} In addition, we note that had Defendant timely objected, Plaintiff would have had an opportunity to call the courier and the clerk as witnesses or to submit additional affidavits in support of his position. We do not believe that the court's possible consideration of the hearsay contained in the letter raises a serious doubt as to the validity of the trial court's decision, and we will not correct an error if to do so would not change the result. *See In re Estate of Heeter,* 113 N.M. 691, 695, 831 P.2d 990, 994 (Ct.App.1992).

D. Reasonableness of Damages

{27} Defendant argues that the trial court erred in denying its motion for a remittitur because the jury's award of $700,000 for pain and suffering was excessive and not supported by substantial evidence. In determining whether a jury verdict is excessive, we do not reweigh the evidence but determine whether the verdict is excessive as a matter of law. *Coates v. Wal–Mart Stores, Inc.,* 1999–NMSC–013, ¶ 49, 127 N.M. 47, 976 P.2d 999. The jury's verdict is presumed to be correct. *Allsup's Convenience Stores, Inc. v. N. River Ins. Co.,* 1999–NMSC–006, ¶ 16, 127 N.M. 1, 976 P.2d 1. When a trial court denies a motion for a remittitur, we defer to the trial court's judgment. *See Sandoval v. Chrysler Corp.,* 1998–NMCA–085, ¶ 14, 125 N.M. 292, 960 P.2d 834. "'When the jury makes a determination and the trial court approves, the amount awarded in dollars stands in the strongest position known in the law.'" *Id.* (quoting

Grammer v. Kohlhaas Tank & Equip. Co., 93 N.M. 685, 695, 604 P.2d 823, 833 (Ct.App. 1979)). Defendant bears the burden of showing that the verdict was infected with " 'passion, prejudice, partiality, sympathy, undue influence, or some corrupt cause or motive.' " *Coates,* 1999–NMSC–013, ¶ 51, 127 N.M. 47, 976 P.2d 999 (quoting *Allsup's,* 1999–NMSC–006, ¶ 19, 127 N.M. 1, 976 P.2d 1). We conclude that Defendant has failed to meet this burden.

{28} At trial, although Plaintiff did not present evidence relating to the amount of medical expenses because Defendant had already paid these expenses, Plaintiff did present evidence that his injuries were significant and that, as a result of these injuries, he had suffered pain from the time of his fall until the time of trial and would continue to suffer pain for the rest of his life. In addition, Plaintiff testified that his injuries limited his activities.

{29} As a result of his injuries, Plaintiff underwent two surgeries: arthroscopic surgery on his right knee, and a cervical fusion to reduce pain in his neck, upper back, and shoulders. Plaintiff also participated in extensive physical therapy. Despite the efforts of Plaintiff and the three doctors who primarily treated his injuries, Plaintiff has trouble standing for more than 40 minutes and has difficulty walking, experiences a constant dull throbbing pain in his elbow that escalates to a sharp pain when he bends his arm, lacks a full range of motion in his neck, and experiences pain in his shoulders and arms when he lifts heavy objects or when the weather changes. The jury was instructed that, based on actuarial tables, Plaintiff's life expectancy is 34.88 more years. We hold that this is substantial evidence to support the verdict. *See Allsup's,* 1999–NMSC–006, ¶ 20, 127 N.M. 1, 976 P.2d 1 (holding that jury's award of damages supported by substantial evidence).

CONCLUSION

{30} For the foregoing reasons, we affirm the district court's denial of Defendant's motion to dismiss and the jury's verdict of $700,000 for pain and suffering.

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

WE CONCUR: RICHARD C. BOSSON, Chief Judge, CYNTHIA A. FRY, Judge.

2001–NMCA–075

33 P.3d 40

David DERRINGER, Plaintiff–Appellant,

v.

Thomas C. TURNEY, New Mexico State Engineer and Mick and Jennifer Chapel, husband and wife, Defendants–Appellees.

No. 21,059.

Court of Appeals of New Mexico.

Aug. 13, 2001.

Certiorari Denied, No. 27,121, Sept. 19, 2001.

David Derringer, Quemado, NM, pro se.

DL Sanders, Special Assistant Attorney General, Joseph E. Manges, Comeau, Maldegen, Templeman & Indall, LLP, Santa Fe, NM, for Appellees.

OPINION

FRY, Judge.

{1} After the state engineer entered an adverse decision on his application for a permit to acquire water rights, Appellant David Derringer appealed to the district court. The Seventh Judicial District Court dismissed his appeal on the ground that it lacked jurisdiction over it because Derringer had not served the other parties—Mick and Jennifer Chapel (the Chapels), and the state engineer—within the required time. Derringer now appeals to this Court, and we reverse the district court's order of dismissal and instruct the district court to remand this case to the state engineer for a post-decision hearing consistent with NMSA 1978, § 72-2-16 (1973).

BACKGROUND

{2} This case developed out of a long-standing dispute over water rights between Derringer's family and the Chapels, who live on neighboring properties. In 1994, the Chapels filed suit for declaratory and injunctive relief to stop Derringer's wife and mother-in-law (the Nevitts) from damming a creek that flowed through both properties. A few months later, Derringer and the Nevitts filed an application with the state engineer for a permit to appropriate water from the creek. The state engineer had not yet ruled on the application when the district court entered a judgment declaring that the Chapels had a prior right to the water in the creek, and enjoined the Nevitts from obstructing the flow of water. On appeal to this Court from that judgment, the only issue raised was whether the Chapels were required to have a permit to store water from the creek in a pond if they then used that water to irrigate their land. We held that under the statute in effect at that time, but which has since been amended, the Chapels were not required to

have a permit in order to use the water stored in their small pond for any purpose.[1]

{3} In 1996, Derringer and the Nevitts sought to amend their application for a permit, and at the end of 1998, the Chapels moved in that proceeding for summary judgment and requested a hearing on their motion. Derringer and the Nevitts responded to the Chapels' request for a hearing, arguing that the hearing officers already had all the information needed to make their decision and that in the interest of judicial economy the request for a hearing should be denied. On March 4, 1999, the state engineer denied the Chapels' request for a hearing and granted their motion for summary judgment, stating that the validity of the Chapels' right to appropriate water from the creek had been determined by the district court decision in the earlier case and that there was insufficient water in the creek to permit Derringer and the Nevitts to appropriate water without interfering with the Chapels' prior right.

{4} On March 10, 1999, Derringer then requested a post-decision hearing under Section 72–2–16. On March 22, 1999, the state engineer mailed his order, entered on March 17, 1999, denying the request for a post-decision hearing, which the state engineer referred to as a "request for rehearing." Derringer then appealed the decision of the state engineer to the district court, serving his notice of appeal on the state engineer on April 8, 1999, and on the Chapels on April 19, 1999. The Chapels filed a motion to dismiss the appeal for lack of jurisdiction, arguing the appeal was untimely under NMSA 1978, § 72–7–1(B) (1971), because they were not served with the notice of appeal within thirty days of Derringer's receipt of the state engineer's decision on the motion for summary judgment. The state engineer also filed a motion to dismiss for lack of jurisdiction because Derringer did not serve the attorney general with the notice of appeal within thirty days of receiving the state engineer's decision on the motion for summary judgment. On January 10, 2000, the district court dismissed Derringer's appeal, finding it had no jurisdiction to proceed. This appeal followed.

DISCUSSION

{5} Derringer raises seven issues on appeal, six of which are substantive and arise from the state engineer's order granting summary judgment. However, because the district court dismissed the appeal without reaching the merits of what would have been a de novo appeal under Section 72–7–1(E), the only issue for us to address is whether the district court erred in concluding it lacked jurisdiction to hear Derringer's appeal from the state engineer's decision. We recognize that time limits imposed by statute for appealing decisions of administrative agencies to the courts have been strictly enforced. *El Dorado Utils., Inc. v. Galisteo Domestic Water Users Ass'n*, 120 N.M. 165, 167, 899 P.2d 608, 610 (Ct.App.1995). As this Court observed in *El Dorado*, " '[j]urisdiction of the matters in dispute does not lie in the courts until the statutorily required administrative procedures are fully complied with. The courts have no authority to alter the statutory scheme, cumbersome as it may be.' " *Id.* (quoting *In re Application of Angel Fire Corp.*, 96 N.M. 651, 652, 634 P.2d 202, 203 (1981)).

{6} Section 72–7–1(B), states the applicable time limit as follows:

> Appeals to the district court shall be taken by serving a notice of appeal upon the state engineer and all parties interested within thirty days after receipt by certified mail of notice of the decision, act or refusal to act. If an appeal is not timely taken, the action of the state engineer is conclusive.

Thus, the failure to serve any party within thirty days of the "decision, act or refusal to act" means that the district court never acquires jurisdiction to hear the appeal. *Id.; see El Dorado*, 120 N.M. at 169, 899 P.2d at 612 (stating service "must be effected on all parties within the statutory 30–day period for the court to have jurisdiction to hear the

1. In 1997, the legislature amended NMSA 1978, § 72–5–32 (1997), to remove the language stating that water impounded in small ponds by small dams exempted from the permit requirement could be used for any purpose.

appeal"). Both the Chapels and the state engineer argue that they were not served in a timely manner.

The Timeliness of Service on the Chapels

{7} Derringer argues that his service on the Chapels was timely because he served the Chapels within thirty days of the state engineer's refusal to act on his motion requesting a post-decision hearing. He asserts that under Section 72–2–16, the state engineer was required to hold a post-decision hearing before the case could be appealed to the district court. Because he requested a post-decision hearing, Derringer argues, he was not free to appeal until the state engineer acted or refused to act on his request. The Chapels argue that because Derringer opposed the pre-decision hearing on their motion for summary judgment, he waived whatever right he had to a post-decision hearing under Section 72–2–16. The question whether the state engineer was required to give Derringer a post-decision hearing when he had opposed a pre-decision hearing is an issue of first impression that requires us to construe Section 72–2–16.

{8} Interpretation of a statute is a matter of law, which an appellate court reviews de novo. *Morgan Keegan Mortgage Co. v. Candelaria,* 1998–NMCA–008, ¶ 5, 124 N.M. 405, 951 P.2d 1066. The first rule of statutory construction is that the " '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 (quoting *Gen. Motors Acceptance Corp. v. Anaya,* 103 N.M. 72, 76, 703 P.2d 169, 173 (1985)). Moreover, "[i]f the meaning of a statute is truly clear, it is the responsibility of the judiciary to apply it as written and not second guess the legislature's policy choices." *State ex rel. State Engineer v. Lewis,* 121 N.M. 323, 325, 910 P.2d 957, 959 (Ct.App. 1995).

{9} Section 72–2–16 sets out the statutory scheme for hearings on decisions of the state engineer:

> The state engineer may order that a hearing be held before he enters a decision, acts or refuses to act. If, without holding a hearing, the state engineer enters a decision, acts or refuses to act, any person aggrieved by the decision, act or refusal to act, is entitled to a hearing, if a request for a hearing is made in writing within thirty days after receipt by certified mail of notice of the decision, act or refusal to act. Hearings shall be held before the state engineer or his appointed examiner. A record shall be made of all hearings. No appeal shall be taken to the district court until the state engineer has held a hearing and entered his decision in the hearing.

{10} It is undisputed that Derringer, the aggrieved party in this case, did not receive a hearing. It is also undisputed that the Chapels requested a pre-decision hearing, and Derringer responded that a pre-decision hearing was unnecessary in the interest of judicial economy because all the information the state engineer needed to decide the case was included in the record. The Chapels rely on *Armijo v. Save 'N Gain,* 108 N.M. 281, 284, 771 P.2d 989, 992 (Ct.App.1989), to argue that Derringer's action in opposing the pre-decision hearing constituted a waiver of his right to any hearing.

{11} We are not persuaded that the analysis in *Armijo* applies to this case. In *Armijo,* a workers' compensation case, our Supreme Court addressed whether a worker's due process rights were violated by the type of process given. Citing *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the court concluded that "there is no deprivation of due process rights where a claimant has been accorded an opportunity to be heard through the informal hearing and affirmatively waived her right to a subsequent formal hearing" through a written acceptance of the recommended resolutions. *Armijo,* 108 N.M. at 284, 771 P.2d at 992. In this case, no informal hearing was provided, and Derringer did not affirmatively waive his right to a subsequent formal hearing.

{12} In administrative proceedings of the type at issue in this case, the language of the statute does not guarantee either party a right to a hearing before the state engineer enters a decision. The state engi-

neer acknowledges as much when he notes that he may enter a decision without the benefit of a hearing. Instead, Section 72–2–16 creates a statutory right to a hearing only if two pre-conditions are satisfied: (1) a party must be aggrieved, and (2) the state engineer must have entered an adverse decision without a prior hearing. The plain language of the statute establishes that the state engineer's authority to hold a hearing before he enters a decision is discretionary. Thus, although the Chapels requested a hearing on their motion for summary judgment, the state engineer was not required to grant their request automatically, and it is speculative to argue whether or not he would have done so even if Derringer had not argued a hearing was unnecessary. We are not persuaded, therefore, that by arguing to the state engineer that a pre-decision hearing on the Chapels' motion was unnecessary, Derringer waived any right to a post-decision hearing that had not yet been triggered.

{13} The Chapels argue that the legislature could not have contemplated permitting a party first to argue against a pre-decision hearing and then to demand a post-decision hearing if the decision is adverse. While we agree that the statute contemplates no more than one hearing, its plain language guarantees an aggrieved party one hearing. By guaranteeing an aggrieved party one hearing, the statute permits the state engineer to forego a pre-decision hearing, perhaps for reasons of judicial economy, and still comply with due process. Therefore, we hold that the state engineer was required by the clear language of the statute to grant Derringer's request for a post-decision hearing because no pre-decision hearing had been held.

{14} We are not persuaded by the arguments of either the state engineer or the Chapels that Derringer should have filed his notice of appeal before the state engineer ruled on his request for a post-trial hearing. The state engineer appears to concede this point when he notes that when no pre-decision hearing is held, his decision is "not final until the expiration of the thirty days or until the state engineer enters a decision after holding the hearing timely requested by [the] person." Section 72–2–16 plainly states that, when a post-decision hearing is required, "[n]o appeal shall be taken to the district court until the state engineer has held a hearing and entered [a] decision in the hearing." This comports with the principle that a party is required to pursue the available administrative remedies before resorting to the courts for relief. *Kerpan v. Sandoval County Dist. Attorney's Office (In re Grand Jury Sandoval County)*, 106 N.M. 764, 766, 750 P.2d 464, 466 (Ct.App.1988).

{15} The state engineer argues, somewhat differently from the Chapels, that Derringer was granted a pre-decision hearing because he had an opportunity to be heard in writing, at a meaningful time and in a meaningful manner. We are not persuaded that the pre-decision hearing described in Section 72–2–16 can be satisfied solely by the written pleadings of the parties. NMSA 1978, § 72–2–17(B) (1965), sets forth the requirements for the conduct of hearings before the state engineer, and although Section 72–2–17(B)(1) allows for part of the evidence to be received in written form to expedite the hearing, it states that the parties shall be afforded an opportunity "to appear and present evidence and argument on all issues involved." In our view, written motions and responses do not satisfy the requirements clearly set forth in the statute.

{16} Because we interpret Section 72–2–16 to require the state engineer to hold a post-decision hearing when, for any reason, no pre-decision hearing has been held, the thirty days for Derringer to serve his notices of appeal began to run when he received the state engineer's denial of his request for a hearing. Accordingly, we hold that the Chapels were timely served on April 19, 1999.

The Timeliness of Service on the State Engineer

{17} Regardless of whether service on the Chapels was timely, the state engineer argues that the district court lacked jurisdiction to hear the entire appeal because service on the state engineer was not completed within the required time. *See El Dorado*

Utils., 120 N.M. at 169, 899 P.2d at 612 (stating that Section 72–7–1(B) requires service on all parties to trigger the district court's jurisdiction to hear the appeal). The state engineer does not dispute that his office was served on April 8, 1999. Instead, he argues that Derringer did not serve the attorney general and thus did not complete service "in the same manner as a summons in civil actions brought before the district court," as required under Section 72–7–1(C). Under Rule 1–004(F)(3) NMRA 2001, when a state agency or an officer of a state agency is a named party defendant, in addition to serving the agency or officer of the agency, a copy of the summons must be delivered to the attorney general.

{18} In *El Dorado*, we articulated our rationale for concluding that the requirements of Rule 1–004 have not been incorporated into the statutory preconditions for jurisdiction under Section 72–7–1(B). *El Dorado*, 120 N.M. at 168–69, 899 P.2d at 611–12. We explained that "the purpose of the general laws governing service of process is to govern only the court's authority to render judgment against individual parties rather than to limit the court's jurisdiction to hear the case." *Id.* Thus, we stated that while "*service in accordance with the statute* must be effected on all parties in a timely manner" for the district court to acquire jurisdiction over the entire appeal, service in accordance with court rules is necessary only for the court to render judgment against a particular party. *Id.* at 169, 899 P.2d at 612 (emphasis added). Additionally, we note that Section 72–7–1(C) states that "[t]he notice of appeal may be served in the same manner as a summons in civil actions brought before the district court or by publication. . . ." Accordingly, service that complies with Rule 1–004 is not phrased as a mandatory statutory precondition to the district court's acquisition of jurisdiction over the appeal.

{19} As *El Dorado* also points out, when *the parties*—i.e., in this case, the state engineer and the Chapels—are served in a timely manner, the district court has jurisdiction over the appeal from the state engineer. *El Dorado*, 120 N.M. at 169, 899 P.2d at 612. However, in order for the court to have the authority to render judgment against a particular party—the state engineer—Derringer will have to serve the notice of appeal on the attorney general, but "such service need not necessarily be accomplished within the thirty-day period established by Section 72–7–1." *Id.*

{20} Therefore, we hold that because both parties were served in a timely manner, the district court had jurisdiction to hear Derringer's appeal. In order for the district court to be able to render judgment against the state engineer, however, Derringer will need to deliver a copy of the notice of appeal to the attorney general as instructed by Rule 1–004.

CONCLUSION

{21} For the above reasons, we hold that the state engineer was required to hold a hearing after entering summary judgment, and his decision was not final until he denied Derringer's request for that hearing. We also hold that Derringer's service on the parties complied with the requirements of Section 72–2–1 and that the district court therefore acquired jurisdiction over this appeal. We remand this case to the district court to vacate its order of dismissal and to remand to the state engineer for a hearing as required by Section 72–2–16.

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

WE CONCUR: RICHARD C. BOSSON, Chief Judge, IRA ROBINSON, Judge.

2001-NMSC-029

33 P.3d 267

STATE of New Mexico,
Plaintiff-Appellee,

v.

Ricardo MARTINEZ-RODRIGUEZ,
Defendant-Appellant.

No. 25,634.

Supreme Court of New Mexico.

Sept. 14, 2001.

Phyllis H. Subin, Chief Public Defender, Sheila Lewis, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

Patricia A. Madrid, Attorney General, Arthur W. Pepin, Assistant Attorney General, Santa Fe, NM, for Appellee.

Professor Thomas H. Rice, Spokane, WA, for Amicus Curiae National Association of Criminal Defense Lawyers.

Professor Barbara E. Bergman Albuquerque, NM, for Amicus Curiae New Mexico Association of Criminal Defense Lawyers.

OPINION

FRANCHINI, Justice.

{1} Following a jury trial, Defendant Ricardo Martinez Rodriguez was convicted in the deaths of three men of the following crimes: three counts of first degree murder contrary to NMSA 1978, § 30–2–1(A)(1) (1994); three counts of kidnapping with great bodily harm contrary to NMSA 1978, § 30–4–1 (1995); conspiracy to commit murder contrary to NMSA 1978, § 30–28–2 (1979) and Section 30–2–1(A)(1); conspiracy to commit kidnapping contrary to Section 30–28–2 and Section 30–4–1; three counts of tampering with evidence contrary to NMSA 1978, § 30–22–5 (1963); unlawful taking of a vehicle contrary to NMSA 1978, § 66–3–504 (1998); and receiving a stolen vehicle contrary to NMSA 1978, § 66–3–505 (1978). This Court has jurisdiction under Rule 12–102(A)(1) NMRA 2001 (providing for direct appeal to the Supreme Court in cases in which a sentence of life imprisonment has been imposed).

{2} On appeal, Defendant [1] asserts that he was denied a fair trial because (1) his rights under the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, [hereinafter VCCR] were violated; (2) the trial court erred in admitting a co-defendant's statement; (3) evidence of other bad acts by the Defendant was improperly admitted; (4) the kidnapping jury instruction was incorrect; (5) the State overcharged the crimes against him; and (6) cumulative error occurred. Under the facts of this case, we reverse Defendant's conviction for receiving a stolen vehicle. Finding no merit in the remaining claims, we affirm all other convictions.

I. FACTUAL AND PROCEDURAL BACKGROUND

{3} On February 25, 1997, the police were summoned to a motel room in Albuquerque, New Mexico, when a motel employee discovered the bodies of two men in one of the rooms she had been assigned to clean. Both men were strangled to death; they had been gagged, bound, and beaten. Missing from the scene was the man who had rented the room the night before and the 1987 Ford Taurus that belonged to one of the victims. The body of the third man would not be found until March 12, 1997, when a state highway employee spotted the body at the bottom of a hillside along Interstate 25 north of Santa Fe, New Mexico. The third victim had also been killed by strangulation; he was gagged and bound hand and foot in a manner similar to the victims in the motel room. The body had been wrapped in a bedspread from the motel. The key to the motel room was found in his pocket, and the one boot he was wearing was the mate to a boot recovered from the motel room. According to the testimony at trial, the three victims, who were friends, had planned to meet four Mexican men at the motel that night for a sexual encounter.

{4} On March 3, 1997, four Mexican nationals were arrested in Salina, Kansas, driving the stolen Taurus. The four men were Defendant, Valentin Reyes, Ricardo Martinez–Silva, and Rene Hernandez–Hernandez. The Kansas authorities contacted the police in Albuquerque, and a team of officers went to Kansas to interview the four men. The team included Detective Gandara, the case agent in charge of the murder investigation, and Detective Torres, a Spanish-speaking officer. The following day, the Albuquerque officers interviewed Defendant and the three others about the murders. Defendant was given his *Miranda* rights in Spanish, orally and in writing, signed a waiver of rights form, and was interviewed by the detectives. He denied knowing anything about

1. For ease of reference, the opinion attributes to one party, Defendant, all arguments made on his behalf whether the arguments were made by Defendant or Amicus Curiae.

the murders, knowing any of the victims, and having been in Albuquerque. He also stated that the four men purchased the car in Denver and that he had never been in Salt Lake City.

{5} While Defendant was in custody in Kansas, he talked to another prisoner, Efrain Porras, who was in jail on a federal drug charge. On March 3, 1997, Defendant told Porras that he and his three confederates were in jail for having killed two people. But, he disclosed to Porras, there were actually three victims; the third had been buried in the snow and had not yet been found. Defendant also told him that the three victims had been strangled to death. Porras told his attorney about the conversation who reported it to a district attorney. At trial, Porras described Defendant's manner in relating this crime as being proud and even euphoric.

{6} Defendant was indicted by a grand jury in May 1997 and pleaded not guilty to all charges. He was tried separately from his confederates. Testimony at trial by the investigating officers revealed that Defendant's fingerprints were in the motel room on an identification card of one of the victims. His fingerprints and his saliva, identified from DNA testing, were found on a beer can in the motel room. His DNA was also matched to anal swabs taken from the body of the third victim. A friend of Valentin Reyes, Carmen Grover, identified Defendant as having been with the other men when they visited her in Salt Lake City. She also identified the stolen Taurus as the car the four men were driving. After an eleven day jury trial, Defendant was convicted of all charges and sentenced to three consecutive life sentences plus sixty-nine years.

II. DISCUSSION

A. Vienna Convention on Consular Relations.

{7} Defendant claims that he was not advised that he could confer with Mexican consular officials after his arrest as provided for by the VCCR. He contends that the appropriate remedy for this failure is suppression of the statement he gave to the police in Kansas. The VCCR is a multilateral treaty signed by more than 100 nations, including the United States and Mexico. It was drafted in 1963 and ratified by the United States in 1969. *United States v. Lombera-Camorlinga*, 206 F.3d 882, 884 (9th Cir.) (en banc), *cert. denied*, 531 U.S. 991, 121 S.Ct. 481, 148 L.Ed.2d 455 (2000). The treaty contains seventy-nine articles concerning the rights and functions of consular officers and also the privileges and immunities associated with their positions. *Id.* Defendant's argument relies upon Article 36(1)(b) of the treaty which provides that arrested foreign nationals shall be informed that they may confer with their consulates as follows:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State: [2]
>
> . . . .
>
> (b) if he [or she] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his [or her] rights under this sub-paragraph.

VCCR, Apr. 24, 1963, art. 36(1)(b); 21 U.S.T. at 100–01.

{8} Defendant filed a pretrial motion to suppress the statement based upon an alleged violation of the VCCR. In denying the motion, the trial court noted first that Article 36(1)(b) of the VCCR was ambiguous. The court further found that (1) Defendant had not established that the treaty had been violated; (2) even if there had been a violation, no remedy was provided in the VCCR; and (3) no violation of due process had oc-

2. The sending state is the nation of the arrested national. The receiving state is the arresting nation.

curred because Defendant had been given his *Miranda* rights and accorded his right to counsel. An appellate court reviews rulings on a motion to suppress to determine whether the law was correctly applied to the facts, reviewing them in the light most favorable to the prevailing party and drawing all reasonable inferences to support the decision below. *State v. Salgado,* 1999-NMSC-008, ¶ 16, 126 N.M. 691, 974 P.2d 661. An appellate court conducts a de novo review of a district court's interpretation of a treaty. *Kreimerman v. Casa Veerkamp, S.A. de C.V.,* 22 F.3d 634, 639 (5th Cir.1994).

{9} The State disputes Defendant's interpretation of the treaty and asks this Court to uphold the trial court's denial of relief to Defendant. The State's position is that Defendant lacks standing under the VCCR because the intent of the treaty signatories, as the Preamble states, was "to ensure the efficient performance of functions by consular posts on behalf of their respective states." Therefore, the State argues, the VCCR was not intended to create a private right of action for foreign nationals to enforce through the domestic courts of the signatories. Additionally, the State argues that even if Defendant had standing to challenge a violation of the VCCR, suppression of his statement would not be the proper remedy under the treaty, and Defendant has shown no prejudice from the lack of notification.

{10} The parties agree that Defendant was not told after his arrest that he could confer with Mexican consular officials. The record does not reflect whether the Salina or Albuquerque police knew about the treaty requirements. It appears that consular officials in Mexico were not notified of the four defendants' arrests until May 28, 1997, when the families of the defendants contacted them. But a determination that the notification provision of Article 36(1)(b) was violated does not resolve the matter. Rather the threshold question is whether an individual foreign national has standing to assert a claim under the VCCR in a domestic criminal case.

{11} Upon ratification, a treaty becomes the law of the land on an equal plane with federal statutes. U.S. Const. art. VI, cl. 2. As a general rule, however, international treaties do not create personal rights that an individual may enforce in judicial courts. *United States v. Li,* 206 F.3d 56, 60 (1st Cir.2000) (en banc); *Matta-Ballesteros v. Henman,* 896 F.2d 255, 259 (7th Cir.1990) ("Even where a treaty provides certain benefits for nationals of a particular state—such as fishing rights—it is traditionally held that any rights arising from such provisions are, under international law, those of states and . . . individual rights are only derivative through the states.") (quoted authority and quotation marks omitted). "Treaties are contracts between or among independent nations." *United States v. Zabaneh,* 837 F.2d 1249, 1261 (5th Cir.1988). Treaties are "designed to protect the sovereign interests of nations, and it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress." *Id.*

{12} Generally, for courts to find that a treaty provides a private right of action, the document should explicitly provide such a right. *Goldstar (Panama) S.A. v. United States,* 967 F.2d 965, 968 (4th Cir.1992) ("International treaties are not presumed to create rights that are privately enforceable."); *accord Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 442, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989) (interpreting the Geneva Convention of the High Seas, the Supreme Court determined that the convention only set forth substantive rules of conduct and could not create a private right of action in the absence of any language to that effect). "In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning." *United States v. Alvarez-Machain,* 504 U.S. 655, 663, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992). The text of the treaty must be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." *Kreimerman,* 22 F.3d at 638 (quoting the Vienna Convention on the Law of Treaties, May 22,

1969, art. 31.1, 1155 U.N.T.S. 331.[3]) In *Kreimerman,* the Fifth Circuit Court of Appeals reasoned that courts should interpret treaty provisions narrowly for fear of waiving sovereign rights that the government or people of the State never intended to cede. *Id.* at 638–39; *see also Air France v. Saks,* 470 U.S. 392, 399, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985) ("[I]t is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.").

{13} Applying these general principles, the VCCR appears to be a customary international treaty whose purpose is to facilitate consular activity between sending and receiving states. The preamble to the VCCR describes the purpose of the treaty as "not to benefit individuals but to ensure the efficient performance of functions by consular posts." VCCR, 21 U.S.T. at 79. Similarly, the first sentence of Article 36, which is the introduction to section (b)(1), begins with the language "With a view to facilitating the exercise of consular functions relating to nationals of the sending State." Notifying arrested foreign nationals that they may confer with their nation's consul would "facilitate the exercise of consular functions." But a determination that the treaty confers benefits upon arrested foreign nationals is not tantamount, as Defendant contends, to determining that this language was intended to create a private right of action. The text of the treaty does not state or even suggest that the signatories intended to provide for individual judicial enforcement of the provisions. *See United States v. Ademaj,* 170 F.3d 58, 67 (1st Cir.1999) (holding that "the Vienna Convention itself prescribes no judicial remedy or other recourse for its violation"); *Li,* 206 F.3d at 66 (Selya, J., and Boudin, J., concurring) ("Nothing in [the VCCR] text explicitly provides for judicial enforcement of their consular access provisions at the behest of private litigants."). Rather, the intentions of the signatories regarding the proper forum for addressing violations of the treaty are reflected in the Optional Protocol for the Compulsory Settlement of Disputes which the United States also ratified. Optional Protocol, April 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 [hereinafter Optional Protocol]. In the Optional Protocol, the United States and the other parties agreed that the International Court of Justice (ICJ) would be the primary forum for the settlement of disputes under the VCCR. Optional Protocol, 21 U.S.T. at 326 ("Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice. . . ."). Under the Optional Protocol only states may bring disputes to the ICJ. *Id.*

{14} Further we must consider that the treaty is dealing with matters of international relations, not domestic criminal law. We find persuasive the reasoning in *Li,* 206 F.3d at 67 (Selya, J., and Boudin, J., concurring), that "when foreign affairs are involved, the national interest has to be expressed through a single authoritative voice." The negotiation and administration of treaties is a matter reserved to the Executive Branch of the federal government with ratification by the Senate. U.S. Const. art. II, § 2, cl. 2. Without a right of private enforcement clearly having been agreed upon by the signatories "[i]ncalcuable mischief can be wrought by gratuitously introducing into this often delicate process court enforcement at the instigation of private parties." *Li,* 206 F.3d at 68 (Selya, J., and Boudin, J., concurring). We therefore consider the State Department's interpretation of the treaty in our analysis. *See Li,* 206 F.3d at 63; *accord El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng,* 525 U.S. 155, 168, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."). " 'While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.' " *United States v. Minjares-Alvarez,* 264 F.3d 980 (10th Cir.

3. The United States is not a party to the Vienna Convention on the Law of Treaties but does view parts of the Convention as declarative of customary international law. *Kreimerman,* 22 F.3d at 638, n. 9.

2001) (quoting *Kolovrat v. Oregon,* 366 U.S. 187, 194, 81 S.Ct. 922, 6 L.Ed.2d 218 (1961) (footnote containing citation omitted)). With regard to the VCCR, the State Department has consistently taken the position that although implementation of the treaty may benefit foreign nationals, it does not create judicially enforceable individual rights that can be remedied in the criminal justice systems of the member states. *Li,* 206 F.3d at 63–64. According to the State Department, "[t]he [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law." [4] *Id.* (quoted authority and quotation marks omitted).

{15} For these reasons, we do not find Defendant's arguments persuasive and thus determine that the provisions of the VCCR do not create legally enforceable individual rights. The presumption against implying rights in international agreements, *see Li,* 206 F.3d at 60, weighs against Defendant's position. We conclude that this Court should not depart from the general principles of international law and the expressed position of the State Department to find that Defendant has a private right of action to enforce the VCCR in our courts. The VCCR, after all, is an agreement negotiated among sovereign states, including the United States and Mexico, not New Mexico and Mexico. Accordingly, we hold that Defendant does not have standing to enforce the provisions of the VCCR. The trial court did not abuse its discretion when it refused to suppress Defendant's statement made to the police during the Kansas interview.

{16} In general, other courts that have considered the issue of individual standing have avoided deciding whether Article 36 was intended to create judicially enforceable individual rights and resolved their cases without reaching the merits of the standing argument. *See United States v. Jimenez–Nava,* 243 F.3d 192, 196, n. 4 (5th Cir.) (listing cases), *cert denied,* 533 U.S. 962, 121 S.Ct. 2620, 150 L.Ed.2d 773 (2001). They have typically followed the path taken by the Tenth Circuit in deciding that it was unnecessary to resolve the question of standing because the court found that, even assuming for the sake of argument that a defendant had standing, the remedy for a violation of the VCCR would not include suppression of evidence or dismissal of an indictment. *See United States v. Chanthadara,* 230 F.3d 1237, 1255 (10th Cir.2000) ("In our view, it is neither appropriate nor necessary to decide this unresolved issue under the facts presented here."). In reaching this decision, the Tenth Circuit relied upon the holding from *Li,* 206 F.3d at 60, that "irrespective of whether or not the treaties create individual rights to consular notification, the appropriate remedies do not include suppression of evidence or dismissal of the indictment." The Ninth Circuit reached a similar conclusion in *Lombera Camorlinga,* 206 F.3d at 888 (holding that violation of Vienna Convention does not require suppression of subsequently obtained evidence). The United States Supreme Court, in a per curiam opinion, left the question of standing unresolved when it held that the defendant's claim under the VCCR had been procedurally defaulted because the defendant failed to raise the issue in state court. *Breard v. Greene,* 523 U.S. 371, 376, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998). The Court did observe, however, that with regard to the claims of Paraguay, "neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States courts to set aside a criminal conviction and sentence for violation of consular notification provisions." *Id.* at 375, 118 S.Ct. 1352. With the Supreme Court having expressed doubt that a signatory nation has a private right of action in domestic courts under the VCCR, it seems unlikely to us that the Court would find that an individual criminal defendant could pursue an action.

{17} Our holding that Defendant does not have standing disposes of his VCCR claim; we address briefly his remaining two arguments under the treaty. Defendant additionally argues that the failure of government authorities to notify an arrested foreign national that he or she may confer with a

4. The record does not indicate and Defendant does not maintain that the government of Mexico has protested to the United States about any violation of the VCCR in this case.

consul should be regarded as the equivalent of a failure to inform an individual of his or her *Miranda* rights. *See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). He urges the adoption of a bright line rule to deter further violations of the VCCR and to protect the right of consular notification through use of the exclusionary rule. To find that suppression is the necessary consequence of a violation of Article 36, a court must find that remedy in the text of the VCCR. *See Goldstar*, 967 F.2d at 968. Nothing in the text of the VCCR, however, requires a *Miranda* remedy or even indicates that it was considered. As the Ninth Circuit concluded, there is no indication that the drafters of the Vienna Convention had these "uniquely American rights in mind, especially given the fact that even the United States Supreme Court did not require Fifth and Sixth Amendment post-arrest warnings until it decided *Miranda* in 1966, three years after the treaty was drafted." *Lombera-Camorlinga*, 206 F.3d at 886.

{18} Although, as noted, other courts have not reached the issue of whether Article 36 was intended to create an individually enforceable right, they have reached a consensus in deciding VCCR claims that is contrary to Defendant's position. They have routinely held that suppression of evidence is not the proper remedy for a violation of the VCCR because the treaty does not provide suppression as a remedy and does not create any fundamental, constitutional rights. *Ademaj*, 170 F.3d at 67; *United States v. Chaparro-Alcantara*, 37 F.Supp.2d 1122, 1125 (C.D.Ill. 1999) ("Application of the exclusionary rule is only appropriate when the Constitution or a statute requires it."); *cf. Dickerson v. United States*, 530 U.S. 428, 435, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (holding that the exclusionary rule is designed to remedy violations of constitutional rights). Because the exclusionary rule is designed to protect core constitutional values, it should only be employed when those values are implicated; a treaty signed by the United States does not alter the Constitution so that a violation of Article 36 does not rise to the level of a constitutional violation.[5] *See Murphy v. Netherland*, 116 F.3d 97, 99–100 (4th Cir. 1997) ("[E]ven if the Vienna Convention on Consular Relations could be said to create individual rights (as opposed to setting out the rights and obligations of signatory nations), it certainly does not create constitutional rights."); *United States v. Esparza-Ponce*, 7 F.Supp.2d 1084, 1097 (S.D.Cal.1998) (holding that "a violation of the Convention does not rise to the level of a *Miranda* violation" and that "[a]pplying the presumption of prejudice mandated by *Miranda* is therefore inappropriate."); *Waldron v. Immigration and Naturalization Serv.*, 17 F.3d 511, 518 (2d Cir.1993) ("Although compliance with our treaty obligations clearly is required, we decline to equate such a provision with fundamental rights, such as the right to counsel, which traces its origins to concepts of due process.").

{19} Furthermore, we are in accord with other courts which have required a showing of prejudice. Defendant has not shown that he was prejudiced by the officers' failure to abide by the treaty; he has not demonstrated how the violation of the VCCR affected the outcome of his case. *See Breard*, 523 U.S. at 377, 118 S.Ct. 1352 ("[I]t is extremely doubtful that the violation [of the VCCR] should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial."). He was advised of his *Miranda* rights and signed a waiver of rights form. Defendant does not argue on appeal that his waiver of rights was not knowing or voluntary. Although he spoke with the officers, he made no inculpatory statements but rather denied any knowledge of the murders and said that he had not even been in Albuquerque. Defendant was represented through the pretrial stages and at trial by experienced counsel who were capable of explaining our criminal procedures and his corresponding rights. Defendant does not allege that the Mexican consul would have been more familiar with the American legal system than his attorney. He does speculate

5. To the extent that the special concurrence equates a treaty right with a constitutional right, we must respectfully disagree.

that he might not have waived his rights had he been advised that neither he nor his family would suffer reprisals for exercising those rights. This assertion seems dubious. Detective Gandara testified that Defendant willingly agreed to speak and was relaxed and cooperative during the interview. Moreover, the officers would not have been required, under the VCCR, to stop their interrogation after informing Defendant about consular notification and access. *See United States v. Rodrigues,* 68 F.Supp.2d 178, 184 (E.D.N.Y. 1999) ("There is no prohibition anywhere in the Convention against continuing to question a foreign national while awaiting consular contact."); *Lombera-Camorlinga,* 206 F.3d at 886 (same).

{20} The Consul of Mexico based in Albuquerque submitted an affidavit at the suppression hearing in which he described the actions that he would have taken upon notification:

> Had the police officers without delay told the defendants of their rights to consular assistance, in a timely fashion as the treaty requires, in particular at the time of their arrest, or before the officers questioned them, a Mexican consulate representative would have gone to visit them and advised them not to speak with anyone, and that they in fact would not suffer any adverse consequence if they chose not to give statements, also that statements that they gave could have been used against them in court, that they can also have a court certified interpreter to be present at any stage of the proceedings, and also about the right to request assistance of legal counsel.

Neither the assertions of Defendant nor the Consul's affidavit reach a showing of prejudice. The advice described by the Consul duplicates the rights guaranteed to Defendant by *Miranda.* Defendant was advised of the constitutional rights to remain silent and to have an attorney. Under these circumstances, courts have generally held that a defendant has not been prejudiced by not being told about consular notification. *See Rodrigues,* 68 F.Supp.2d at 184 ("Prejudice has never been—nor could reasonably be—found in a case where a foreign national was given, understood, and waived his or her *Miranda* rights."); *United States v. Alvarado-Torres,* 45 F.Supp.2d 986, 990 (S.D.Cal. 1999) (holding that the consul's advice would have been cumulative to the *Miranda* warnings); *Chaparro-Alcantara,* 37 F.Supp.2d at 1126 (same); *cf. Breard,* 523 U.S. at 379, 118 S.Ct. 1352 (Souter, J., concurring) (agreeing that "the lack of any reasonably arguable causal connection between the alleged treaty violations and [defendant's] convictions and sentences disentitle him to relief").

B. Statement of Co-defendant.

{21} Defendant asserts that the trial court erred when it admitted the out-of-court statement of another defendant as a statement against penal interest. *See* Rule 11-804(B)(3) NMRA 2001. He argues that the statement did not qualify as a statement against interest and that its admission violated his confrontation rights under the Sixth Amendment. U.S. Const. amend. VI. "As a general matter, we review a trial court's admission of evidence under an exception to the hearsay rule only for an abuse of discretion." *State v. Torres,* 1998-NMSC-052, ¶ 15, 126 N.M. 477, 971 P.2d 1267; *accord State v. Benavidez,* 1999 NMSC 041, ¶ 2, 128 N.M. 261, 992 P.2d 274; *State v. Gonzales,* 1999-NMSC-033, ¶ 5, 128 N.M. 44, 989 P.2d 419, *cert. denied,* 529 U.S. 1025, 120 S.Ct. 1434, 146 L.Ed.2d 323 (2000).

{22} Rule 11-804 defines exceptions to the hearsay rule that apply when the declarant is unavailable as a witness; one of the exceptions is a statement against interest which is defined as follows:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

Rule 11-804(B)(3). This type of statement is admissible as an exception to the hearsay rule "because it is presumed that one will not make a statement damaging to one's self unless it is true." 5 Jack B. Weinstein &

Margaret A. Berger, *Weinstein's Federal Evidence* § 804.06[1], at 804–47 (Joseph M. McLaughlin, ed., 2d ed.2000). This guarantee of reliability provides the justification for the exception. A reviewing court must decide whether the trial court abused its discretion in making the determination that a statement so far tended to subject a person to criminal liability, rather than to relieve him or her of it, that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true. *Torres,* 1998 NMSC 052, ¶ 16, 126 N.M. 477, 971 P.2d 1267.

{23} While the four defendants were in custody in Kansas, jail officials found a message, hand written in Spanish, concealed in a pair of shoes belonging to Martinez–Silva. The note was signed by Reyes. Defendant subsequently filed a pretrial motion to suppress the note. After a suppression hearing, the trial court ruled that the note could be admitted at Defendant's trial. The trial court examined the various statements made by Reyes in the note and determined they were against his penal interest and subjected him to criminal liability. The note instructed the others as follows:

> Whenever you want to write to Mexico, write to Carmen [Grover] and send a letter to your mother and so that Carmen will send it to Mexico. You deny everything and I too denied everything. They want to lie to us that they have photos of us in Albuquerque. Just say we were never there. Just about 3 hours in Salt Lake City, Utah and we worked in Denver cleaning homes and gardens. Let's just see what happens. Throw out this paper after you read it.
>
> What they found was the blood from their shirts. I think we will remain inside a few years, well we all said different things but the 4 of us are equally guilty, nobody less nobody more. I'll see you.

In this case, Defendant does not challenge the unavailability of declarant Reyes, *see* Rule 11–804(A), but rather the trial court's determination that the statement by Reyes was against his penal interest. As we understand Defendant's argument, he is maintaining that the note is not against Reyes' penal interest because he is not accepting responsibility, but rather "telling the recipient what to say to the police-regardless of the truth" and trying to shift responsibility.

{24} In evaluating whether a declarant's statement qualifies under Rule 11–804(B)(3), a statement-by-statement inquiry must be conducted to determine if the statement was against the declarant's interest. *See Torres,* 1998–NMSC–052, ¶ 11, 126 N.M. 477, 971 P.2d 1267 (agreeing with *Williamson v. United States,* 512 U.S. 594, 603, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994), that a statement-by-statement analysis, viewing it in context, is proper method for determining reliability of the declaration against interest). In their police interviews, each of the four men had denied involvement in the murders, but their statements as to their activities after entering this country differed and were contradictory. The first paragraph of the note, discussing the need for the four of them to develop a consistent cover story, reveals knowledge of the crimes and a consciousness of guilt. *See Torres,* 1998–NMSC–052, ¶ 14, 126 N.M. 477, 971 P.2d 1267 (concluding that "facially-neutral but contextually-incriminating details may be admitted if a reasonable person in the declarant's position would not have revealed them unless believing them to be true due to their strong tendency to subject the declarant to criminal liability"). The instruction to destroy the note after reading it also shows a consciousness of guilt and further demonstrates that Reyes knew the statement was against his interest. *See State v. Martinez,* 1999–NMSC–018, ¶ 34, 127 N.M. 207, 979 P.2d 718 (observing that changing statement to the police evidenced consciousness of guilt); *State v. Lujan,* 103 N.M. 667, 674, 712 P.2d 13, 20 (Ct.App.1985) (concluding that an attempt to deceive police shows a consciousness of guilt). In the second paragraph, Reyes refers to possible police testing of the defendants' shirts for the blood of the victims and acknowledges that they may be facing incarceration ("we will remain inside a few years"). As the Supreme Court observed in *Williamson,* 512 U.S. at 603, 114 S.Ct. 2431, a self-inculpatory statement by a declarant showing that he knew something "can in some situations help the jury infer that his confederates knew it

as well." We are in agreement with the trial court that the inculpatory nature of "the 4 of us are equally guilty" is evident. Contrary to Defendant's assertion, the statement directly equally incriminates Reyes and the other three men in the murders, rather than minimizing his culpability by shifting responsibility to them.

{25} In addition to conducting a statement-by-statement review, a trial court should also "examine the statement in light of all surrounding circumstances." *Torres,* 1998–NMSC–052, ¶ 29, 45 F.Supp.2d 986. In considering the surrounding circumstances in this case, we observe first that the statement was made privately to a co-defendant; Reyes was not communicating with police in an attempt to curry favor or in response to a promise of leniency. He never intended for the statement to become public. After being questioned by the police, Reyes knew that he was a suspect in the murders when he made the statement. It was clearly against his penal interest, and he did not attempt to shift responsibility away from himself to the other three defendants. Because we do not think that a reasonable person would falsely admit his involvement in such serious crimes, we hold that the statement fell within the penal interest exception to the hearsay rule and the trial court did not abuse its discretion in admitting the statement.

{26} Defendant also contends that the statement should not have been admitted because it violated his right of confrontation under the Sixth Amendment. We review de novo the question of whether the Confrontation Clause has been violated by the admission of hearsay evidence. *Gonzales,* 1999–NMSC–033, ¶ 16, 128 N.M. 44, 989 P.2d 419. In general, there is no Confrontation Clause problem in admitting a hearsay statement if the declarant is unavailable and the statement bears adequate indicia of trustworthiness. *Id.* ¶ 17, 989 P.2d 419. The requisite indicia of trustworthiness may be found either by determining that the hearsay exception is a firmly rooted one or that the circumstance surrounding the making of the statement "bears adequate indicia of reliability." *See Ohio v. Roberts,* 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) (quoted authority and quotation marks omitted). This Court previously has held that the penal interest exception to the hearsay rule is "a firmly rooted hearsay exception for purposes of satisfying the indicia of reliability requirement of the Confrontation Clause." *Torres,* 1998–NMSC–052, ¶ 32, 126 N.M. 477, 971 P.2d 1267; *accord Gonzales,* 1999–NMSC–033, ¶ 19, 128 N.M. 44, 989 P.2d 419. Typically, a hearsay statement that satisfies the penal interest exception will also satisfy the requirements of the Confrontation Clause because the issue of trustworthiness has already been resolved in favor of admissibility. *Gonzales,* 1999–NMSC–033, ¶ 39, 128 N.M. 44, 989 P.2d 419.

{27} Nevertheless, Defendant argues that this Court should disregard its previous case law to follow the United States Supreme Court in *Lilly v. Virginia,* 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999). We declined to follow a similar argument in the motion for rehearing in *Gonzales* because, under our case law, the challenged statement in *Lilly* would not have survived a Rule 11–804(B)(3) analysis because the statement in that case did not implicate the declarant in the murder and instead placed blame for the murder on a co-defendant. *Gonzales,* 1999–NMSC–033, ¶¶ 36–37, 128 N.M. 44, 989 P.2d 419. The Court in *Gonzales* then ratified the holding in *Torres* that we regard this hearsay exception to be firmly rooted. 1999–NMSC–033, ¶¶ 30, 39–40, 128 N.M. 44, 989 P.2d 419. We are unpersuaded by Defendant's argument and reaffirm that, in New Mexico, a statement against penal interest within the meaning of Rule 11–804(B)(3) is a firmly rooted exception to the hearsay rule. The trial court did not err in admitting Reyes' statement into evidence as a statement against penal interest and permitting the detective to testify about the statement.

C. Testimony by Detective.

{28} Defendant asserts that the trial court improperly permitted the State to introduce evidence that violated Rule 11–404(B) NMRA 2001. He also contends that the trial court failed to weigh the probative value of the challenged evidence against its

prejudicial effect as required by Rule 11–403 NMRA 2001 (stating that trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice"). The admission of evidence is entrusted to the discretion of the trial court and will not be disturbed absent a showing of abuse of that discretion and that an error in the admission of evidence was prejudicial. *See State v. Jett*, 111 N.M. 309, 312, 805 P.2d 78, 81 (1991).

{29} During direct examination, Detective Torres testified at length about the murder investigation that had been conducted in Albuquerque and in Kansas. He described the manner in which he conducted the interviews in Kansas and the questions he had asked Defendant. He also described Defendant's responses and demeanor which he characterized as laughing and cocky. During cross-examination, defense counsel challenged the detective's description and advanced the argument that the detective really did not know the reasons for Defendant's conduct during the interview. Defense counsel then asked if Defendant's demeanor could instead be attributed to being afraid or nervous. Detective Torres responded that, based on his experience with interviews, he thought Defendant's demeanor was attributable to arrogance.

{30} First, we must determine if Detective Torres' testimony about Defendant's demeanor was relevant. Rule 11–403. The State responds, and we agree, that the testimony about Defendant's demeanor was offered to counter the defense theory that Defendant's actions after arrest were caused by fear. Defense counsel had begun her opening statement to the jury by stating that "This is a case about fear, about Ricardo's fear. This is a case about protection and about Ricardo's need to protect himself." Defendant did not testify, but defense counsel argued during the trial that this fear could be attributed to a number of reasons including fear of his companions, deception and intimidation by the police, or fear of mistreatment in prison. Throughout the cross examination of Detective Torres and Detective Gandara, the implication was raised that they had been trained in deceptive and abusive interview techniques designed to obtain confessions and that Defendant's behavior had been induced by those techniques. In closing argument Defendant declared that his conduct during the interview with the detectives in Kansas and his admissions to Porras had been attempts to protect himself by portraying himself as a dangerous person because he was afraid.

{31} Although the opening and closing statements and questions by defense counsel were not evidence, they did suggest to the jury that Defendant's statements to the police were the product of his fears and therefore not to be trusted. Defendant sufficiently put at issue the circumstances surrounding these statements to open the door for the state to respond to those assertions. *State v. Smith*, 2001–NMSC–004, ¶¶ 38–40, 130 N.M. 117, 19 P.3d 254 (determining that "it is clear that the prosecutor was responding to defense counsel's claim during opening argument and was thus commenting on what Defendant had already invited"); *State v. Reynolds*, 111 N.M. 263, 267, 804 P.2d 1082, 1086 (Ct.App.1990) ("A party cannot complain of prejudice possibly resulting from a situation which he created by his own remarks during the course of the trial.") (quoted authority and quotation marks omitted).

{32} We disagree with Defendant's assertion that the trial court abused its discretion by not applying the balancing test described in Rule 11–403. Our review of the record reveals that during a bench conference on this testimony, the court determined that the questions related to Defendant's persona and, therefore, the evidence developed would not be too prejudicial. The trial court then cautioned the prosecutor about this line of questioning, telling him to confine his questions to Defendant's demeanor at the interview. The trial court conducted the proper Rule 11–403 balancing analysis to determine whether the probative value of the testimony was substantially outweighed by the danger of unfair prejudice. *See State v. Aragon*, 1999–NMCA–060, ¶ 10, 127 N.M. 393, 981 P.2d 1211 (stating that there is a presumption in favor of the correctness of a trial court's rulings). The trial court reasonably limited the nature of the questioning

and correctly determined that it was relevant because it responded directly to a theory of the defense.

{33} Next, as we understand Defendant's argument, he is asserting that this testimony was improper propensity evidence. Defendant contends that the introduction of this evidence violated Rule 11–404(B) that "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Defendant cites no authority for the proposition that a description of demeanor is evidence of other bad acts. After a review of the record, we conclude that the witness's description of Defendant's demeanor and his mood during the interview was properly admitted and did not rise to the level of a crime, wrong, or act that Rule 11–404(B) was intended to address. We conclude that the trial court acted within its discretion in admitting the evidence.

{34} Moreover, Defendant has not shown how he was prejudiced by the statement of this detective. *See In re Ernesto M.*, 1996–NMCA–039, ¶ 10, 121 N.M. 562, 915 P.2d 318 ("An assertion of prejudice is not a showing of prejudice."). An earlier witness, Detective Gandara, had also described without objection Defendant's cocky attitude and laughing demeanor during the Kansas interview. Additionally, the jury heard an audiotape of the interview accompanied by a transcript in English. These measures allowed the jury to assess Defendant's conduct and then arrive at its own conclusions. The detective's testimony was essentially cumulative to evidence that was already before the jury. *Cf. State v. Woodward*, 121 N.M. 1, 10, 908 P.2d 231, 240 (1995) ("The erroneous admission of cumulative evidence is harmless error because it does not prejudice the defendant.").

D. Jury Instruction on Kidnapping.

{35} Defendant asserts that his three convictions for kidnapping were in error because the wrong jury instruction was given. He appears to argue that the instruction given at trial, which was modeled on UJI 14–404 (withdrawn effective Aug. 1, 1997), was incorrect because it had been superseded by UJI 14–403 NMRA 2001. This assertion is unfounded.

{36} In New Mexico, the crime of kidnapping is defined as follows:

> A. Kidnapping is the unlawful taking, restraining, transporting or confining of a person, by force, intimidation or deception, with intent:
>
> (1) that the victim be held for ransom;
>
> (2) that the victim be held as a hostage or shield and confined against his will;
>
> (3) that the victim be held to service against the victim's will; or
>
> (4) to inflict death, physical injury or a sexual offense on the victim.

NMSA 1978, § 30–4–1(A) (1995).

{37} The kidnapping statute was amended in 1995 to add the language in subsection (4). A new uniform jury instruction for kidnapping incorporating the additional language of the statute was approved by this Court in Order NO. 97–8300 on June 17, 1997. The Order stated that "the above-referenced amendments to Uniform Jury Instructions for criminal cases shall be effective for cases filed in the district courts on and after August 1, 1997." Defendant's case was filed in the second judicial district court on May 7, 1997, when the prosecutor filed an indictment returned by the grand jury on May 6, 1997. *See* Rule 5–201 NMRA 2001 ("A prosecution may be commenced by the filing of: (1) a complaint; (2) an information; or (3) an indictment."). Consequently, UJI 14–404 was still the effective instruction for Defendant's trial, not the amended instruction. *Cf. R.A. Peck, Inc. v. Liberty Fed. Sav. Bank.*, 108 N.M. 84, 93, 766 P.2d 928, 937 (Ct.App.1988) (holding that the district court erred when it based its decision on a rule that was not in effect when the case began).

{38} Moreover, the instruction given at trial properly instructed the jury on the offense of kidnapping. The jury was given UJI 14–404 on kidnapping for each of the three victims:

> For you to find the defendant guilty of Kidnapping resulting in great bodily harm as charged in Count 5, the state must prove to your satisfaction beyond a reason-

able doubt each of the following elements of the crime:

1. The defendant took, restrained and/or confined [the victim] by force;

2. The defendant intended to hold [the victim] for service against his will;

3. The defendant inflicted great bodily harm on [the victim];

4. This happened in New Mexico on or about the 25th day of February, 1997.

The instruction correctly reflected the language of the statute and contained all the essential elements of the offense. *See State v. Cawley,* 110 N.M. 705, 710, 799 P.2d 574, 579 (1990) ("Generally, an instruction that parallels the language of the statute and contains all essential elements of the crime is sufficient."); *State v. Gunzelman,* 85 N.M. 295, 301, 512 P.2d 55, 61 (1973) (holding that "instructions are sufficient which substantially follow the language of the statute or use equivalent language"), *overruled on other grounds by State v. Orosco,* 113 N.M. 780, 783, 833 P.2d 1146, 1149 (1992). Accordingly, we conclude that the trial court did not err in the instructions to the jury on the kidnapping charges. The trial court properly instructed the jury on every essential element for the third alternative under the kidnapping statute, holding the victim to service.

E. Overcharging of Offenses.

{39} Defendant contends that his convictions for two counts of conspiracy and three counts of tampering with evidence resulted from overcharging by the prosecutor and thus violate the double jeopardy clauses of the United States and New Mexico constitutions. After reviewing the record and the applicable law, we conclude that Defendant's claims are without merit. With respect to the conspiracy charges, we conclude that there was sufficient evidence of separate conspiracies to support Defendant's convictions for conspiracy to commit murder and conspiracy to commit kidnapping. Similarly, with regard to the three convictions for tampering with evidence, those convictions are supported by evidence of three separate acts presented at trial.

{40} We reach a different conclusion, however, with regard to the convictions for unlawful taking of a vehicle, contrary to NMSA 1978, § 66-3-504 (1998), and receiving a stolen vehicle, contrary to NMSA 1978, § 66-3-505 (1978). Defendant correctly argues, and the State agrees, that under the facts of this case Defendant cannot be convicted of both crimes. *See State v. Stephens,* 110 N.M. 525, 526, 797 P.2d 314, 315 (Ct.App. 1990) (deciding that, under the facts of the case, "one who steals property cannot be convicted of receiving or retaining the same property"). For this reason, we reverse Defendant's conviction for receiving a stolen vehicle. This decision does not affect the length of Defendant's sentence because the trial court ordered the eighteen month sentence for each of these convictions to be served concurrently with each other and consecutively to the other sentences.

F. Cumulative Error.

{41} Defendant's final claim relies upon cumulative error to assert that he was deprived of a fair trial. This principle requires reversal if the cumulative effect of errors occurring during trial was "so prejudicial that the defendant was deprived of a fair trial." *State v. Baca,* 120 N.M. 383, 392, 902 P.2d 65, 74 (1995) (quoted authority and quotation marks omitted). After reviewing the record, we conclude that Defendant received a fair trial and affirm the judgment of the trial court regarding his guilt.

III. CONCLUSION

{42} We hold that the trial court did not err in denying Defendant's motion to suppress the Kansas interview statements, because Defendant does not have standing under the VCCR to pursue the claim. We conclude that the trial court acted within its discretion in admitting evidence of the statement against penal interest by the co-defendant and the testimony of Detective Torres. There was no error in the kidnapping jury instruction. Defendant did not face duplicative charges, but, under the facts of this case, he cannot be convicted of receiving a stolen vehicle. There was no cumulative error; Defendant received a fair trial. The convictions of Defendant are affirmed, except for that of receiving a stolen vehicle. We remand with

instructions for the trial court to vacate the conviction for receiving a stolen vehicle and enter an amended judgment and sentence consistent with this opinion.

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

WE CONCUR: PATRICIO M. SERNA, Chief Justice, and JOSEPH F. BACA, Justice, PETRA JIMENEZ MAES, Justice.

PAMELA B. MINZNER, Justice (specially concurring).

MINZNER, Justice (specially concurring).

{44} I concur in Sections II(B), (C), (D),(E), and (F) of the majority opinion and in the result of Section II(A), which concludes the district court did not err in denying Defendant's motion to suppress certain statements he made while in custody. I am not persuaded, however, that Defendant lacked standing to raise violations of the Vienna Convention on Consular Relations (VCCR). Majority Opinion, ¶¶ 11–15. The text of Article 36(1)(b) of the VCCR seems to me to provide or create rights and suggests that those rights are personal to the foreign national. *Standt v. City of New York,* 153 F.Supp.2d 417, 424–25 (S.D.N.Y.2001) (discussing text of Article 36(1)(b) and the Preamble to the VCCR). I would affirm the district court's decision denying Defendant's motion on a different basis.

{45} Article 36 of the VCCR states:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

. . . .

(b) if he [or she] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his [or her] rights under this sub-paragraph.*

VCCR, Apr. 24, 1963, art. 36(1)(b), 21 U.S.T. 77, 100–01 (emphasis added). It is true that the preamble to the VCCR states that "the purpose of such privileges and immunities [set forth herein] is not to benefit individuals but to ensure the efficient performance of functions by consular posts. . . ." It is also true that the first sentence of Article 36 contains language that suggests a limited administrative purpose. I do not believe, however, that either the preamble or the introductory language to Article 36 are necessarily inconsistent with the creation of an individual right in Article 36(1)(b).

{46} As a number of courts have recognized, "when taken in the context of the treaty as a whole, the Preamble's reference to 'individuals' is best understood as referring to consular officials rather than civilian foreign nationals." *Standt,* 153 F.Supp.2d at 425; *see also United States v. Rodrigues,* 68 F.Supp.2d 178, 182 (E.D.N.Y.1999) ("Although this clause [of the Preamble] is regularly cited as proof that the Convention was not intended to create individual rights, it seems more reasonable to interpret the word 'individuals' here as referring to consular officials, not foreign nationals."). When the term "individuals" is interpreted to refer to consular officials, it appears "that the purpose of this clause is not to restrict the individual notification rights of foreign nationals, but to make clear that the Convention's purpose is to ensure the smooth functioning of consular posts in general, not to provide special treatment for individual consular officials." *Rodrigues,* 68 F.Supp.2d at 182. Creating an individually enforceable right in foreign nationals to be notified of the associated rights of access to and assistance from their consul would facilitate the exercise of consular functions.

{47} The records of the committee and plenary meeting debates suggest that Article 36 of the VCCR was intended to confer individual rights. *See* Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul,* 18 Mich. J. Int'l L. 565, 596–99 (1997). Both committee and plenary debates over Article 36 focused on consular notification as it related to ensuring "due process safeguards for

the protection of [foreign] nationals" and the "free will of the affected national." *Id.* at 598. The United States itself "proposed language intended to 'protect the rights of the national concerned.'" *Standt*, 153 F.Supp.2d at 426 (citing 2 United Nations Conference on Consular Relations: Official Records, at 337, U.N. Doc. A/Conf.25/6, U.N. Sales. No. 63.X.2 (1963)). Others appear to have recognized that Article 36 conferred individual rights. For example, some nations supported a proposed amendment eliminating reference to a national's freedom to communicate with his consul "because they believed that the Treaty was an inappropriate place to establish an individual national's rights." Kadish, *supra*, at 596. This proposed amendment was withdrawn in the face of strong opposition and replaced with language which included the freedom of the individual to communicate with his consul. *Id.* at 596–97.

{48} Based upon the text and legislative history of Article 36(1)(b), I believe that we ought to construe the VCCR to have created individual rights. The fact that no judicial remedy is provided makes the task of defining and enforcing such rights more difficult but does not make me doubt their existence. Many of our most fundamental constitutional rights are not protected by remedies provided within the constitution itself. *See, e.g.*, U.S. CONST. amend. IV. The scope of the rights created by the VCCR and the appropriate remedy for violation of those rights seem to me to be proper subjects for judicial interpretation and construction.

{49} It would certainly have been helpful to have had a definitive statement of purpose from which to begin that work. I gather from the available legislative history, however, that the rights established under the VCCR are intended to safeguard the procedural rights of foreign nationals. That is, if notified, the appropriate authorities of the sending State would help ensure that its citizen understood and claimed the process that was due. Where due process rights have been safeguarded by other means, I do not believe it is appropriate to suppress evidence obtained absent such notice. *See Breard v. Greene*, 523 U.S. 371, 377, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998) ("Even were Breard's Vienna Convention claim properly raised and proven, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial."); *United States v. Chanthadara*, 230 F.3d 1237, 1256 (10th Cir. 2000) ("Even presuming the Vienna Convention creates individually enforceable rights, Mr. Chanthadara has not demonstrated that the denial of such rights caused him prejudice.").

{50} For these reasons, I conclude the VCCR is ambiguous in important respects, but we ought to construe it as recognizing individual rights on which this Defendant may rely. As a result, at a minimum, I think Defendant was entitled to notice of his rights of access and assistance. Nevertheless, as the majority has noted, the record in this case does not support a conclusion that the lack of notice prejudiced Defendant. Majority Opinion ¶¶ 19, 20. Although Defendant was not given the requisite notice, other procedural safeguards ensured that he received a fundamentally fair trial. Under these circumstances, I am persuaded that the lack of notice was not prejudicial. I therefore do not believe that the district court erred in denying Defendant's motion for suppression. For these reasons, and for the reasons contained in Sections II(B), (C), (D),(E), and (F) of the majority opinion, I would reverse only Defendant's conviction for receiving a stolen vehicle. I would affirm his remaining convictions.

2001-NMCA-089

33 P.3d 285

Janie MEALAND, Plaintiff–Appellant,

v.

EASTERN NEW MEXICO MEDICAL CENTER, Defendant–Appellee.

No. 20,160.

Court of Appeals of New Mexico.

Aug. 29, 2001.

Certiorari Denied, No. 27,145, Oct. 18, 2001.

Chris Key, Albuquerque, NM, Keith Oas, Roswell, NM, for Appellant.

W.R. Logan, Lisa Entress Pullen, Civerolo, Gralow & Hill, P.A., Albuquerque, NM, for Appellee.

OPINION

ALARID, Judge.

{1} The opinion heretofore filed in this case is withdrawn and the following substituted therefor. The motion for rehearing (reconsideration) is denied.

{2} This case arises out of a hospital's discharge of a registered nurse. The principal issue presented by this appeal is whether an employee handbook promulgated by the hospital gave rise to a reasonable expectation that Plaintiff would be discharged only after being afforded a fair opportunity to respond to charges of misconduct. We conclude that the evidence before the trial court established a genuine issue of fact as to whether the Eastern New Mexico Medical Center (ENMMC) employee handbook supported a reasonable expectation that Plaintiff would be discharged only after being afforded a fair opportunity to respond to charges of misconduct, and accordingly we reverse the grant of summary judgment in favor of Defendant. We also address the issue of whether Plaintiff came forward with sufficient evidence to ward off summary judgment on her claim that Defendant deprived her of property and liberty without due process of law claim. We conclude that Plaintiff's evidence created a genuine issue of fact on this claim, and accordingly we reverse the grant of summary judgment on Plaintiff's civil rights. Lastly, we consider whether the trial court's dismissal of Plaintiff's civil rights claim should be affirmed because Plaintiff failed to allege that ENMMC acted under color of state law. We conclude that Plaintiff's civil rights claim was subject to dismissal. However, we conclude that such dismissal is without prejudice and that, on remand, Plaintiff should be afforded an opportunity to replead this count.

Background

{3} The following facts are not in dispute. Plaintiff was employed as a nurse by ENMMC beginning in March 1991. Plaintiff had no individual written contract with ENMMC. During Plaintiff's employment, ENMMC had promulgated an employee handbook that included the following provisions:

> SCOPE AND APPLICATION OF THIS MANUAL
>
> The employee handbook outlines policies applicable to all employees of the organization. Nothing in this handbook is meant to create an employment contract or to guarantee the employment or duration of employment of any individual with the Medical Center. Employees may be terminated or may terminate their employment with the Medical Center at any time,

subject only to applicable requirements of law. Any oral statements or promises to the contrary are not binding upon the Medical Center. This edition supersedes all previous editions.

POLICY LANGUAGE

Although statements in this handbook have been approved by the Chief Executive Officer as representing general Medical Center policy, they should not be considered absolute. Eastern New Mexico Medical Center reserves the right to modify these policies at any time to ensure ease of administration and consistent, nondiscriminatory application of policy.

DISTRIBUTION

This employee handbook is distributed to senior management, department managers, current employees and new employees at orientation.

EMPLOYEE REQUESTS FOR INFORMATION

The contents of this handbook are available for inspection by employees at any time during normal business hours. Managers and supervisors are responsible for the administration and adherence to the policies, practices and procedures presented in this guide, and for explaining them to employees in their areas.

. . . .

PROGRESSIVE DISCIPLINE

It is the policy of the Medical Center to use a system of progressive and/or positive discipline for all employees under the level of Department Head, except in cases requiring immediate dismissal of an employee. The vast majority of our employees never require any disciplinary action. However, if it does become necessary, the type of corrective action will be determined on an individual basis by the nature of the circumstances. The progressive discipline steps apply only to non-exempt employees.

Counseling occurs all the time. This is the normal method by which supervisors counsel employees on the normal work methods or appropriate behavior. When normal counseling fails to correct a problem, progressive discipline steps usually occur. The purpose of these steps is to give employees a chance to correct their performance or behavior. The steps are: verbal warning, written warning, probation or suspension, and termination.

* Verbal Warning: Verbal warning is an oral discussion with an employee regarding the employee's behavior, performance or actions that are unacceptable and must be either improved or not repeated depending on the circumstances. Verbal warnings are documented on the progressive counseling form and placed in the employee's personnel file.
* Written Warning: A written warning is a follow-up to the verbal warning when the employee has not improved or corrected the problem. This written documentation identifies the employee's inappropriate behavior or performance and an outline of a plan for improvement that has been mapped out by the supervisor. This documentation is discussed privately between the employee and his/her supervisor, signed by both, and a copy given to the employee and one placed in his/her personnel file in Human Resources.
* Suspension/Probation: If a problem still has not been corrected and is of an incident nature (for instance, a punctuality problem where the employee keeps coming late to work) the next step would be a 3–day suspension without pay. If the problem was performance oriented, the next step would be probation.

Normal probation is 90 days, during which time the employee is provided every opportunity to comply with departmental expectations. Suspensions are without pay and employee benefits, vacation or sick leave will not accrue during the suspension.

In some extreme cases, such as gross insubordination, a supervisor may immediately suspend an employee and send that employee home regardless of shift. In these situations, the department director/manager will meet with Human

Resources on the next business day to determine the next disciplinary step.

* Termination: Termination is a last resort for those employees who refuse to improve their behavior or performance despite the supervisor's attempt to counsel and provide opportunities for satisfactory job performance. However, in some rare cases due to the severity of the situation, termination may occur with little or no previous counseling. No employee will be terminated without prior review from Human Resources.

The following examples may result in *disciplinary action* or *immediate discharge* depending upon the circumstances or severity, but are not considered to be all inclusive.

* Continual tardiness and/or absence from assigned work area
* Violation of established safety rules
* Use of obscene or profane language
* Continuing unsatisfactory work performance
* Smoking in unauthorized area
* Defacing hospital property
* Failure to report occupational injuries and/or diseases to proper supervisor
* Selling, solicitation or contributions
* Acceptance of gratuities by an individual
* Refusal, or repeated failure to follow supervisor's instructions
* Fighting or disorderly conduct
* Repeated clocking early, or out late, in excess of six minutes prior to and/or following scheduled or authorized work time
* Violation of any established rules, regulations and procedures, i.e. abuse of telephone use policy
* Abuse of sick leave
* Attempting to injure others
* Theft or attempted theft
* Improper treatment of patients
* Possession of weapons on hospital property
* Gambling on hospital property
* Reporting to work under the influence of drugs or alcohol
* Possession of alcohol or unauthorized narcotics or other drugs on hospital property
* Unauthorized disclosure or falsification of patient information or other hospital information of a confidential nature
* Intentionally clocking or signing another employee in or out of work, i.e. time cards, work sheets, etc., or falsification of time cards
* Leaving the Medical Center area or assigned work station without proper permission prior to completion of the designated work shift
* Insubordination, rudeness, or abrasive conduct toward supervisors, individual employees, patients, visitors, physicians or others
* Refusing a blood or urine test will constitute admission that the employee is impaired and will be grounds for termination
* Dishonesty, stealing or destroying Medical Center property

Note: As stated elsewhere in this handbook, the 90 day probationary period is a trial period. Progressive discipline steps may not occur during this period. This period is designed for training, learning or retraining in a close role with the supervisor. If identified problems are not immediately corrected, it may be determined that the employee is not suited to work at the Medical Center and separation could occur during the 90 day probationary period.

(Emphasis in original).

{4} ENMMC provided Plaintiff with a copy of the handbook and told her that its provisions would govern her employment with ENMMC. Plaintiff was discharged by ENMMC on March 12, 1997, allegedly for calling in prescriptions for medications without physician approval.

{5} In January 1998, Plaintiff filed the present lawsuit. In her first count, Plaintiff asserted a common-law wrongful termination claim. In her second count, Plaintiff asserted that ENMMC, as "a New Mexico entity,"

had deprived Plaintiff of liberty and property without due process of law.

{6} In October 1998, ENMMC filed a "Motion for Dismissal of Claims for Failure to State Claims upon Which Relief May Be Granted, and Alternatively, for Summary Judgment." After full briefing and oral argument, the trial court entered an order granting summary judgment in favor of ENMMC. The trial court ruled that "[P]laintiff's at will employment relationship with the Medical Center has not been modified by the Medical Center's Employee Handbook, oral representations, or the conduct of the parties."

DISCUSSION

Plaintiff's Contract Claim

{7} On appeal, Plaintiff asserts that ENMMC was mistaken in its understanding that she acted without physician authorization; that the employee handbook supported a reasonable expectation that prior to discharge, employees will be given a meaningful opportunity to respond to allegations of misconduct; and, that if ENMMC had provided her a meaningful opportunity to respond to the charges of misconduct as required by the handbook, she would have corrected the misunderstanding and her discharge would not have occurred. ENMMC argues that whether ENMMC afforded Plaintiff an opportunity to demonstrate her innocence is immaterial because Plaintiff was an at-will employee, who could be terminated for no reason at all.

{8} Employers and employees have considerable freedom to contractually define their relationship, including specifying the terms under which the employer-employee relationship can be terminated. *See* UJI 13–2302 NMRA 2001; 13–2303 NMRA 2001. Where the parties have not addressed the issue of termination, courts will supply a default term permitting either party to terminate the relationship at any time, for any reason, without liability. *Melnick v. State Farm Mut. Auto. Ins. Co.*, 106 N.M. 726, 730, 749 P.2d 1105, 1109 (1988); Alan Farnsworth, *Contracts* § 7.17 at 555–58 (2d ed.1990) (characterizing termination at will as example of "omitted case" in which court supplies term for parties).

{9} New Mexico adheres to the objective theory of contracts. *Pope v. The Gap, Inc.*, 1998–NMCA–103, ¶ 13, 125 N.M. 376, 961 P.2d 1283. Notwithstanding its subjective intentions, an employer may be bound by its words or conduct that support a reasonable expectation on the part of employees that they will be dismissed only in accordance with specified procedures or for specified reasons. *Kiedrowski v. Citizens Bank*, 119 N.M. 572, 575, 893 P.2d 468, 471 (Ct.App. 1995). Whether an employer's words and conduct support a reasonable expectation on the part of employees that they will be dismissed only in accordance with specified procedures or for specified reasons generally is a question of fact for the jury. UJI 13–2302 and UJI 13–2303. In reviewing the grant of summary judgment in favor of ENMMC, we do not decide whether or not we ourselves believe that the employer's words and conduct gave rise to a reasonable expectation of fair treatment; rather, the question we must answer is whether, on the evidence before the court, a reasonable jury could find that ENMMC's words and conduct support an objectively reasonable expectation that its employees will be dismissed only in accordance with specified procedures and for specified reasons. *Kiedrowski*, 119 N.M. at 575, 893 P.2d at 471 (to defeat employer's prima facie case for summary judgment, employee must satisfy court that her expectations meet "a certain threshold of objectivity").

{10} Employers are not required to issue employee handbooks. *Lukoski v. Sandia Indian Mgmt. Co.*, 106 N.M. 664, 666, 748 P.2d 507, 509 (1988). There are a number of reasons that employers continue to issue handbooks, notwithstanding the risk that statements in the handbooks may give rise to enforceable rights in favor of employees. "Policy manuals provide a means by which an employer can create a clear set of expectations about a given subject; communicate those expectations broadly across an organization; and ensure that those standards are available for application well beyond the time they were created. . . ." Ronald C. Glover, *Drafting the Personnel Handbook* § 11.3 (Mass. CLE 1997). Formal written policies are perceived to "pro-

mote fairness and consistency, guarding against the arbitrary, capricious, and incongruous treatment of similar cases.... [S]uch policies ... help the employer by enhancing worker morale, loyalty, and productivity, providing competitive advantage in the labor market, and minimizing employee litigation." *Guz v. Bechtel Nat'l, Inc.*, 24 Cal.4th 317, 100 Cal.Rptr.2d 352, 8 P.3d 1089, 1106–07 (2000).

> Systems of personnel rules serve the goals of increasing both order and employee commitment. Rules provide one method of standardizing employee production and punishing deviations from the standards without depending unduly on the idiosyncrasies of supervisors.... Rules also increase employee morale. By reducing the opportunity for arbitrary supervisory action, rules can enhance the perception of fairness. When coupled with supervisory training and procedures for appealing adverse supervisory actions, rules promote a perception that employees are treated with respect and concern.

Henry H. Perritt, Jr., *Employee Dismissal Law and Practice* § 10.4 at 378 (1998). Employees who perceive that they will be treated fairly by their employer may be less likely to unionize. Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 Indus. Rel. L.J. 326, 338 (1991/1992) (hereafter Befort).

{11} ENMMC's handbook is an example of a give with one hand, take back with the other approach to employee handbook drafting. *Eldridge v. Evangelical Lutheran Good Samaritan Soc'y*, 417 N.W.2d 797, 801 (N.D. 1987) (Meschke, J., dissenting); *cf. Allstate Ins. Co. v. Stone*, 116 N.M. 464, 466, 863 P.2d 1085, 1087 (1993) ("Thus, the policy on one hand giveth, but on the other hand it taketh away."). A handbook utilizing this approach relies on disclaimers and/or qualifying words or phrases to neutralize affirmative representations describing procedural safeguards and substantive standards. The goal of this approach is "to obtain the benefits of a handbook policy, while avoiding liability that might otherwise arise from promissory language contained in the handbook." Befort, *supra*, at 348. Reliance on disclaimers and qualifying words and phrases to negate expectations generated by other statements can be risky; courts have declined to give dispositive effect to disclaimers, reasoning that a combination of disclaimers and promissory statements on the same subject results in a question of fact for the jury. *McGinnis v. Honeywell, Inc.*, 110 N.M. 1, 791 P.2d 452 (1990) (declining to treat disclaimers as dispositive; upholding jury verdict in favor of employee); *Kiedrowski*, 119 N.M. at 575, 893 P.2d at 471 (holding that disclaimer did not necessarily override other employer representations giving rise to reasonable expectation of termination only for good cause; reversing grant of summary judgment in favor of employer); *accord Strass v. Kaiser Found. Health Plan of Mid-Atlantic*, 744 A.2d 1000, 1013 (D.C.Ct.App.2000) (characterizing statement in disclaimer that handbook is not contract as "rationally at odds with other language in the document"; reversing trial court's order setting aside jury verdict in favor of employee); *Trombley v. Southwestern Vt. Med. Ctr.*, 169 Vt. 386, 738 A.2d 103, 108 (1999) (noting that handbook provisions committing employer to progressive discipline system are sufficient to support jury finding that employer may terminate employee only for cause); *Fleming v. Borden, Inc.*, 316 S.C. 452, 450 S.E.2d 589, 596 (1994) (observing that "[i]n most instances, summary judgment is inappropriate when the handbook contains both a disclaimer and promises"); *Swanson v. Liquid Air Corp.*, 118 Wash.2d 512, 826 P.2d 664, 674 (1992) (en banc) (rejecting premise that disclaimer "can, as a matter of law, effectively serve as an eternal escape hatch for an employer who may then make whatever unenforceable promises of working conditions it is to its benefit to make"); *see also* Maureen E. McClain, *Employee Handbooks/Personnel Manuals*, 625 PLI/Lit. 163, 177 (2000) (prudent approach is to avoid detailed references in employee handbook to disciplinary procedures, rather than attempting "neutralization" by disclaimer).

{12} In the present case, a number of features in ENMMC's handbook could be understood by a jury as supporting a reasonable expectation that ENMMC had commit-

ted itself to discipline employees only in accordance with specified procedures and for a reason related to legitimate business needs. The handbook sets out, with considerable detail, a multi-stage system of progressive discipline. An employee might reasonably believe that ENMMC would not have described the progressive discipline system in such detail, nor would it have disseminated the policy to employees, if the progressive discipline policy was simply a non-binding set of guidelines to be used in management's complete discretion. The handbook prefaces the progressive discipline procedures with statements that "[m]anagers and supervisors *are responsible for* the administration and *adherence to* the policies, practices and procedures presented in this guide . . ." and "[i]t is *the policy* of the Medical Center to use a system of progressive and/or positive discipline for all employees under the level of Department Head. . . ." (Emphasis added). Terms such as "are responsible for," "adherence to" and "policy" have formal connotations suggesting that the progressive discipline policy is more than a set of non-binding guidelines.

{13} Furthermore, in addition to describing various procedures, the progressive discipline policy provides an extensive list of examples of conduct that may result in disciplinary action or discharge. Each of these examples is arguably related to a legitimate business interest of ENMMC. While the handbook states that the examples of sanctionable conduct are "not considered to be all inclusive," an employee could infer from the fact that the examples all relate to legitimate business needs that ENMMC would not discipline or discharge an employee for a reason unrelated to a legitimate business need.

{14} This brings us to what we view as the pivotal provision of the handbook: "[n]o employee will be terminated without prior review from Human Resources." This promissory statement is "sufficiently explicit" to support a jury finding that this statement established a "norm[ ] of conduct." *Kiedrowski,* 119 N.M. at 575, 893 P.2d at 471.

{15} We recognize that the provisions of the handbook favorable to Plaintiff's position must be considered in the context of the entire handbook. The handbook includes the following disclaimer:

> Nothing in this handbook is meant to create an employment contract or to guarantee the employment or duration of employment of any individual with the Medical Center. Employees may be terminated or may terminate their employment with the Medical Center at any time, subject only to applicable requirements of law.

In addition to the above disclaimer, ENMMC employed precatory verbs such as "may" in several places and inserted various qualifying words and phrases such as "should not be considered absolute,"and "usually occur."

{16} ENMMC emphasizes the statement that "[n]othing in this handbook is meant to create an employment contract." The flaw in this type of disclaimer is that it misses the point that even an at-will employee hired pursuant to an oral agreement has a contract: "it is simply one that may be ended at any time for any reason." *Swanson,* 826 P.2d at 677. An employee relying on a handbook need not demonstrate that the handbook *created* the employer-employee relationship; it is enough that the handbook has *supplemented or modified* a pre-existing, consensual employer-employee relationship.

> [W]hen the evidence is construed most strongly in favor of plaintiff, reasonable minds could conclude that the employee manual, although not independently constituting a contract, sets forth some of the terms and conditions of the employment contract otherwise entered into between the parties. . . . The matters set forth in the manual constitute some of the terms and conditions of the employment relationship, even though the manual is not a complete contract of employment and is not the employment agreement itself. . . . Thus, the manual is not a contract but does set forth terms and conditions of the employment relationship created separately by an employment agreement, whether oral or written.

Pond v. Devon Hotels, Ltd., 55 Ohio App.3d 268, 563 N.E.2d 738, 744 (1988). "Obviously, any employment is a contract. The issue is about the terms of that contract." *Eldridge,*

417 N.W.2d at 801 (Meschke, J., dissenting). Plaintiff's theory of her case is not necessarily inconsistent with the disclaimer, because her theory of the case does not require the jury to find that the handbook created her employer-employee relationship; Plaintiff can prevail if the handbook modifies or supplements a pre-existing oral employment agreement. *Garcia v. Middle Rio Grande Conservancy District*, 1996–NMSC–029 ¶¶ 9–10, 121 N.M. 728, 918 P.2d 7 (noting that employment contract may be shown by conduct amounting to offer of employment, acceptance, and consideration; recognizing principle that employee handbook may supply " 'implied contract term that restricts the employer's power to discharge' ") (quoting *Hartbarger v. Frank Paxton Co.*, 115 N.M. 665, 668–69, 857 P.2d 776, 779–80 (1993)).

{17} We likewise find no inconsistency between Plaintiff's position and the statement in ENMMC's handbook that "[n]othing in this handbook is meant to . . . guarantee the employment or duration of employment of any individual." Plaintiff is not arguing that she was promised employment for a specific term or that she could not be terminated without progressive discipline if she in fact phoned in prescriptions without physician approval.

{18} The statement that "[e]mployees may be terminated . . . at any time" is the closest the handbook comes to a direct reference to at-will employment. However, this statement is immediately qualified by the phrase "subject only to applicable requirements of law." Since "applicable requirements of law" includes the principle that an employee handbook may create legally-enforceable expectations modifying what would otherwise be an at-will employer-employee relationship, we do not read this particular disclaimer as necessarily inconsistent with Plaintiff's position that she could be removed from her position only in accordance with specified procedures and for a legitimate reason. *McGinnis*, 110 N.M. at 6, 791 P.2d at 457; *but see Garrity v. Overland Sheepskin Co. of Taos*, 1996–NMSC–032, ¶ 12, 121 N.M. 710, 917 P.2d 1382 (stating that employer's express reservation of right to terminate employees for any reason and without notice negated any reasonable expectation that employer had limited its common-law right to discharge employees at will).

{19} ENMMC refers us to the affidavit of Sam Pettit, ENMMC's Director of Personnel, which was included in the papers supporting ENMMC's motion for summary judgment. In his affidavit, Pettit states that ENMMC "did not intend to alter the at-will relationship between the hospital and [Plaintiff] by the language of the employee handbook," and that "[t]he discretion of the employees' supervisors and of the hospital's Director of Personnel controlled the material printed in the handbook on employee evaluations, discipline and termination." There is no indication in the record that Pettit's understanding was communicated to employees other than through the statements in the employee handbook. Accordingly, Pettit's individual understanding is irrelevant to the reasonableness of employee expectations created by the handbook: "what is operative is the objective manifestations of mutual assent by the parties, not their secret intentions." *Pope*, 1998–NMCA–103, ¶ 13, 125 N.M. 376, 961 P.2d 1283.

{20} To summarize, ENMMC promulgated an employee handbook containing detailed statements that could reasonably be understood as imposing substantive and procedural limitations on its common-law right to discharge employees at will. Although the handbook also contains qualifying language, the overall effect of the handbook is to create genuine issues of fact as to whether Plaintiff could be terminated only after meaningful prior review by ENMMC's human resources department and only if that review established reasonable grounds to believe that Plaintiff had engaged in the alleged misconduct.

Plaintiff's Civil Rights Claim

{21} In her second count, Plaintiff alleged that ENMMC denied Plaintiff of property and liberty without due process of law. Plaintiff's liberty interest claim was based on the theory that "[i]n terminating plaintiff in the manner in which it did, defendant implicated a liberty interest by failing to

provide plaintiff with a forum to clear her name from the unfounded allegations of defendant." Defendant moved for summary judgment on the liberty interest claim on the ground that Plaintiff could not establish a genuine issue of fact as to the element of public dissemination. *See, e.g., Casias v. City of Raton,* 738 F.2d 392, 396 (10th Cir. 1984) (noting absence of evidence of public dissemination of reasons for discharge of public employee; upholding directed verdict in favor of employer on employee's claim that manner of discharge deprived employee of liberty without due process of law). Plaintiff responded with an affidavit stating that ENMMC had reported her alleged misconduct to the Board of Nursing. Plaintiff's evidence that ENMMC reported the reasons for Plaintiff's discharge to the Board of Nursing was sufficient to create a genuine issue of fact as to dissemination. *Walker v. United States,* 744 F.2d 67, 69–70 (10th Cir. 1984) (noting evidence that government employer disclosed stigmatizing information to Oklahoma Employment Security Commission; reversing order dismissing liberty interest claim).

{22} ENMMC also moved for summary judgment on the entire civil rights count (both the property interest and liberty interest claims) on the ground that ENMMC did not act "under color of state law" in terminating Plaintiff's employment and in reporting her alleged misconduct to the Board of Nursing. *See generally Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n,* 531 U.S. 288, 294, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001) (distinguishing between non-actionable private conduct and state action; noting relationship of conduct "under color of state law" to state action). ENMMC supported its motion for summary judgment with the affidavit of Ronald Shafer, Chief Executive Officer of ENMMC. In his affidavit, Shafer averred that none of ENMMC's employees are employees of Chaves County; that Chaves County does not control the personnel policies or employment decisions of ENMMC; that Chaves County does not receive any funds generated by ENMMC operations; and, that ENMMC does not receive funds from Chaves County. In response, Plaintiff attached photocopies of various documents, including answers to complaints in which ENMMC had asserted the defense of the Tort Claims Act; a jury demand in which ENMMC requested a waiver of the jury fee on the ground that "Defendant is a State entity such that no jury fee is required by law;" an ENMMC policy statement promulgated by the ENMMC Board of Trustees acknowledging that ENMMC "is a not-for-profit, non-tax-supported County facility (political subdivision of the State of New Mexico)"; various minutes of the ENMMC Board of Trustees acknowledging the applicability of the Open Meetings Act [NMSA 1978, §§ 10–15–1 to –4 (1989, as amended through 1999)]; and a memo from Shafer to "All Employees" advising them that ENMMC is owned by Chaves County. The copies of federal and state court pleadings submitted by Plaintiff were not certified. See Rule 11–902 NMRA 2001, for examples of self-authenticating documents. Plaintiff did not provide the trial court with an affidavit authenticating the documents attached to her response. *See, e.g.,* Rule 11–901(B)(1), (7), for methods of authenticating documents.

{23} In its reply, ENMMC argued that the documents submitted by Plaintiff were not properly authenticated, and therefore, did not satisfy the requirement of Rule 1–056(E) NMRA 2001, that evidence tendered in support of or in opposition to a motion for summary judgment "set forth facts as would be admissible in evidence." ENMMC requested that the trial court strike the documents. We agree with ENMMC that the trial court was required to disregard the documents submitted by Plaintiff. Where the opponent of evidence has raised a timely objection, the requirement that a party set forth facts as would be admissible in evidence is "mandatory in nature." *Chavez v. Ronquillo,* 94 N.M. 442, 445, 612 P.2d 234, 237 (Ct.App.1980). ENMMC interposed a timely objection and Plaintiff made no attempt to correct the deficiencies noted by ENMMC.

{24} Plaintiff's failure to follow Rule 1–056(E) is not fatal to her case that NMMC acted under color of law in firing her, however. ENMMC's counsel conceded during the

hearing on ENMMC's motion for summary judgment that Chaves County was involved in ENMMC's creation, which statement we understand as a reference to NMSA 1978, § 4–48B–5(A)–(E) (1947, as amended through 1981) (authorizing counties to "purchase, own, maintain and operate hospitals;" to "purchase the land necessary to construct hospitals;" to "construct county hospitals;" and to "issue general obligation bonds and revenue bonds ... for the construction, purchase, renovation, remodeling, equipping or re-equipping of a county hospital"). There is no dispute that Plaintiff was dismissed by the duly-constituted management of ENMMC. Our review of enabling legislation for the establishment of a county hospital satisfies us that ENMMC's management necessarily derived its authority to make personnel decisions through a delegation of authority by Chaves County. NMSA 1978, §§ 4–48B–5(C) (1982) (authorizing counties to control and regulate county hospitals) and 4–48B–10(A) (1982) (authorizing county commissioners to appoint hospital governing board to exercise county's powers). These circumstances are sufficient to raise genuine issues of material fact as to whether ENMMC is a public hospital and whether its management acted under color of state law in dismissing Plaintiff and by reporting her alleged misconduct to the Board of Nursing. *Milo v. Cushing Mun. Hosp.*, 861 F.2d 1194, 1196 (10th Cir.1988); *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995) (holding that Amtrak is agency or instrumentality of the United States for First Amendment purposes; emphasizing United States' control over appointment of members of board of directors).

{25} The "nexus" cases cited by ENMMC such as *Rendell–Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982) and *Loh–Seng Yo v. Cibola Gen. Hosp.*, 706 F.2d 306 (10th Cir.1983), are largely inapposite. These cases involve attempts to hold *private* actors liable for civil rights violations. Here, in contrast, we are concerned with the issue of whether officials of an arguably public hospital acted under color of law in discharging Plaintiff. *Faucher v. Rodziewicz*, 891 F.2d 864, 868–69 (11th Cir.1990) (holding that director and clinical director of public hospital acted under color of state law in terminating physician's staff privileges); *Malak v. Associated Physicians, Inc.*, 784 F.2d 277, 282 (7th Cir.1986) (distinguishing *Rendell–Baker*; holding that conduct of public hospital and its employees in terminating staff privileges of physician is "clearly state action"); *McVarish v. Mid–Neb. Cmty Mental Health Ctr.*, 696 F.2d 69, 71 (8th Cir.1982) (holding that members of governing board of public health facility were state actors for purposes of employee's claim that he was terminated without due process of law).

{26} ENMMC argued in the alternative that Count II should be dismissed pursuant to Rule 1–012(B)(6) NMRA 2001, due to Plaintiff's failure to allege that ENMMC acted under color of state law. In the trial court, Plaintiff's counsel conceded that Plaintiff had failed to allege facts demonstrating that ENMMC acted under color of state law. We agree with ENMMC that dismissal of Count II is appropriate in view of Plaintiff's admitted failure to allege the essential element of conduct under color of state law. *Guy v. Swift & Co.*, 612 F.2d 383, 385–86 (8th Cir.1980). However, we agree with Plaintiff that this dismissal should be *without* prejudice and that Plaintiff should be afforded an opportunity to correct this defect in her pleading of Count II. *Electro–Jet Tool & Mfg. Co. v. City of Albuquerque*, 114 N.M. 676, 685, 845 P.2d 770, 779 (1992).

CONCLUSION

{27} The trial court's order granting summary judgment as to Plaintiff's contract and civil rights counts is reversed. The dismissal of Plaintiff's civil rights count is affirmed due to Plaintiff's failure to allege that ENMMC acted under color of state law. This dismissal is without prejudice. On remand, Plaintiff should be afforded the opportunity to replead this count.

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

RICHARD C. BOSSON, Chief Judge, concurs.

JONATHAN B. SUTIN, Judge (specially concurring).

SUTIN, Judge (specially concurring).

{29} New Mexico law is developed and it covers the issue of the propriety of summary judgment in this case. We do not need to invoke law review articles or pull in foreign law.

{30} Reversal because a genuine issue of material fact exists does not require us to venture beyond our existing law and discuss why employers "continue to issue handbooks," what "policy manuals provide," how "formal written policies are perceived," what goals "systems of personnel rules serve," whether "employees who perceive that they will be treated fairly . . . may be less likely to unionize," how employers use disclaimers with discipline systems to create a give-but-take-back approach, and whether an at-will employment relationship is a contract. The majority states that "courts have declined to give dispositive effect to disclaimers," ignoring the fact that a disclaimer was given dispositive effect by our Supreme Court in *Garrity v. Overland Sheepskin Co. of Taos*, 1996–NMSC–032, ¶ 12, 121 N.M. 710, 917 P.2d 1382. *See also Paca v. K–Mart Corp.*, 108 N.M. 479, 481, 775 P.2d 245, 247 (1989).

{31} In New Mexico, an employee is presumed to be an at-will employee in the absence of an express or implied contract. *Hartbarger v. Frank Paxton Co.*, 115 N.M. 665, 672, 857 P.2d 776, 783 (1993); *Kiedrowski v. Citizens Bank*, 119 N.M. 572, 575, 893 P.2d 468, 471 (Ct.App.1995). The existence of an implied contract that restricts the unfettered discharge power rebuts the presumption. *Hartbarger*, 115 N.M. at 672, 857 P.2d at 783; *Kiedrowski*, 119 N.M. at 575, 893 P.2d at 471. "An employer creates expectations by establishing policies or making promises. An implied contract is created only where an employer creates a reasonable expectation. The reasonableness of expectations is measured by just how definite, specific, or explicit has been the representation or conduct relied upon." *Hartbarger*, 115 N.M. at 672, 857 P.2d at 783. A written policy may not create any reasonable expectation giving rise to an implied contract when the policy contains an "express reservation of the right to terminate an employee for any reason." *Garrity*, 1996–NMSC–032, ¶ 12, 121 N.M. 710, 917 P.2d 1382.

{32} Circumstances that create an objectively reasonable expectation that employees will not be terminated except through a fair procedure can give rise to such an implied contract. *Kiedrowski*, 119 N.M. at 575, 893 P.2d at 471. In looking at the totality of circumstances surrounding a discharge, an employee handbook containing disciplinary or termination procedures may be considered when determining the question of objectively reasonable expectations. *Id.* at 575–76, 893 P.2d at 471–72. This is true although the handbook contains a termination-at-will type of disclaimer, "where the employer's conduct reasonably leads employees to believe that they will not be terminated without just cause and a fair procedure." *Id.* at 575, 893 P.2d at 471. What constitutes those objectively reasonable expectations is ordinarily a jury question. *Id.*

{33} In this case, the evidence to support an implied contract consists of provisions in the ENMMC employee handbook, and ENMMC's having provided Plaintiff with the employee handbook and telling her that the handbook would govern her employment. *See* Majority Opinion, ¶¶ 2–3. The question is simply whether a genuine issue of material fact exists as to whether these circumstances give rise to a reasonable expectation that ENMMC would conform to the fair hearing procedure before discharging Plaintiff. *Garrity*, 1996–NMSC–032, ¶ 12, 121 N.M. 710, 917 P.2d 1382; *Hartbarger*, 115 N.M. at 672, 857 P.2d at 783; *Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 427, 773 P.2d 1231, 1234 (1989).

{34} Our developed New Mexico precedent more than adequately puts employers on notice that when, as in this case, an employer creates an elaborate and detailed progressive discipline procedure and policy and disseminates it to employees in an employee handbook, but fails to state in an unambiguous, open, obvious, and explicit manner the difference between the at-will disclaimer and the progressive discipline policy and procedure, the issue of reasonable expectation is going to be a jury issue.

{35} ENMMC went to great length to detail in its employee handbook a discipline policy for management to follow. The handbook explicitly and unambiguously says that "no employee will be terminated without prior review from Human Resources." To permit an employee "every opportunity to comply with departmental expectations" is to give the employee a fair hearing on an issue of alleged employee misconduct. At the same time, ENMMC minimized its disclaimer, and has not distinguished the disclaimer from the discipline policy by explicitly giving employees reason to understand that they can be terminated for any reason at any time and for no particular work-related or business reason notwithstanding the existence of the employer's elaborate discipline policy. The disclaimer is, as well, ambiguous, in that it states that the handbook is applicable to all employees but does not create a contract or guarantee employment. It is ambiguous, too, when it states that employment termination is subject only to applicable requirements of law. Both the disclaimer and the discipline policy are contained in the employee handbook. Although seemingly inconsistent, both provisions might reasonably and objectively be construed by an employee as being applicable in tandem when considering the termination of an employee's employment.

{36} Because the result in this case is straightforward under existing New Mexico precedent, I fear the majority's apparent purpose may be to somehow question *Hartbarger* or *Garrity*, broaden *Kiedrowski*, or whittle away the at-will employment rule. Otherwise, there exists no need for elaboration. No expansion or clarification is required to decide this case. We should restate New Mexico adherence to the at-will rule and at the same time reiterate the *Hartbarger* admonition: "An employer does not have to issue a policy statement limiting its power to discharge, but if the employer chooses to do so and creates a reasonable expectation on the part of the employee, it is bound to fulfill that expectation." *Hartbarger*, 115 N.M. at 672, 857 P.2d at 783. *See also Lukoski v. Sandia Indian Mgmt. Co.*, 106 N.M. 664, 666–67, 748 P.2d 507, 509–10 (1988) (quoting *Leikvold v. Valley View Cmty. Hosp.*, 141 Ariz. 544, 688 P.2d 170, 174 (1984)):

> Employers are certainly free to issue no personnel manual at all or to issue a personnel manual that clearly and conspicuously tells their employees that the manual is not part of the employment contract and that their jobs are terminable at the will of the employer with or without reason.... However, if an employer does choose to issue a policy statement, in a manual or otherwise, and, by its language or by the employer's actions, encourages reliance thereon, the employer cannot be free to only selectively abide by it. Having announced a policy, the employer may not treat it as illusory.

{37} For these reasons, I concur in the reversal of summary judgment dismissing the contract claim, but in the result only. I fully concur in the remainder of the opinion.

2001-NMCA-078

33 P.3d 296

STATE of New Mexico, Plaintiff–Appellee,

v.

Justin HUNTER, Defendant–Appellant.

No. 21,677.

Court of Appeals of New Mexico.

Sept. 10, 2001.

Patricia A. Madrid, Attorney General, Santa Fe, NM, Steven S. Suttle, Ass't Attorney General, Albuquerque, NM, for Appellee.

Michael Kiernan, David G. Crum & Associates, Albuquerque, NM, for Appellant.

OPINION

PICKARD, Judge.

{1} This case requires us to address the authority of a trial court to sentence a juvenile, charged with first degree murder but found guilty of second degree murder, as an adult after holding only a typical adult sentencing hearing. By that, we mean the trial court did not consider the factors required to be considered or make the findings required to be made pursuant to the statute that permits juveniles found guilty of second degree murder to be sentenced as adults. We hold that the trial court did not have the requisite authority, and accordingly we reverse and remand for further proceedings. We address summarily the other issues raised by Defendant.

FACTS AND PROCEEDINGS

{2} Defendant was seventeen years old when he went to a pool hall to play pool with friends. Defendant and a friend were challenging others to play for money. Although conflicting evidence was elicited on this point,

Defendant was described as having an "attitude," giving people dirty looks, and making hostile remarks. The victim was described similarly. Defendant and the victim engaged each other verbally and then with fists. It was disputed whether Defendant fought back when the victim, who was larger than Defendant, was punching him. Defendant fell back toward a bench, pulled a gun from his pocket, and fired several shots in rapid succession at the victim, killing him. Defendant then fled the premises and either dropped or lost the gun thereafter.

{3} Defendant was indicted on an open count of murder, including first degree murder, second degree murder, and manslaughter, and one count of tampering with evidence. The trial court directed a verdict on first degree murder, and the jury was instructed on second degree murder, voluntary manslaughter, tampering with evidence, and self defense, but was not instructed on involuntary manslaughter, as Defendant had requested.

{4} Following the verdict finding Defendant guilty of second degree murder and tampering with evidence, the trial court continued Defendant on bond and ordered a presentence report. Three months later, the matter came before the trial court for sentencing. Defendant's father and Defendant himself first addressed the court. The father explained that Defendant was physically assaulted by the victim prior to the shooting and was basically a good boy who deserved to be sentenced as a juvenile. Defendant apologized to the victim's family and asked for forgiveness. The victim's grandmother, two aunts, the victim's future mother-in-law, and the victim's father then addressed the court. They asked for justice, they asked the court to send a message, and some rejected Defendant's apology. The State argued that Defendant's age, the circumstances of the crime, and the crime itself were too serious for the trial court to even consider a juvenile sentence. Defendant's counsel confessed that he had not dealt with the juvenile code before, told the trial court that it could do whatever it wanted, and requested that the trial court accept one of the recommendations of the pre-sentence report, which was to give a juvenile sentence. The trial court considered the verdict of the jury, finding Defendant guilty of killing the victim without provocation and not in self defense, and also considered that Defendant had not been involved with the law before. The trial court acknowledged that it would not make either side happy, and said that "this was an adult crime and that [Defendant] should pay a penalty as a result of being an adult." The trial court then sentenced Defendant to concurrent terms for the two offenses, giving Defendant fifteen years for the second degree murder and tampering with evidence convictions and one year for the firearm enhancement for a total of sixteen years of which eight were suspended. The trial court entered a standard adult judgment and sentence.

{5} Defendant's appeal raised the following issues: (1) whether NMSA 1978, § 32A–2–20 (1996) is unconstitutional under *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and whether the trial court abused its discretion in giving Defendant an adult sentence; (2) whether Defendant's conviction for second degree murder was supported by sufficient evidence; (3) whether the trial court erred in refusing to instruct on involuntary manslaughter; and (4) whether trial defense counsel was ineffective for not calling Defendant to testify on his own behalf. We issued an order, asking for supplemental briefing on a question related to the first issue-whether it was fundamental or jurisdictional error for the trial court to have sentenced Defendant as an adult without considering all the factors set forth in Section 32A–2–20(C) and without making the findings required by Section 32A–2–20(B). Not surprisingly, Defendant's supplemental brief contends that it was fundamental or jurisdictional error, while the State's brief contends that it was not. Interestingly, we take judicial notice of our records in another case, *see State v. Anaya,* 1997–NMSC–010, ¶ 13, 123 N.M. 14, 933 P.2d 223, and note that the State confessed error in *State v. Joseph S.,* Ct.App. No. 21,691, on the issue of whether an amenability hearing is necessary when a child charged with first degree murder pleads guilty to second degree murder.

DISCUSSION

SENTENCING AS AN ADULT

{6} We recently had occasion to canvass the sentencing possibilities for juveniles convicted of various crimes. In *State v. Gonzales,* 2001–NMCA–025, ¶¶ 16–17, 130 N.M. 341, 24 P.3d 776, *cert. granted,* 130 N.M. 254, 23 P.3d 929 (2001), we explained that there were three categories of juvenile offenders under the 1993 revisions to the Children's Code: (1) serious youthful offenders-youths fifteen years of age or older and charged with first degree murder, who were entirely excluded from the Children's Code unless found guilty of lesser offenses; (2) youthful offenders-youths fourteen years of age or older and convicted of certain enumerated crimes or certain multiple crimes; and (3) delinquent offenders-all others. Youthful offenders may be sentenced as adults or given juvenile sanctions; delinquent offenders must be given juvenile sanctions.

{7} Defendant in this case was a serious youthful offender, having been charged with first degree murder for an offense he committed when he was seventeen years old. However, once the trial court directed a verdict on that charge and once the jury found Defendant guilty only of second degree murder, Defendant was no longer a serious youthful offender. Section 32A–2–20, entitled "[d]isposition of a youthful offender," states in Subsection F that a "fourteen to eighteen year old child charged with first degree murder, but convicted of an offense less than first degree murder, is subject to the dispositions set forth in this section." The dispositions set forth in that section grant the trial court the discretion to invoke either an adult sentence or juvenile sanctions. Section 32A–2–20(A). However, "the court *shall* make the following findings in order to invoke an adult sentence: (1) the child is not amenable to treatment or rehabilitation as a child in available facilities; and (2) the child is not eligible for commitment to an institution for the developmentally disabled or mentally disordered." Section 32A–2–20(B) (emphasis added). "In making the findings set forth in Subsection B of this section, the judge *shall* consider" eight enumerated factors relating to the seriousness of the offense, the history of the child, and the protection of the public and prospects for rehabilitation of the child using currently available services and facilities. Section 32A–2–20(C) (emphasis added).

{8} It has long been held that a trial court's authority to sentence is only that which has been provided by statute and that a sentence unauthorized by statute is jurisdictional and can be raised for the first time on appeal. *See State v. Sparks,* 102 N.M. 317, 324–25, 694 P.2d 1382, 1389–90 (Ct.App. 1985). The rule set forth in *Sparks* may be traced through *State v. Dominguez,* 115 N.M. 445, 456, 853 P.2d 147, 158 (Ct.App. 1993), to the Supreme Court's recent case of *State v. Martinez,* 1998–NMSC–023, ¶ 12, 126 N.M. 39, 966 P.2d 747. There, the Court stated that a trial court's power to sentence is derived exclusively from statute, which limited the judicial authority as a matter of separation of powers inasmuch as it is the legislature's sole province to establish penalties for offenses. *Id.*

{9} We relied on *Martinez* in *State v. Muniz,* 2000–NMCA–089, ¶¶ 9, 14, 19, 129 N.M. 649, 11 P.3d 613, *cert. granted,* 129 N.M. 599, 11 P.3d 563 (2000), for the proposition that, in a case involving a serious youthful offender who pleaded guilty to lesser crimes, a trial court had no authority to sentence the offender as an adult unless it was with express statutory authorization or unless the juvenile expressly waived the issue in a voluntary, knowing, and intelligent manner. In other words, simple failure to raise the issue does not preclude its being raised for the first time on appeal.

{10} We deem it noteworthy that *Martinez* and *Muniz* were both decided well after the time that the Supreme Court limited the concept of jurisdictional error to those instances in which the court was completely powerless to act. *See State v. Orosco,* 113 N.M. 780, 783, 833 P.2d 1146, 1149 (1992). Nonetheless, the *Orosco* Court did preserve the concept of fundamental error and included within that concept the situation where an error so prejudiced a defendant's rights as to require a reversal. *Id.* This concept is similar to the construct of fundamental error as that was articulated in *State v. Garcia,* 46

N.M. 302, 309, 128 P.2d 459, 462 (1942): "Error that is fundamental must be such error as goes to the foundation or basis of a defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive."

{11} We believe that the error in this case, under the facts and circumstances of this case, fits this construct. The error was the failure to follow the statutory conditions precedent to sentencing Defendant as an adult. The circumstances were that there was a genuine factual issue as to whether Defendant should be so sentenced. The error went to the entire foundation of Defendant's sentence.

{12} In the context of children and the court's authority over them, we have frequently said that the authority of the court is limited by the Children's Code. *See In re Zac McV.*, 1998–NMCA–114, ¶ 9, 125 N.M. 583, 964 P.2d 144; *In re Jacinta M.*, 107 N.M. 769, 771, 764 P.2d 1327, 1329 (Ct. App.1988); *In re Doe*, 88 N.M. 632, 634–35, 545 P.2d 491, 493–94 (Ct.App.1975). Even in ordinary civil cases, our courts are especially solicitous of the rights of juveniles. *See Shelton v. Sloan*, 1999–NMCA–048, ¶ 42, 127 N.M. 92, 977 P.2d 1012 (stating that minors in court are represented not only by guardians ad litem or next friends but also by the court itself). We deem it fundamental that children who are not convicted of first degree murder and who appear to be amenable to rehabilitation have a basic and essential right not to be sentenced as adults unless the trial court fulfills the requirements of Section 32A–2–20(B) and (C). In such a case, the trial court must make the findings required by Section 32A–2–20(B) after evaluating the circumstances in light of Section 32A–2–20(C). *See In re Aaron L.*, 2000–NMCA–024, ¶¶ 25–26, 128 N.M. 641, 996 P.2d 431 (holding it to be fundamental error in a children's court case for the trial court to fail to interrogate the child as to the voluntariness and knowingness of his admission to the charges when there are doubts about whether the child knew what he was admitting and appreciated the consequences); *cf. Martinez v. Martinez*, 1997–NMCA–096, ¶¶ 20–21, 25, 123 N.M. 816, 945 P.2d 1034 (holding, in a civil case, that it is error requiring a remand when a trial court fails to make findings justifying a decision to refuse to award costs when the record indicates that an award of costs is warranted).

{13} In this case, while it appeared that the parties and the court were aware that either an adult sentence or juvenile sanctions were possibilities, none of the participants appeared aware of the statutory requirements for invoking an adult sentence. The sentencing hearing was a sentencing hearing, not an amenability hearing. The trial court heard statements that trial courts typically hear from victims and defendants and their families. It did not hear evidence from any experts. *Cf. Gonzales*, 2001–NMCA–025, ¶¶ 41–44, 130 N.M. 341, 24 P.3d 776 (indicating that the trial court heard from many experts on the question of the defendant's prospects for rehabilitation and amenability to treatment as well as on the availability of facilities). The only expert opinion before the trial court was the presentence report, which apparently concluded that Defendant was amenable to treatment in available facilities. The trial court here did not make the required findings, either orally or in written form. All the trial court said was "this was an adult crime and that [Defendant] should pay a penalty as a result of being an adult."

{14} We hold that the adult sentence was unauthorized under the circumstances of this case and that the lack of authorization amounted to fundamental error. Specifically, considering all of the facts of this case, there is a close issue concerning whether the trial court should impose an adult sentence on this Defendant, and we are not confident that the result would have been the same had proper procedures been followed. We reverse the sentence and remand with instructions to the trial court to hold an amenability hearing, to consider the factors set forth in Section 32A–2–20(C), and to make the findings required in Section 32A–2–20(B) before reimposing an adult sentence or to impose juvenile sanctions if the required findings are not made. In the absence of an amenability hearing and findings, we deem it inappropri-

ate at this time to review Defendant's issue alleging abuse of discretion, in which he contends that we should remand with instructions that juvenile sanctions should be imposed.

ISSUES ADDRESSED SUMMARILY

{15} Defendant's *Apprendi* issue was answered adversely to him in *Gonzales,* 2001–NMCA–025, ¶ 32, 130 N.M. 341, 24 P.3d 776.

{16} Defendant's sufficiency of the evidence contention boils down to a contention that he established self defense or provocation as a matter of law. We cannot agree. Particularly in light of the fact that the victim was unarmed and the jury did not have to believe the defense theory, it was for the jury to determine whether Defendant used an amount of force necessary under the circumstances or was provoked in such a way than an ordinary person would have reacted as Defendant did. *See* UJI–14–222 NMRA 2001 (defining sufficient provocation in terms of an "ordinary person of average disposition"); *State v. Sutphin,* 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988) (holding that a jury can reject a defendant's version); *State v. Johnson,* 1998–NMCA–019, ¶ 16, 124 N.M. 647, 954 P.2d 79 (indicating that reasonableness in the use of force is generally a jury question); *State v. Duarte,* 1996–NMCA–038, ¶ 4, 121 N.M. 553, 915 P.2d 309 (indicating that deadly force in self defense is not available to respond to hand-and-fist combat).

{17} Defendant's contention that the trial court erred in refusing to instruct the jury on involuntary manslaughter is answered by *State v. Abeyta,* 120 N.M. 233, 241–42, 901 P.2d 164, 172–73 (1995), *abrogated on other grounds by State v. Campos,* 1996–NMSC–043, ¶ 32 n. 4, 122 N.M. 148, 921 P.2d 1266, in which the Supreme Court held that shooting at someone, if not justified in perfect self defense, would be a felony, and not a lawful act, and would thus not fall within the involuntary manslaughter statute.

{18} Defendant's ineffective assistance contention is answered by the fact that there is no record showing that Defendant wanted to testify. Matters not of record present no issue for review. *See State v. Wood,* 117 N.M. 682, 687, 875 P.2d 1113, 1118 (Ct.App.1994).

CONCLUSION

{19} Defendant's convictions are affirmed. The adult sentence is vacated, and this matter is remanded for an amenability hearing and subsequent proceedings as indicated by the result of that hearing.

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

WE CONCUR: RICHARD C. BOSSON, Chief Judge and MICHAEL D. BUSTAMANTE, Judge.

2001-NMSC-031

33 P.3d 633

STATE of New Mexico, Plaintiff–Petitioner,

v.

Roger Van CLEAVE, Defendant–Respondent.

No. 26,441.

Supreme Court of New Mexico.

Oct. 9, 2001.

Patricia A. Madrid, Attorney General, William McEuen, Assistant Attorney General, Santa Fe, NM, for Petitioner.

Phyllis H. Subin, Chief Public Defender, Laurel A. Knowles, Assistant Appellate Defender, Santa Fe, NM, for Respondent.

OPINION

MINZNER, Justice.

{1} Defendant was convicted of possession of methamphetamine with intent to distribute, contrary to NMSA 1978, § 30–31–20(A) (1990), and possession of drug paraphernalia, contrary to NMSA 1978, § 30–31–25.1 (1997), after the district court denied his motion to suppress evidence United States Border Patrol agents seized from his vehicle at a fixed checkpoint. The Court of Appeals reversed. *State v. Van Cleave,* 2000–NMCA–071, 129 N.M. 355, 8 P.3d 157, *cert. granted,* 129 N.M. 386, 9 P.3d 69. We issued our writ of certiorari to the Court of Appeals and now address the question of whether United States Border Patrol agents conducted an illegal search under the federal constitution by directing a narcotics dog to sniff downwind from the open trunk of Defendant's vehicle after receiving consent to "look in" or "inspect" the trunk.

{2} We hold that the dog sniff was not a search for Fourth Amendment purposes and therefore did not violate Defendant's federal constitutional rights. We therefore reverse the Court of Appeals with respect to the only issue presented by the petition for certiorari. As a general rule, "only questions set forth in the petition [for writ of certiorari] will be considered by the Court." Rule 12–502(C)(2) NMRA 2001. We therefore remand to the Court of Appeals for consideration of the remaining issues raised on appeal from the district court.

I.

{3} Defendant entered the United States Border Patrol fixed checkpoint near Orogrande, New Mexico at approximately 5:30 a.m. on December 10, 1996. The checkpoint is on U.S. Route 54, north of El Paso and approximately thirty miles south of Alamogordo. Agent James Stack, who was working the primary inspection area, inquired as to Defendant's citizenship, and Defendant said he was a United States citizen. When asked where he lived, Defendant said he was going to visit his grandparents in Alamogordo and was continuing on to Grants. The agent repeated his question, and Defendant responded that he was staying and working in Grants. The agent then asked Defendant where he was coming from, and Defendant said he had been in Chaparral, New Mexico for two days. The agent saw no luggage in the car and asked Defendant if he was carrying any. Defendant said no. Agent Stack found Defendant's responses to his questions suspicious.

{4} After noticing that Defendant's car keys were the only keys on a yellow tag, which the agent believed was normally used by car dealers, the agent asked Defendant if the car was his. Defendant said that the car belonged to his partner, Buck, in Grants but was unsure about Buck's last name. The agent asked Defendant for his vehicle registration. As Defendant searched through some papers above the visor, the agent saw Defendant "intensely" examining an application for admission to the Denver Institute of Technology. The agent noticed that Defendant's chest was rising rapidly and that the document was trembling in his hands. Although he was unable to produce any ownership documents for the vehicle, Defendant produced his driver's license, which showed a home address in Alamogordo.

{5} Agent Stack asked for Defendant's consent to "look in" or "inspect" the vehicle's trunk. Defendant agreed to the inspection, and the agent directed him to the secondary inspection area. Without any additional request or other prompting from the agent, Defendant got out of the vehicle and opened the trunk. After Defendant had moved clear of the vehicle, Agent Joe Martinez approached the open trunk with a narcotics dog. The dog alerted to the open trunk, and the agents took Defendant into custody, escorted him inside the checkpoint trailer, and advised him of his rights. Agent Martinez then performed a warrantless search of the vehicle based on the dog alert. He discovered drug paraphernalia and the ingredients for making methamphetamine in the trunk and a jar of "pre-finished" methamphetamine on the front seat.

{6} Defendant moved to suppress this evidence under the Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution. Defendant argued: (1) that his consent to search the trunk was not freely given as required by the Fourth Amendment, (2) that even if Defendant consented freely to an inspection of the trunk, the agents exceeded the scope of his consent in violation of his Fourth Amendment rights by directing the drug dog to the open trunk, and (3) that although the dog alert gave the agents probable cause to search, the warrantless search of the trunk and the interior of the car were illegal under Article II, Section 10 because there were no exigent circumstances.

{7} After an evidentiary hearing, the trial court denied the motion. First, the court concluded that Agent Stack did not coerce Defendant into giving consent and that Defendant consented freely. Second, the court concluded that the State did not meet "its burden of showing by clear and convincing evidence that what Defendant consented to in response to the agent's request to 'inspect' the trunk of his vehicle included the use of the canine." However, it found that "the use of the dog was reasonable under the totality of the circumstances" and that "[h]aving the trunk open didn't make a difference in this case." Third, the court concluded that Article II, Section 10 did not require the agents to obtain a warrant before searching the interior and trunk of Defendant's car. The court offered alternative bases for this conclusion. It reasoned that *State v. Gomez*, 1997–NMSC–006, ¶¶ 39–40, 122 N.M. 777, 932 P.2d 1, which holds that warrantless searches of automobiles violate Article II, Section 10 of our state constitution unless the State makes a particularized showing of exigent circumstances, does not apply to this case because the search occurred before *Gomez* was decided. Alternatively, the court reasoned, even if *Gomez* does apply, the search did not run afoul of Article II, Section 10 because the search was conducted under exigent circumstances due to "the remote location and limited staffing of the checkpoint."

{8} A divided panel of the Court of Appeals reversed the trial court. *Van Cleave*, 2000–NMCA–071, ¶ 1, 129 N.M. 355, 8 P.3d 157. The two-judge majority assumed without deciding that Defendant had freely consented to the search of the trunk and concluded that the agents exceeded the scope of consent when they directed the drug dog to the open trunk. *Id.* ¶ 6. The majority reasoned that obtaining consent to search and directing the dog to sniff must be analyzed "as a whole" and distinguished the cases that hold that a dog sniff is not a search for Fourth Amendment purposes. *Id.* ¶ 11. Deferring to the trial court's factual findings, the Court concluded that a reasonable person would not have understood the exchange between Agent Stack and Defendant, when Defendant consented to inspection of his trunk, to include the use of a drug dog. *Id.* ¶¶ 12, 16. This holding disposed of the appeal and made it unnecessary for the Court to reach Defendant's other arguments. *Id.* ¶ 1.

{9} Judge Sutin dissented on the grounds that this case is a simple dog sniff case, not a consent case. *Id.* ¶ 22 (Sutin, J., dissenting). According to Judge Sutin, the proper starting point for the Fourth Amendment analysis is whether the dog sniff was a search; the first inquiry should be whether Defendant had a legitimate expectation of privacy in the airspace that contained the incriminating odor. *Id.* ¶¶ 23, 25. Citing cases holding that a dog sniff by a trained narcotics detection dog is not a search because a person does not have a legitimate expectation of privacy in that airspace, Judge Sutin concluded that the agents' conduct did not implicate Defendant's Fourth Amendment rights and that the dog sniff therefore could not have exceeded the scope of Defendant's consent. *Id.* ¶¶ 26–29.

II.

{10} When reviewing a ruling on a motion to suppress, we review "purely factual assessments to determine if the fact-finder's conclusion is supported in the record by substantial evidence." *State v. Attaway*, 117 N.M. 141, 144, 870 P.2d 103, 106 (1994). However, we review mixed questions of law and fact de novo, especially if constitutional

rights are involved. *Id.* at 145, 870 P.2d at 107 (reviewing de novo a trial court's conclusion about whether exigent circumstances were present); *Aguilar v. State*, 106 N.M. 798, 799, 751 P.2d 178, 179 (1988) (reviewing de novo a conclusion about whether a confession was voluntary).

{11} Defendant argues that the agents violated his Fourth Amendment right to be free from unreasonable searches by directing a trained dog to sniff for contraband downwind from the open trunk of the vehicle after obtaining consent to "inspect" or "look in" the trunk. The relevant language of the Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The protections of the Fourth Amendment only apply if there has been a search or seizure, so a threshold inquiry in every Fourth Amendment analysis is whether a search or seizure has occurred. Not every investigatory technique is a search for Fourth Amendment purposes. A search is an intrusion on a person's "reasonable 'expectation of privacy.'" *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (quoting *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring)).

{12} In this case, the Court of Appeals concluded that the dog sniff was a search, reasoning that the agent's actions in obtaining consent to inspect and directing the dog to sniff "must be analyzed and considered as a whole." *Van Cleave*, 2000-NMCA-071, ¶ 11, 129 N.M. 355, 8 P.3d 157. We disagree. A person does not have a legitimate expectation of privacy in the odors emanating from his or her belongings in a public place, so the use of a well-trained and reliable narcotics dog in a public place is generally not a search for Fourth Amendment purposes. *United States v. Place*, 462 U.S. 696, 707, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983); *United States v. Morales-Zamora*, 914 F.2d 200, 205 (10th Cir.1990); *State v. Villanueva*, 110 N.M. 359, 362, 796 P.2d 252, 255 (Ct.App.1990). Courts in other jurisdictions have applied this principle in a wide variety of situations. For example, courts have held that no search occurs when law enforcement officers use dogs on vehicles in a motel parking lot, *United States v. Ludwig*, 10 F.3d 1523, 1526 (10th Cir.1993); on vehicles in a school parking lot, *Hearn v. Bd. of Public Educ.*, 191 F.3d 1329, 1332 (11th Cir. 1999); on luggage passing through an airport, *State v. Morrow*, 128 Ariz. 309, 625 P.2d 898, 901-02 (1981) (in banc); *People v. Mayberry*, 31 Cal.3d 335, 182 Cal.Rptr. 617, 644 P.2d 810, 814 (1982) (in bank); on luggage in the luggage rack of a stopped bus, *United States v. Gant*, 112 F.3d 239, 241 (6th Cir. 1997); *United States v. Harvey*, 961 F.2d 1361, 1362-63 (8th Cir.1992) (per curiam); and on vehicles passing through a fixed border patrol checkpoint, *United States v. Dovali-Avila*, 895 F.2d 206, 207-08 (5th Cir.1990) (per curiam). We find it persuasive that courts have consistently applied the Fourth Amendment principle that the use of trained dogs to sniff for contraband in public places is generally not a search and conclude that the agents' use of the dog did not violate Defendant's Fourth Amendment rights.

{13} We agree with Judge Sutin that the scope of consent is not an issue in this case because the use of the dog was not a Fourth Amendment search. Consent is simply one of several different legal justifications for a warrantless search. There is no need to justify a dog sniff that is not a search for Fourth Amendment purposes. Methods of investigation that are not searches do not implicate Fourth Amendment rights, and law enforcement need not obtain consent to employ them. We emphasize that when the State seeks to justify a *search* based on consent, the State must prove that the search did not exceed the scope of the actual consent given. *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991); *State v. Flores*, 122 N.M. 84, 91, 920 P.2d 1038, 1045 (Ct.App.1996). However, the scope of Defendant's consent was a false issue with respect to the dog sniff in this case. The Court of Appeals erred by concluding that the dog sniff was a Fourth Amendment search and by requiring the State to prove that the agents did not exceed

the scope of consent by using the dog to sniff for contraband.

{14} The Court of Appeals relied heavily on two cases in support of its holding. *Van Cleave,* 2000–NMCA–071, ¶¶ 9,10, 129 N.M. 355, 8 P.3d 157. In *United States v. Winningham,* 140 F.3d 1328 (10th Cir.1998), agents pulled over a van based on reasonable suspicion that it might be carrying undocumented aliens. The agents asked for permission to "search the van," and the defendant consented. *Id.* at 1329. An agent "opened the sliding door of the van and conducted a visual search of its interior." *Id.* He found nothing and, leaving the door open, obtained consent to "run a dog on [the] vehicle." *Id.* The dog, who was not leashed at the time, leapt into the van and began to sniff the interior, eventually alerting at a rear vent. *Id.* at 1330. The Court concluded that the agents violated the defendant's Fourth Amendment rights by facilitating the dog's entry into the van. *Id.* at 1331. It was the dog's intrusion into the defendant's private space, not its sniffing at the open van door, that invalidated the search.

{15} Unlike the dog in *Winningham,* the dog in this case neither entered nor touched the vehicle. The agents in this case positioned the dog downwind from the vehicle near the open trunk, which is less intrusive than allowing the dog to enter or touch the vehicle. *Winningham* does not support Defendant's argument. The analysis in *Winningham* indicates that a dog sniff can become a search if the dog intrudes on the private space of the suspect, but such an intrusion did not occur here.

{16} The Court of Appeals also relied on *State v. Warsaw,* 1998–NMCA–044, 125 N.M. 8, 956 P.2d 139. In *Warsaw,* a narcotics dog jumped into the open trunk of the defendant's car after being prompted to do so by a police officer. *Id.* ¶ 17. The Court of Appeals recognized that a person has a reasonable expectation of privacy in an open trunk. *Id.* ¶ 16. After distinguishing cases where the officers neither prompted nor encouraged the dog to enter the protected space, the Court held that "the police officers . . . violated Defendant's expectation of privacy in his open trunk." *Id.* ¶ 17.

{17} This case is distinct from *Warsaw* for the same reason this case is distinct from *Winningham.* The dog did not enter the passenger compartment or trunk of Defendant's vehicle. The dog sniff in *Warsaw* was more intrusive because the dog entered the trunk to sniff for contraband. Because the dog did not enter the trunk in this case, no search occurred.

{18} For the reasons explained above, we hold that no Fourth Amendment search occurred when the federal agents directed a trained dog to sniff the odors emanating from the open trunk of Defendant's vehicle after obtaining consent to "inspect" or "look in" the trunk. Because the dog sniff was not a search for Fourth Amendment purposes, the scope of Defendant's consent did not restrict the use of the dog. We therefore conclude that the use of the dog did not violate Defendant's Fourth Amendment rights.

III.

{19} We hold that the agents did not violate Defendant's Fourth Amendment rights by directing the dog to sniff at the odors emanating from the open trunk of the vehicle. We therefore reverse the Court of Appeals and remand this case to that court with directions to proceed in a manner consistent with this opinion. It is our intention that the issues remaining unresolved as a result of this opinion be resolved by the Court of Appeals. We do not exclude rebriefing, oral argument, or remand to the district court if in the judgment of the Court of Appeals any of those procedural options seem appropriate.

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

PATRICIO M. SERNA, Chief Justice, JOSEPH F. BACA, Justice, GENE E. FRANCHINI, Justice and PETRA JIMENEZ MAES, Justice, concur.

2001-NMCA-090

33 P.3d 638

Patrick Glenn SMITH and Jeanne Louise Smith, individually and as natural parents and next of kin of Sean Patrick SMITH, Plaintiffs–Appellants,

v.

BRYCO ARMS, Jennings Firearms, Inc., (NV), a/k/a B.L. Jennings and Jennings Firearms, Inc., (CA), Defendants–Appellees.

No. 20,389.

Court of Appeals of New Mexico.

July 27, 2001.

Michael G. Rosenberg, Rosenberg & Associates, P.C., Albuquerque, NM, Brian J. Siebel, Center to Prevent Handgun Violence, Washington, DC, for Appellants.

Sally Ann Hagan, J.D. Behles & Associates, a Commercial Law Firm, P.C., Albuquerque, NM, for Appellees.

OPINION

BUSTAMANTE, Judge.

{1} In this case we consider, under theories of strict products liability and negligence, the liability of the manufacturer and distributor of a .22 caliber handgun, referred to as the J–22, for the accidental shooting of an Albuquerque boy, 14–year–old Sean Smith (Sean), by his 15–year–old friend D.J. Valencia (D.J.). The trial court granted summary judgment to the gun manufacturer, Defendant Bryco Arms (Bryco), and to the gun distributor, Defendant Jennings Firearms, Inc. (NV), a/k/a B.L. Jennings and Jennings Firearms Inc. (CA) (Jennings).

{2} Plaintiff raises strict products liability and negligence theories of recovery against Bryco and Jennings. Both theories are predicated upon the fact that the J–22 handgun does not incorporate a "magazine-out safety," a "chamber load indicator," or a written warning on the gun itself alerting users that the J–22 can fire even though the magazine has been removed. The issues on appeal are (1) whether the court erred in ruling that, as a matter of law, Bryco and Jennings were not negligent because they had no duty to incorporate the safety features described above; (2) whether the trial court erred in ruling that, as a matter of law, the J–22 does not present an unreasonable risk of injury for purposes of strict product liability; and (3) whether Plaintiff came forward with evidence sufficient to raise a genuine issue of material fact that the failure to incorporate the above safety features was a proximate cause of Sean's injury. We reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

{3} The shooting occurred on January 29, 1993, at Sean's house. No parents were home at the time. Sean, Michael Brummett (Michael) age 15, and Brian Romero (Brian) age 16, were at Sean's house. The three boys decided to go out to get some food. While they were out, Michael legally purchased the J–22 handgun and ammunition for $40 from an individual identified only as Bernard. The sale occurred in a parking lot in Albuquerque. While purchasing the gun, Michael examined the chamber and saw it was empty and asked to see the ammunition magazine. Michael inserted the magazine into the gun and purchased it. The three boys examined the gun in the car. When they got back to Sean's house, the boys again

examined the gun. Michael put the gun and magazine clip in his jacket, brought it into the house, and took the gun with him into the bathroom. At some point, Sean also called D.J. to come over. Michael removed the magazine and kept it with him in the bathroom while the other boys passed the gun around in the livingroom. Sean, D.J., and Brian testified that they thought the gun was unloaded and would not fire with the magazine out. The boys testified that they did not realize that a bullet might remain in the chamber even though the magazine had been removed. When the gun was passed to D.J., he "stupidly" pulled the trigger and unintentionally shot Sean as Sean was talking on the telephone, hitting him in the mouth and seriously injuring him.

{4} Sean and his parents, Patrick and Jeanne Smith (Plaintiffs), initially filed a complaint to recover damages for personal injury, alleging that the parents of D.J., Michael, and Brian were negligent for failing to supervise the boys properly. The complaint was then amended to name the three boys and their parents, alleging negligence of minors, negligence as a matter of law, vicarious parental liability, and parental negligence. The complaint was amended a second time to add Bryco, the manufacturer of the J–22, and Jennings, the distributor of the J–22. The second amended complaint alleged that Bryco and Jennings were liable in strict products liability and negligence for manufacturing and distributing a product defective because of inadequate warnings and their failure to incorporate feasible safety devices into the design of the J–22 gun that would have prevented Sean's injuries. The claims against the minors and their parents were settled, leaving Bryco and Jennings as Defendants.

{5} Bryco and Jennings filed separate motions for summary judgment. After full briefing and a hearing, the trial court issued a Decision Letter and granted summary judgment in favor of Defendants. The Decision Letter reads as follows:

> As a matter of law I do not think that Defendants were either negligent in the manufacture of the gun, nor do I think they are liable under strict products liability. It is not alleged that the gun in question had a defect which caused the injury. The gun operated exactly as designed. Handguns are intended and designed to be deadly weapons. The fact that they are capable of being misused, and are in fact often misused, does not render them defective.
>
> This lawsuit against gun manufacturers is another attempt to outlaw or severely restrict the manufacture of a product using the tort law. In my opinion such efforts are better left to the legislative branch of government. If the legislature wants to require all manner of safety devices or warnings they may do so. It should not be for the courts and juries to make that law on a case by case manner. If this is a case for extending the tort law, it should not be done by this Court. A significant change in the law, as is advocated by Plaintiffs in this lawsuit, should be made, if at all, by the Supreme Court.

STANDARD OF REVIEW

{6} If the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law, then summary judgment should be granted. Rule 1–056(C) NMRA 2001; *Paca v. K–Mart Corp.*, 108 N.M. 479, 480, 775 P.2d 245, 246 (1989). Summary judgment, however, is a drastic measure that should be used with caution. *Knapp v. Fraternal Order of Eagles*, 106 N.M. 11, 12, 738 P.2d 129, 130 (Ct.App.1987). "In deciding whether summary judgment is proper, a court must look to the whole record and view the matters presented in the light most favorable to support the right to trial on the merits." *Cunningham v. Gross*, 102 N.M. 723, 725, 699 P.2d 1075, 1077 (1985). We review questions of law de novo. *Self v. United Parcel Serv., Inc.*, 1998–NMSC–046, ¶ 6, 126 N.M. 396, 970 P.2d 582.

DISCUSSION

{7} As reflected in its Decision Letter, the trial court applied a restrictive definition of defect. In the trial court's view, a defect

consisted of a flaw in the fabrication of the particular J-22 involved in this case. The trial court reasoned that here, the J-22 functioned exactly as it was designed to do: when D.J. pointed the gun at Sean and pulled the trigger, the J-22 fired. Thus, under the trial court's restrictive definition of defect, the J-22 was not defective. The trial court relied on Plaintiffs' failure to show a manufacturing defect which resulted in a malfunction.

{8} The trial court's unwillingness to consider possible design and warning defects sidestepped the true gravamen of the Plaintiffs' case: that the gun as designed was defective because it did not incorporate available and economically reasonable design features and warnings which would have prevented the shooting. *See Fernandez v. Ford Motor Co.*, 118 N.M. 100, 109, 879 P.2d 101, 110 (Ct.App.1994) ("Under Section 402A, there are three types of defects: manufacturing defects, design defects, and warning defects."). Apparently viewing the application of normal products liability and negligence concepts to handguns as a significant change in the law, the trial court deferred to our Supreme Court for action. Characterizing Plaintiffs' action as an attempt to "outlaw or severely restrict" the manufacture of guns, the trial court also opined that the legislature is the most appropriate forum for any remedy. We address this concern first and then consider whether our general products liability and negligence law adequately encompasses Plaintiffs' cause of action.

{9} The notion that the courts cannot speak in the area of products liability without legislative guidance has been considered and rejected by the New Mexico Supreme Court. In *Brooks v. Beech Aircraft Corp.*, 120 N.M. 372, 382, 902 P.2d 54, 64 (1995), for example, the Court explained that the standards for measuring strict liability and negligence are the general and traditional rules of relevance and materiality for all evidence upon which unreasonable risk of harm and negligence are to be decided, unless the legislature has preempted the application of these principles with specific statutory product requirements. As such, New Mexico courts have long held manufacturers and distributors responsible in strict liability or negligence for failing to include safety devices in their products. *Id.* at 383, 902 P.2d at 65 (failure to include shoulder harness in aircraft); *see also Cleveland v. Piper Aircraft Corp.*, 890 F.2d 1540, 1556 (10th Cir.1989) (failure to include rear seat visibility and shoulder harness); *Fabian v. E.W. Bliss Co.*, 582 F.2d 1257, 1260–61 (10th Cir.1978) (failure to include punch press guards); *Fernandez*, 118 N.M. at 109–12, 879 P.2d at 110–14 (failure to include back-up alarm on tractor and trailer); and *Salinas v. John Deere Co.*, 103 N.M. 336, 341, 707 P.2d 27, 32 (Ct.App.1984) (failure to include "corn saver" in combine).

{10} All parties in the chain of distribution of a defective product are strictly liable. *Parker v. St. Vincent Hosp.*, 1996-NMCA-070, ¶ 4, 122 N.M. 39, 919 P.2d 1104 ("Ordinarily, any entity engaged in the business of selling or otherwise distributing products is strictly liable for distributing a defective product."). Public policy factors based on safety concerns, economic realities, and fairness (discussed below) have defined the responsibilities of product suppliers. Existing case law has relied on these factors and defined the decision-making roles of judge and jury in this area. *See* UJI-13-1406 to -1419 NMRA 2001 (including committee commentary and case law cited thereunder).

{11} The trial court was perhaps concerned that applying our tort law to handguns could have the effect of infringing on the constitutional right to bear arms. N.M. Const. art. XI, § 6. We recognize that firearms are different than other products in the sense that they are the subject of a constitutional right. However, as the following discussion will demonstrate, we do not perceive anything so unique about handguns that they cannot or should not be subject to normal tort law concepts, norms, and methods of analysis. The distinctive aspects of handguns as a type of firearm can be reasonably accommodated and accounted for under our existing law without effectively "outlawing" or otherwise restricting handgun manufacture and sale. To the contrary, application of our tort law can be expected to enhance ownership by tending to increase the safety of handgun use.

A. The Strict Products Liability Theory

{12} New Mexico adopted the principle of strict products liability based on the Restatement (Second) of Torts § 402A (1965) in *Stang v. Hertz Corp.*, 83 N.M. 730, 732, 497 P.2d 732, 734 (1972). "'The purpose behind the strict products liability doctrine is to allow an injured user or consumer to recover against a supplier or manufacturer without the requirement of proving negligence.'" *Fernandez*, 118 N.M. at 109, 879 P.2d at 110 (quoting *Trujillo v. Berry*, 106 N.M. 86, 88, 738 P.2d 1331, 1333 (Ct.App. 1987)). The policy underpinnings supporting imposition of strict liability on product manufacturers and suppliers include (1) ensuring that the risk of loss for injury resulting from defective products is borne by the suppliers, principally because they are in a position to absorb the loss by distributing it as a cost of doing business; (2) encouraging suppliers to select reputable and responsible manufacturers who generally design and construct safe products and who generally accept financial responsibility for injuries caused by their defective products; and (3) promoting fairness by ensuring that plaintiffs injured by an unreasonably dangerous product are compensated for their injuries. *Brooks*, 120 N.M. at 375–76, 902 P.2d at 57–58.

{13} Under the strict products liability theory, a supplier of products is liable for harm proximately caused by an unreasonable risk of injury resulting from a condition of the product or from a manner of its use. *See* UJI 13–1406; *Fernandez*, 118 N.M. at 109, 879 P.2d at 110. This rule applies even though all possible care has been used by the supplier in putting the product on the market. *Id.* at 109, 879 P.2d at 110. The liability of the supplier is to persons the supplier can reasonably expect to use the product and to be in the vicinity during the use of the product. *See id.; see also* UJI 13–1403 and UJI 13–1406 (stating supplier has a duty to consider foreseeable risks of injury). An unreasonable risk of injury is a risk which a reasonably prudent person having full knowledge of the risk would find unacceptable. UJI 13–1407; *Fernandez*, 118 N.M. at 112, 879 P.2d at 113. Determining whether a product design poses an unreasonable risk of injury also involves considering whether the risk can be eliminated without seriously impairing the usefulness of the product or making it unduly expensive. *Brooks*, 120 N.M. at 379–81, 902 P.2d at 61–63.

{14} Whether a product is unreasonably dangerous, and therefore defective, is ordinarily a question for the jury. *Fernandez*, 118 N.M. at 112, 879 P.2d at 113; *Salinas*, 103 N.M. at 341, 707 P.2d at 32. New Mexico's "unreasonable-risk-of-injury" test allows for proof and argument under any rational theory of defect. *Brooks*, 120 N.M. at 379, 902 P.2d at 61. The jury instructions covering strict products liability are designed to encourage a risk-benefit calculation by defining "unreasonable risk of injury" in a way which requires the jury to balance meritorious choices for safety made by the manufacturer while minimizing the risk that the public will be deprived needlessly of beneficial products. UJI 13–1407; *Brooks*, 120 N.M. at 379–80, 902 P.2d at 61–62. Under a strict liability theory, the jury assesses the supplier's design decisions according to a risk-benefit analysis rather than, or in addition to, its conduct (negligence) at the time of supply. *Id.* at 381, 902 P.2d at 63.

{15} For their strict liability claims, Plaintiffs allege that the J–22 handgun was in an unreasonably dangerous and defective condition because it (1) "[i]nadequately lacked a proper safety mechanism which would prevent the handgun from firing when the ammunition magazine was removed," (2) "was not designed so as to sufficiently warn foreseeable users when a round of ammunition has been loaded," and (3) lacked "a warning adequate to apprise all foreseeable users, especially minor users, of the fact that the handgun could fire a projectile even if the ammunition magazine were removed."

{16} We perceive nothing new or unusual in these theories of defect. They present straightforward assertions that the handgun could have—and therefore should have—incorporated long-known design features which would have helped prevent this shooting and others like it. The Plaintiffs' case assumes that in a products liability context, handgun manufacturers can and should be dealt with the same as any other defendant who makes unreasonable design decisions or provides in-

adequate warnings. We see no reason why they should be excluded. The fact that handguns are meant to fire projectiles which can cause great harm is to our view all the more reason to allow the tort system to assess whether the product is reasonably designed to prevent or help avoid unintended—albeit careless—firings such as occurred here.

{17} Misuse of a product is not of necessity fatal to a products liability cause of action. Suppliers are responsible for risks arising from foreseeable uses of the product, including reasonably foreseeable unintended uses and misuses. UJI 13–1403. The foreseeability of unintended uses and misuses is ordinarily a question for the jury; though there are cases where the use is so unforeseeable that the matter can be taken from the jury. *Van de Valde v. Volvo of Am. Corp.*, 106 N.M. 457, 458–60, 744 P.2d 930, 931–33 (Ct.App.1987) (using a tire restraining strap to secure luggage on a roof rack unforeseeable as a matter of law).

B. The Negligence Theory

{18} In support of their negligence claims, Plaintiffs allege that Defendants had a duty to Plaintiffs (1) "to use reasonable care in the design, manufacture and [marketing] of the J–22 handgun to ensure that it would be reasonably safe for its foreseeable uses" and (2) to warn Plaintiffs "of all inherent dangers to the J–22 handgun including the fact the weapon could fire a projectile even if the ammunition magazine was removed." Plaintiffs further allege that Defendants failed to fulfill this duty because they did not design the J–22 with a magazine-out safety, or a chamber load indicator, or a printed warning on the J–22.

{19} It is well-established in New Mexico negligence law that manufacturers and distributors of products have a duty to use ordinary care in producing products so as to avoid a foreseeable risk of injury caused by a condition of the product or manner in which it is used. UJI 13–1402; *see also Fernandez*, 118 N.M. at 113, 879 P.2d at 114; *Cleveland*, 890 F.2d at 1554–55. As detailed in UJI 13–1410, the manufacturer of a product must use ordinary care in designing, making, inspecting, tending, and packaging the product. Ordinary care is defined as "that care which a reasonably prudent supplier would use in the conduct of [its] business." UJI 13–1404. What constitutes ordinary care varies with the likelihood of injury and the seriousness of harm which can be reasonably expected; as the foreseeable danger increases, so does the amount of care required. *Id.; see also* UJI 13–1603 NMRA 2001. In deciding whether a supplier has exercised ordinary care, the jury is required to undertake a risk-benefit analysis which includes the usefulness of the product and its ordinary function. UJI 13–1410.

{20} These are bedrock propositions of New Mexico products liability negligence law. It can thus be stated without risk of contradiction that the duty of a product supplier to use ordinary care to avoid foreseeable risks of injury caused by a condition of the product or manner in which it is used exists as a matter of law. *Fernandez*, 118 N.M. at 113, 879 P.2d at 114. There are, however, limits to the duty of care. Manufacturer and supplier have the duty only to consider foreseeable risks of injury. *See Klopp v. Wackenhut Corp.*, 113 N.M. 153, 158, 824 P.2d 293, 298 (1992); *see also* UJI 13–1403. Where an injury is caused by a risk or a misuse of the product which was not reasonably foreseeable to the manufacturer and supplier, they are not liable. *See Klopp*, 113 N.M. at 158, 824 P.2d at 298.

{21} Stated positively, the general duty imposed on manufacturers and suppliers of products to use ordinary care includes a duty to consider risks of injury created by foreseeable misuse of the product. *Id.; see Brooks*, 120 N.M. at 374, 902 P.2d at 56 (discussing policies behind the rule, and noting that car manufacturers must make automobiles that are crashworthy, because it is foreseeable that drivers will drive negligently on the highways); *see also Cleveland*, 890 F.2d at 1554–55 (holding that the plaintiff's misuse of aircraft was objectively reasonable and thus foreseeable); *First Nat'l Bank v. Nor-Am Agric. Prods., Inc.*, 88 N.M. 74, 82, 537 P.2d 682, 690 (Ct.App.1975) (holding vendor liable for selling treated grain which would foreseeably be fed to hogs, making

them and humans who ate them ill); *Fabian*, 582 F.2d at 1262 (holding punch press manufacturer must use ordinary care to avoid risks against which it can expect the user to fail to protect himself); *Moomey v. Massey Ferguson, Inc.*, 429 F.2d 1184, 1188 (10th Cir.1970) (declaring it was not in error to refuse to hold conduct as misuse of product because manner of use was reasonably foreseeable). Thus, a product's misuse by the consumer does not necessarily operate to bar recovery as a matter of law.

{22} The duty of ordinary care is owed to persons who can reasonably be expected to use the product and to persons who can reasonably be expected to be in the vicinity during the use of the product. *Elmore v. Am. Motors Corp.*, 70 Cal.2d 578, 75 Cal.Rptr. 652, 451 P.2d 84, 88 (1969) (en banc) (holding that a product supplier's duty is owed to all who may be foreseeably endangered by the product, especially bystanders); *see also* UJI 13–1402, Committee Comment; Prosser & Keeton, *The Law of Torts* § 100, at 703 (5th ed. 1984) ("There is no longer any doubt that the negligence liability extends to any lawful user of the thing supplied, as well as to a mere bystander....").

{23} Defendants argue that they had no duty of care to Sean because they had no "special relationship" with him. Defendants base this contention on the theory that the injury was caused by D.J.'s criminal act in pointing and firing the handgun at Sean. Because the trigger was pulled by a third party, Defendants contend, they cannot be held liable unless it can be found that they had a special relationship with Sean which imposed a duty to control the conduct of the third person.

{24} Defendants cite the Restatement (Second) of Torts § 315 (1965), *Ciup v. Chevron U.S.A., Inc.*, 122 N.M. 537, 539, 928 P.2d 263, 265 (1996); *Rummel v. Edgemont Realty Partners, Ltd.*, 116 N.M. 23, 26, 859 P.2d 491, 494 (Ct.App.1993); *Torres v. State*, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995); and the dram shop cases including *Lopez v. Maez*, 98 N.M. 625, 651 P.2d 1269 (1982) in support of their argument. These authorities discuss and analyze the factors which should be taken into account when deciding whether an actor has a duty to protect another from the acts of third parties. The issue arises most frequently in the context of landlords and nonpossessory property owners. In *Rummel*, for example, the issue was whether the entity which owned real estate leased by a convenience store chain for one of its outlets had a duty to protect an employee of the store from the acts of a third party. 116 N.M. at 26, 859 P.2d at 494. In *Ciup*, the issue was whether a petroleum products franchisor had a duty to its franchisee's employee to guard against third party acts. 122 N.M. at 539, 928 P.2d at 265. The dram shop cases explore another facet of the general problem. They examine the duty owed by sellers of alcoholic beverages to third parties who may be injured by those to whom they purvey liquor. *See Lopez*, 98 N.M. at 628, 651 P.2d at 1272.

{25} The basic inquiry in all of these cases is whether the defendant has the ability to exercise control over a premise or an activity such that it is reasonable to impose a duty of ordinary care on it as to the management of the premises or activities. At times a duty is found based on the existence of a "special relationship" between plaintiff and defendant. *Rummel*, 116 N.M. at 26–27, 859 P.2d at 494–95. A special relationship can arise as part of a commercial connection between parties, or it can be more or less voluntarily undertaken. *See Sarracino v. Martinez*, 117 N.M. 193, 194–95, 870 P.2d 155, 156–57 (Ct.App.1994) (taking charge of intoxicated passenger created obligation of reasonable care for passenger's safety).

{26} These difficulties are not present in a products liability context. The basic policy decision has been made that the duty of a product distributor extends to persons who can be foreseeably injured by a defective product—including injuries caused by foreseeable misuse of the product if the defect proximately contributes to the injury. *See* UJI 13–1403. Thus, contrary to Defendants' contentions, a "special relationship" between manufacturer/distributor and user is not required to establish a product supplier's duty to make or distribute safe products.

{27} Further, the presence or absence of a special relationship between Defendants and Sean is immaterial because Plaintiffs are clearly not attempting to hold Defendants responsible for failing to control D.J. Plaintiffs are attempting to hold Defendants liable in negligence or strict liability for harm proximately caused by Defendants' affirmative acts of designing and distributing a defective product which combined with D.J.'s subsequent misconduct to injure Sean. "[A proximate cause] need not be the only cause, nor the last nor nearest cause. It is sufficient if it occurs with some other cause acting at the same time, which in combination with it, causes the injury." UJI 13–305 NMRA 2001. While Defendants are entitled to argue that their liability should be reduced by the percentage of fault attributable to D.J., NMSA 1978, § 41–3A–1(B) (1987), the nature of D.J.'s conduct does not, as a matter of law, prevent Defendants from being held accountable for the foreseeable consequences of their own misconduct. *Torres,* 119 N.M. at 613, 894 P.2d at 390 (holding that duty of care of New Mexico law enforcement officers may extend to out-of-state victims murdered by criminal who remained at large due to alleged negligence of officers investigating earlier murders by same criminal).

{28} Once it has been determined that a duty exists, the limits on that duty under a specific set of facts are ordinarily questions for the jury. *Klopp,* 113 N.M. at 160, 824 P.2d at 300 (holding negligence is an issue to be "decided by the jury whenever reasonable minds may differ"). Under existing New Mexico negligence case law, therefore, the issues of whether Bryco and Jennings breached their duty to design and distribute a safe product by failing to incorporate a magazine out safety device, and/or a chamber load indicator, and/or a warning to users to "check the chamber at all times for a bullet"; whether the boys were foreseeable users of the gun; and whether the alleged design defects or lack of warnings were the proximate cause of Sean's injuries in light of the conduct or misconduct of the minors in this case, are ordinarily all questions of fact for jury determination.

C. Material Issues of Fact Were Raised by Plaintiffs in Response to Defendants' Motions for Summary Judgment.

{29} Upon the movant for summary judgment "making a prima facie showing, the burden shifts to the party opposing the motion to demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Roth v. Thompson,* 113 N.M. 331, 334–35, 825 P.2d 1241, 1244–45 (1992). Defendants contend that as a matter of law, the J–22 was not a defectively designed product and Defendants were not negligent in the manufacture and design of it. Defendants contend they are entitled summary judgment as to the design and warning defects issues because the J–22 has the following safety features which they argue are sufficient as a matter of law: (1) the J–22 Operator's Parts and Instructions Sheet, which accompanies the newly manufactured gun in its display box, explains all safety concerns, including the safe loading and unloading of the gun; and (2) the word "Fire" is visible when the handgun is in a firing position, and there is a manual safety, which when applied makes the word "Safe" visible and keeps the gun from firing.

{30} Defendants also assert the J–22 handgun was not defectively manufactured because it operated as intended when D.J. intentionally pulled the trigger while pointing it at Sean, even if he did not intend to injure him. Bryco and Jennings representatives testified that had the boys put the existing safety on and not pointed the gun at anyone, as they had been taught by their parents and guardians not to do, the shooting could not have occurred. Defendants also contend they are entitled to summary judgment because the safety devices and warnings Plaintiffs advocate are not feasible for the J–22, and that, in general, there are pros and cons to the desirability, with gun purchasers, of magazine safeties.

{31} Defendants also contend they are entitled to summary judgment because as a matter of law, Bryco and Jennings had no duty to protect these minors against their intentional, reckless, and criminal use of the product. The President of Jennings,

Janice Jennings, testified that in her opinion, the boys' reckless conduct made the accident inevitable. The boys' actions were so reckless, willful, and criminal, Defendants contend, that as a matter of law, this misuse of the gun could not reasonably be foreseen by Bryco and Jennings. Finally, Defendants argue that the boys' actions interrupt the chain of proximate causation. Defendants point to the boys' depositions where they each admitted their actions were "stupid." In addition, the boys admitted that they acted contrary to what they had been taught by their parents or guardians about not handling guns, not pointing them at anyone, and assuming a gun is loaded at all times. The boys admitted that they initially lied to the police about how they got the gun and how the shooting occurred. They also admitted to initially hiding the gun from their parents and the police.

{32} To counter Defendants' criminal and per se negligence theories, Plaintiffs provided evidence that the boys purchased the gun legally at the time. *See* 18 U.S.C. § 922(b)(1) (1994) (making it unlawful for "licensed dealer" to sell a handgun to a juvenile); 18 U.S.C. § 922(1)(x) (1994) (unlawful sale of handgun by "person" to juvenile not enacted until 1994); NMSA 1978, § 30–7–2.2 (1994) (unlawful possession of handguns by juveniles not enacted until 1994). To counter Defendants' assertions that the gun is sufficiently safe, Plaintiffs provided evidence that when purchased, there was no Parts and Instruction Sheet that came with the gun, and that this was a common occurrence in gun sales. In addition, Plaintiffs provided evidence that without the instruction sheet and in the absence of a magazine-out safety, chamber load indicator, or suitable warning (e.g., "check the chamber for a bullet at all times"), that loading and unloading the gun is confusing depending on whether the chamber is checked while the magazine is in or out. If the chamber is viewed while the magazine is in the gun, the chamber will appear empty, but a bullet will then be loaded into the chamber. Removing the magazine, therefore, does not necessarily unload the gun.

{33} While D.J. testified that he "stupidly" pulled the trigger, each of the boys testified that he thought the gun was unloaded because the magazine was out. There was some evidence that Sean or Brian actually, though inadvertently, may have loaded the gun while the magazine was in the gun and before returning it to Michael who thought that, by removing the magazine and keeping it with him while the other boys examined the gun in another room after D.J. showed up, he had made it safe. Michael testified that the chamber was empty when he examined the gun while purchasing it. Then, when Michael removed the magazine and kept it with him in the bathroom while the other boys examined it in another room, Michael testified that he thought the gun was safe and unloaded.

{34} In response to Defendants' contentions that the J–22 had sufficient safety devices and warnings as designed, Plaintiffs provided evidence that patents for magazine-out safeties have been filed in 1912, 1914, 1916, 1921, 1922, 1927, 1945, 1949, 1951, 1977, 1980, 1981, 1984, and 1986. These patent applications specifically articulate the known danger that people will remove the gun magazine and think they have unloaded the gun and then fire it, unintentionally injuring someone. The United States Patent Office granted the first patent for a magazine-out safety device on April 30, 1912. The Patent Abstract for this patent No. 1,024,932, describes a device with the purpose and effect of preventing accidents such as the one in which Sean was injured:

> A number of accidents occur in connection with automatic fire arms owing to the fact that if the fire arm is loaded and the magazine withdrawn, persons little acquainted with the operation of these fire arms often believe it to be unloaded while in reality a cartridge remains in the barrel.
>
> The present invention has for its object to obviate such accidents by providing means for setting the weapon automatically at a position of safety immediately the magazine is withdrawn.

See also Hurst v. Glock, Inc., 295 N.J.Super. 165, 684 A.2d 970, 972–73 (App.Div.1996) (reciting a report relying on patents as evidence that the Glock handgun was defective for failing to include a magazine safety, which

the report concluded was a "standard safety feature[ ]" for "[r]esponsible firearms manufacturers and designers"). The report in the *Hurst* case was also based on a National Rifle Association magazine article that lauded the accident-prevention value of a magazine safety and the fact that certain gun makers, including Smith & Wesson, include these safeties on their handguns:

> The reasons for the importance of the magazine safety as pointed out in 1910 [patents], 1916 [patents], and [a] 1958 [*American Rifleman* article] are no less valid or important today ... Responsible firearms manufacturers and designers produce and design guns with this important device as one of the guns['] standard safety features.

Id.

{35} In response to Defendants' contentions that the boys' misuse of the gun was unforeseeable or interrupted proximate causation, Plaintiffs provided government studies that show that the kind of unintentional shooting that occurred in this case is relatively common and might have been prevented if the person handling the gun had known it was loaded. For example, a nationally published study by the United States General Accounting Office reported in 1991 that 23% of unintentional shootings in America might have been prevented if the person handling the gun had known it was loaded. Another study showed that in New Mexico, 25 children aged 0–14 years old were killed in unintentional shootings between 1984 and 1988. During depositions, Defendants admitted they could foresee that children and teenagers would be able to access the J–22, and could be injured from handling a gun they believed to be unloaded. Plaintiffs' evidence would permit a reasonable jury to find that at the time the J–22 handgun was manufactured, Defendants were on notice, knew, or should have known of the risks posed by bullets in the chamber through the numerous patents filed about this issue, existing designs by other gun manufacturers, and through lawsuits against gun manufacturers and distributors.

{36} Documents and advertisement flyers showed that recent handguns manufactured and distributed by Defendants have incorporated a magazine-out safety that blocks the trigger bar and disables the handgun so that it cannot fire when the magazine is removed, and a chamber load indicator device to guard against the risks posed by a bullet hidden in the chamber. Plaintiffs quoted Defendants' testimony that, notwithstanding, Defendants did not consider additional safety devices for the J–22; that no product analyses were conducted on the J–22; that no one reviews Bryco products to see if they can be made safer; and that Bryco did not investigate what other manufacturers were doing to make their firearms safer.

{37} Defendants admitted that had a magazine-out safety been in the J–22 at the time D.J. fired, the gun would not have fired and Sean would not have been shot.

{38} This is not a case where the use to which the product was put is so unforeseeable as a matter of law that the case should be taken from the jury under either a strict products liability or negligence theory. *See Van de Valde,* 106 N.M. at 458–60, 744 P.2d at 931–33 (holding use of a tire restraining strap to secure luggage on a roof luggage rack unforeseeable as a matter of law). Moreover, Plaintiffs are not arguing that the J–22 is per se defective because it is a gun and capable of being misused for intentional shootings. *See Armijo v. Ex Cam, Inc.,* 656 F.Supp. 771, 773–75 (D.N.M.1987) (rejecting plaintiff's argument that defendants' guns were per se defective because the risk of them being misused by murderers outweighed their utility).

{39} In addition, Plaintiffs' feasibility evidence conflicted with Defendants' contentions on that point. Plaintiffs provided evidence indicating that installing the safety devices and warnings were both feasible and inexpensive. The cost of the magazine out safety parts is about 22 cents and the cost of the chamber load indicator parts about 8 cents, adding about 30 cents to the manufacturing price of the J–22. Finally, Plaintiffs presented the affidavits of three experts on the issues of feasibility, foreseeability, and causation. Vaughn P. Adams, Jr., Ph.D., P.E., is a registered industrial and safety engineer who has qualified as an expert in numerous cases

and has testified on safety devices and firearms. In his opinion, Bryco and Jennings failed to provide reasonable safeguarding means which were available and widely known at the time the J–22 handgun was designed, manufactured, and distributed, to control the recognized hazard of unintentional discharge of their handgun under foreseeable conditions, including the occurrence of a cartridge unknowingly remaining in the chamber when the magazine was removed. He also opined that it was foreseeable that severe injury and death will be caused when individuals handle a loaded handgun which they believe is unloaded. David P. Sklar, M.D., Chairman of the Department of Emergency Medicine, Professor of Internal Medicine, and Medical Director of the Center for Injury Prevention, Research, and Education at the University of New Mexico School of Medicine, also opined about the foreseeability of accidental shootings like the one that injured Sean. Robert L. Hillberg, a firearms manufacturer and designer, opined about the feasibility of installing additional safeties and warnings on the J–22.

CONCLUSION

{40} For years, New Mexico courts have held manufacturers and distributors responsible for marketing products that pose an unreasonable risk of injury. *See Brooks*, 120 N.M. at 375–80, 902 P.2d at 57–62 (discussing history of products liability law in New Mexico). In this case, we are applying existing principles of products liability under New Mexico law to another type of product supplier: the manufacturer and distributor of the J–22 handgun. We are not changing the law.

{41} Plaintiffs' claims pose the question whether the gun could function as intended and yet be made safer. Plaintiffs contend that the J–22 is defective because it did not incorporate safety devices and warnings designed to prevent foreseeable unintentional shooting accidents, a claim well within existing New Mexico products liability and negligence law. We note that the open and obvious danger rule has been abolished in New Mexico and a risk is not made reasonable simply because it is made open and obvious to persons exercising ordinary care. *Klopp*, 113 N.M. at 157, 824 P.2d at 297. Thus, several of the out-of-state cases on which Defendants rely, *e.g.*, *Treadway v. Smith & Wesson*, 950 F.Supp. 1326 (E.D.Mich.1991), are not controlling in this jurisdiction.

{42} Whether the type of misuse evident in this case was foreseeable, whether the existing features of the J–22 are sufficiently safe, and whether it was feasible without impairing the utility of the gun or being unduly expensive for Bryco and Jennings to incorporate the advocated safety devices and/or warnings into the design of the J–22, are all issues for the jury to decide. To determine whether Bryco and Jennings are strictly liable for Sean's injuries, the jury will assess whether the product as designed posed an unreasonable risk of injury to these minors. To determine whether Bryco and Jennings are liable under a negligence theory, the jury will assess whether they were negligent in adopting the particular design of the J–22.

{43} The testimony, documents, and affidavits produced by Plaintiffs in response to Defendants' motions for summary judgment establish that reasonable minds could disagree on these issues.

{44} Because there remain material issues of fact for resolution by the jury, Defendants are not entitled to judgment as a matter of law. The trial court erred, therefore, in granting summary judgment and in removing these material issues of fact from jury decision. The judgment of the trial court is reversed and this case is remanded for proceedings consistent with this opinion.

{45} IT IS SO ORDERED.

A. JOSEPH ALARID, Judge, and LYNN PICKARD, Judge, concur.

2001-NMCA-082

33 P.3d 651

PUBLIC SERVICE COMPANY OF NEW MEXICO, Defendant-Appellant/Cross-Appellee,

v.

DIAMOND D CONSTRUCTION COMPANY, INC., Plaintiff-Appellee/Cross-Appellant.

No. 21,590.

Court of Appeals of New Mexico.

Aug. 22, 2001.

Certiorari Granted Oct. 9, 2001.

Certiorari Quashed, No. 27,132, Oct. 16, 2001.

Thomas C. Bird, Eric R. Burris, Kathleen M. Regan, Keleher & McLeod, P.A., Albuquerque, NM, for Appellant/Cross–Appellee.

Jane Bloom Yohalem, Santa Fe, NM, Thomas J. Hynes, Farmington, NM, for Appellee/Cross–Appellant.

OPINION

PICKARD, Judge.

{1} In this appeal we must decide whether the inclusion of an at-will termination clause in a contract relieves the parties of their duty, under the same contract, to use their best efforts to resolve disputes quickly and amicably. In addition, we must review the sufficiency of the evidence underlying the jury's award of punitive damages. Finally, we must determine whether the culpable mental states underlying punitive damages awards are synonymous with "tortious conduct, bad faith, intentional or willful acts," such that the 15 percent post-judgment interest rate set by NMSA 1978, § 56–8–4 (1993), should apply to all punitive damages awards.

{2} Defendant Public Service Company of New Mexico (PNM) appeals from a judgment awarding compensatory and punitive damages to Plaintiff Diamond D Construction Company, Inc. (Diamond D). At trial, the jury found that PNM breached its contract with Diamond D by failing to use its best efforts to quickly and amicably resolve a billing dispute and by wrongfully suspending work prior to terminating the contract. Before and after trial, PNM moved to dismiss Diamond D's claims on the grounds that (1) a contractual provision reserving the right to terminate the contract for any reason nullified all other provisions appearing to regulate the parties' dispute resolution rights and obligations, (2) PNM's refusal to verbally guarantee the adequacy of the workload after the parties had previously agreed to temporarily suspend work relieved PNM of its contractual obligation to provide an adequate workload up to the date of termination, and (3) the evidence was inadequate to show that PNM employees acted with a sufficiently culpable mental state to justify an award of punitive damages. The trial court rejected PNM's arguments and entered judgment on the jury's verdict. At the presentment hearing, Diamond D argued that it was entitled to an award of post-judgment interest at the rate of 15 percent per year, *see* § 56–8–4(A), based on the jury's finding that PNM had acted recklessly or wantonly in breaching the contract. The trial court rejected Diamond D's arguments and set the interest rate at eight and three-quarters percent. PNM appealed and Diamond D cross-appealed. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

{3} In May 1996, Diamond D and PNM entered into a contract for the remediation of contaminated pits in oil fields near Bloomfield, New Mexico. The remediation work involved excavating soil contaminated by dis-

charge from natural gas wells, spreading out the soil to allow the contaminants to evaporate, and then returning the decontaminated soil to the excavated pits.

{4} The remediation contract between PNM and Diamond D includes several provisions relevant to this appeal. First, a termination clause gives PNM the right to terminate a construction contract for any reason, with fifteen days written notice:

> 31.2 Notwithstanding any of the foregoing or anything in this Contract to the contrary, PNM shall have the right, at any time and for any reason whatsoever, including its own convenience, before completion of Work and upon fifteen (15) calendar days advance written notice, to suspend, abandon, or terminate said Work, or any portion thereof, and to terminate this Contract, without regard to whether or not Contractor has defaulted or failed to comply with the provisions of this Contract.

The parties agree that this provision was modified by a contract change that extended the period of performance from one year to until the project was completed or "until terminated by either party providing thirty (30) days written formal notice to the other party."

{5} The second relevant provision is a dispute resolution clause that imposes a duty on both parties to attempt a prompt and amicable resolution of all disputes:

> 32.1 Disputes on any matter relating to this Contract shall be discussed and resolved by authorized representatives of each Party who have the authority to bind the Party that they represent. The Parties shall use their best efforts to amicably and promptly resolve the dispute.

Finally, the contract requires that PNM "ensure that an adequate number of pits are available for remediation each week," for the duration of the contract.

{6} According to Diamond D and several PNM employees, the first two years of the remediation project went well. The project was within budget and on schedule, and the parties were able to amicably and informally resolve any disputes that arose. During the winter of 1996–1997, Diamond D and PNM agreed to stop remediation work temporarily because the cold weather prevented the contaminants from evaporating, and mud, snow, and frozen soil greatly slowed the digging process.

{7} The following winter, however, PNM decided not to stop the work and asked Diamond D to work on so-called "wet pits," where contaminants have been carried away from the discharge point by the watertable and which therefore require more extensive excavation and remediation than other sites. The clean-up techniques used on wet pits are not affected substantially by cold weather. PNM gave Diamond D a list of equipment that would be needed to complete the wet pit work and told Diamond D not to schedule other work for that equipment. Diamond D complied with PNM's request and turned down other work so that the equipment would be available.

{8} PNM gave Diamond D a list of five wet pits to remediate. The president of Diamond D testified that these pits were sufficient to keep Diamond D busy until the regular remediation project resumed in April 1998. Diamond D began working on the wet pits in January 1998.

{9} Between December 1997 and January 1998, PNM became aware that PNM field staff had made verbal changes to the contract with Diamond D. These changes were not put into writing, as required by the terms of the contract. In February 1998, PNM initiated an audit of the contract. The auditors were instructed to compare Diamond D's financial reports and invoices to the original, written contract. The auditors identified approximately $120,000 in discrepancies in Diamond D's invoices, which PNM concluded represented overbilling by Diamond D. Ultimately, however, PNM concluded that, with the exception of $10,000, the invoices were proper.

{10} On March 5, 1998, PNM sent a letter to Diamond D, ordering an immediate stop to the wet pit work. In the letter, PNM indicated that it was considering termination of its contract with Diamond D. Diamond D responded to the letter by making repeated telephone calls to PNM management, re-

questing that Diamond D be given an opportunity to discuss and attempt to resolve the billing disputes. All PNM employees contacted by Diamond D refused to discuss the dispute, instead referring Diamond D to another employee or promising to get back to Diamond D, but never doing so.

{11} On March 13, 1998, PNM sent Diamond D a notice of intent to terminate the contract. Diamond D responded by repeating its urgent telephone calls to PNM management, but encountered the same unwillingness of PNM staff to discuss the dispute. As Diamond D's president testified, "[w]e contacted every person [at PNM] that we knew a name to." Finally, on March 26, 1998, Diamond D's president wrote a letter to PNM's president, "agree[ing] that under the terms of the contract either party may cancel at any time by giving 30 days notice," but nonetheless stating that Diamond D had carried out its part of the contract and requesting that someone at PNM respond to Diamond D's attempts to resolve the issue regarding invoices. Diamond D followed up on this letter with repeated telephone calls. No action was taken by PNM, and the contract was terminated on April 12, 1998.

{12} Diamond D filed a complaint alleging that PNM breached the remediation contract and committed a prima facie tort. Only the contract claims are relevant to this appeal. Diamond D's breach of contract claims were based on (1) the failure of PNM to use its best efforts to amicably and promptly resolve the billing dispute, as required by Clause 32.1 of the general provisions and (2) the failure of PNM to provide Diamond D with pits to remediate between the date of PNM's notice that work under the contract would be suspended and the date PNM's termination of the contract became effective. Diamond D sought compensatory and punitive damages. The punitive damages claim was based on allegations that PNM had acted recklessly in refusing to meet with Diamond D representatives and had wantonly disregarded Diamond D's rights under the contract.

{13} PNM responded by filing a motion for summary judgment, which was denied by the trial court. The case was tried before a jury. The jury found that PNM had breached the contract and awarded Diamond D $25,000 for PNM's failure to provide adequate pits and $365,000 for PNM's failure to attempt resolution of the billing dispute. In addition, the jury awarded Diamond D $1.5 million in punitive damages, finding that PNM's violation of the contract was wanton and reckless.

{14} At the presentment hearing, Diamond D argued that it was entitled to post-judgment interest at the 15 percent rate provided by Section 56–8–4(A) for judgments based on "tortious conduct, bad faith, intentional or willful acts." The trial court rejected Diamond D's argument and set the post-judgment interest rate at eight and three-quarters percent.

{15} PNM appeals, and Diamond D cross-appeals. On appeal, PNM argues that (1) the termination provision of the contract had precedence over the dispute resolution clause, and therefore Diamond D's claim for breach of the contract fails as a matter of law; (2) the evidence was insufficient to find that PNM breached the "adequate number of pits" provision of the contract given that the parties had agreed to suspend work during the previous winter and PNM had not verbally guaranteed that work would continue through the winter at issue; and (3) the evidence was insufficient to sustain a finding that PNM breached the remediation contract with a culpable state of mind, and therefore the trial court erred in refusing to vacate the jury's award of punitive damages. On cross-appeal, Diamond D argues that the language and history of Section 56–8–4(A) evince a legislative intent that the higher 15 percent post-judgment interest rate be imposed on all punitive damages awards, or, in the alternative, be imposed on the award in this case.

II. DISCUSSION

A. Breach of Contract

1. *Standard of Review*

{16} Whether the trial court erred in denying motions for summary judgment, directed verdict, and a new trial on the issue of whether the termination clause took precedence over and controlled the dispute resolution clause as a matter of law is a question of

law which we review de novo. *See Mitchell-Carr v. McLendon*, 1999-NMSC-025, ¶ 30, 127 N.M. 282, 980 P.2d 65 (holding that a party's entitlement to judgment as a matter of law is reviewed de novo); *W. Farm Bureau Ins. Co. v. Carter*, 1999-NMSC-012, ¶ 4, 127 N.M. 186, 979 P.2d 231 (holding that interpretation of a contract is an issue of law that is reviewed de novo). In reviewing for sufficiency of the evidence, we use the substantial evidence standard. Under this standard, we view the evidence in the light most favorable to support the jury's verdict, drawing all reasonable inferences and resolving all disputed facts in favor of the verdict. *Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000-NMSC-033, ¶¶ 6-7, 129 N.M. 698, 12 P.3d 960.

2. Dispute Resolution

{17} PNM argues that, as a matter of law, the at-will termination clause precludes the jury's finding that PNM breached its agreement to attempt an amicable and prompt resolution of the billing dispute. PNM's position is premised on its assertion that the only possible basis for the jury's finding of a breach must have been its interpretation that the dispute resolution clause modified the at-will termination provision such that the parties could not exercise their right to terminate for any reason without first attempting to resolve any disputes related to the contract. Based on its formulation of the issue, PNM claims that we must find that the termination provision takes precedence over and controls the dispute resolution clause, disallowing what it argues are damages based on termination of the contract, because (1) the contract's termination and dispute resolution clauses irreconcilably conflict; (2) the termination provision is a "change" that has precedence over all other provisions of the contract; and (3) the introductory language of the at-will termination clause, which states that the clause applies "[n]otwithstanding any of the foregoing or anything in this contract to the contrary," expressly trumps the dispute resolution clause.

{18} Diamond D asks us to reject PNM's formulation of the issue. Instead, Diamond D contends that the jury was asked to determine (1) whether PNM breached the dispute resolution clause by failing to use its best efforts to attempt an expedient and amicable resolution of the billing dispute and (2) whether Diamond D suffered damages as a result of this breach. Under Diamond D's formulation of the issue, the termination of the contract is relevant only insofar as Diamond D was able to prove that breach of the dispute resolution clause was the likely cause of the termination and the proximate cause of the resulting loss of profits. We agree with Diamond D's formulation, and in so doing, we note that the jury did not decide the issue of which clause took precedence-the dispute resolution clause or the termination clause. That issue was determined by the trial court when it submitted to the jury the issue of damages caused by the breach of the dispute resolution clause. The jury was not instructed to interpret the contract or to determine the intent of the parties, and it did not have to do so in reaching its verdict under the instructions given. We therefore address the legal issue determined by the trial court.

{19} In deciding this appeal, we rely on several basic rules of contract interpretation. First, we view the contract as a harmonious whole, give meaning to every provision, and accord each part of the contract its significance in light of other provisions. *See id.* ¶ 8, 12 P.3d 960; *Manuel Lujan Ins., Inc. v. Jordan*, 100 N.M. 573, 575, 673 P.2d 1306, 1308 (1983). We will not interpret a contract such that our interpretation of a particular clause or provision will annul other parts of the document, unless there is no other reasonable interpretation. *See Casias v. Cont'l Cas. Co.*, 1998-NMCA-083, ¶ 13, 125 N.M. 297, 960 P.2d 839. "Apparently conflicting provisions must be reconciled so as to give meaning to both, rather than nullifying any contractual provision, if reconciliation can be effected by any reasonable interpretation of the entire instrument in light of the surrounding circumstances." 17A C.J.S. *Contracts* § 324, at 348-49 (1999) (footnotes omitted) (citing Restatement (Second) of Contracts § 203(a) (1981)). Finally, we strictly construe a contract against the party who drafted the contract in order to protect the rights of the party who did not

draft it. *See In re Vidal*, 234 B.R. 114, 119 (Bankr.D.N.M.1999); *Schultz & Lindsay Constr. Co. v. State*, 83 N.M. 534, 536, 494 P.2d 612, 614 (1972).

{20} PNM's contentions would require us to interpret the contract in violation of the well-established rule that particular provisions should not be read to annul other provisions unless there is no other reasonable interpretation. *See Casias*, 1998 NMCA 083, ¶ 13, 125 N.M. 297, 960 P.2d 839. It is unnecessary to read the dispute resolution provision as conditioning or limiting the parties' rights to terminate at any time and for any reason. We understand these two provisions to be coextensive: either party may terminate for any reason or no reason at all, but if the termination is the result of a dispute, the party must also use its best efforts to attempt a resolution of the dispute within the thirty days remaining before the termination becomes effective. *See Mayfield Smithson Enters. v. Com -Quip, Inc.*, 120 N.M. 9, 14, 896 P.2d 1156, 1161 (1995) (stating that provisions of a contract will not be read to nullify other provisions). Attempts to quickly and amicably resolve disputes benefit the parties beyond merely staving off potential termination. In this case, for example, as a result of the ongoing dispute, PNM refused to accept Diamond D's bid on another project, despite the fact that Diamond D was the low bidder, ceased inviting Diamond D to bid on projects for which Diamond D was qualified, and delayed payment of approximately $55,000 owed to Diamond D for work performed under the remediation contract.

{21} When both provisions are triggered-as in this case where the billing dispute likely resulted in the termination of the contract-the contract allows PNM to give immediate notice of intent to terminate, without requiring PNM to attempt resolution first, as long as PNM nonetheless uses its best efforts to amicably and promptly resolve the dispute within the time remaining prior to the date on which the termination becomes effective. *See Brown v. Am. Bank of Commerce*, 79 N.M. 222, 226, 441 P.2d 751, 755 (1968) (holding that a termination provision requiring ninety-days notice required that both parties continue to abide by terms of contract from date notice given until date termination became effective). It is unnecessary for us to read the contract as requiring PNM to allow Diamond D to attempt to persuade it to reinstate the contract, and we do not understand Diamond D to assert this position; nor do we understand the court or the jury to have found such an interpretation.

{22} We also reject PNM's attempt to portray Diamond D's letter to PNM's president as evidence of Diamond D's "practical interpretation" of the contract to allow PNM to terminate without attempting to resolve the dispute. Diamond D's letter is consistent with our interpretation of the contract: after acknowledging that PNM had the right to terminate the contract, Diamond D explained that it had questions concerning the billing dispute, described its attempts to meet with PNM representatives to resolve the dispute, and again requested the opportunity "to meet with someone to express our side of this issue." Diamond D did not ask that the contract be reinstated or that PNM delay its decision to terminate until after the parties had attempted to resolve the billing dispute. Instead, Diamond D merely asked that PNM attempt an amicable resolution of the dispute in spite of the fact that the contract had been terminated.

{23} The jury instructions likewise support our understanding of the contract and of the jury's finding of breach. The jury was instructed that, to find that PNM breached its duty to attempt a prompt and amicable resolution of the billing dispute, the evidence must show that:

1. Plaintiff and Defendant entered into the Remediation Contract.

2. Under the terms of the Remediation Contract, Defendant had the obligation to discuss and attempt to amicably and promptly resolve disputes which related to the contract prior to terminating the contract.

3. Defendant refused to discuss with Plaintiff disputes arising from the contract and to attempt to amicably and promptly resolve such disputes.

4. Plaintiff was damaged as a result of Defendant's refusal to discuss such disputes and amicably and promptly resolve disputes which related to the contract.

PNM focuses its interpretation of the issue on the phrase "prior to terminating the contract." Diamond D counters that this phrase merely describes the time period during which PNM breached the contract, and it does not direct the jury to consider whether PNM's right to terminate the agreement was contingent on the fulfilment of its duty to attempt to resolve the underlying dispute.

{24} We read jury instructions as a whole and resolve ambiguities by referring to other parts of the instructions. *See Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999–NMSC–006, ¶ 46, 127 N.M. 1, 976 P.2d 1; *McCarson v. Foreman*, 102 N.M. 151, 158, 692 P.2d 537, 544 (Ct.App.1984). In this case, other sections of the instructions support Diamond D's position that the jury was asked to determine only whether PNM breached its duty to attempt resolution and not whether the resolution clause modified PNM's contract termination rights. For example, in describing the relief sought by Diamond D, the introduction to the instruction on breach of the dispute resolution clause states: "Plaintiff seeks compensation from ... Defendant for damages which Plaintiff claims were proximately caused by Defendant's refusal to attempt to resolve disputes between Plaintiff and Defendant." Later the instruction informed the jury that Diamond D bore the burden of proving "that the refusal of Defendant to discuss disputes and attempt to amicably and promptly resolve such disputes was the proximate cause of Plaintiff's damages." Read together, these instructions directed the jury to consider PNM's behavior from the date the dispute arose in January 1998 until the contract termination became effective on April 12, 1998. This instruction was a correct statement of the law insofar as PNM's duties under the contract continued until the contract was terminated. *See Brown*, 79 N.M. at 226, 441 P.2d at 755.

{25} We note that Diamond D's proposed jury instructions did not include the limiting phrase "prior to terminating the contract." Instead, the proposed instructions merely asked the jury to determine whether the evidence showed that PNM had a duty to attempt to resolve disputes "which arose ... during the terms [sic] of the contract." The termination language was added at the insistence of PNM's attorneys. After the jury returned its verdict, Diamond D moved to supplement the record to include its original instructions to prevent PNM from making the very claim it now makes on appeal. Insofar as PNM is arguing that the jury instructions were legally incorrect or confusing, it is precluded from making this argument by its interjection of the error. *Harrison v. ICX, Ill.–Cal. Express, Inc.*, 98 N.M. 247, 252, 647 P.2d 880, 885 (Ct.App. 1982).

{26} In its reply brief, PNM argues that the jury instructions are irrelevant because the verdict was subsumed by the judgment, which states that the jury found that PNM breached the contract by "terminating ... without first attempting to resolve disputes." We reject this argument. If the meaning of a judgment is ambiguous, the entire record may be used to properly construe the judgment. *Russell v. Russell*, 106 N.M. 133, 136, 740 P.2d 127, 130 (Ct.App. 1987). In this case, the jury was properly instructed and the trial court was aware that Diamond D's claim was not for improper termination of the contract but was for failure to attempt an amicable and expedient resolution of the dispute.

{27} Finally, we reject PNM's contention that in seeking loss-of-profit damages Diamond D's real position all along was that the breach in question was the act of terminating the contract, not the refusal to discuss and attempt to resolve the billing dispute. We recognize that loss-of-profit damages are ordinarily awarded for a wrongful termination of contract. However, the unique facts of this case support the award of such damages for breach of the dispute resolution clause. For contract termination loss-of-profit damages to be awardable, the necessary proximate cause connection had to be that, but for PNM's refusal to discuss and attempt to resolve the billing dispute, the

dispute would likely have been amicably resolved, giving PNM no reason to want to exercise its at-will termination right and resulting in a continuing amicable contractual relationship between the parties. The theory of Diamond D's case was that PNM's preclusion of that likely result through a contract termination entitled Diamond D not solely to damages directly flowing from the billing dispute prior to termination, but also to loss of profits arising from any cause linked to the breach of the dispute resolution clause, including the resulting termination of the contract. The evidence introduced at trial supported Diamond D's theory.

{28} PNM did not object to the jury instructions. By failing to object, PNM is in no position to complain about the theories of liability, proximate cause, and damages as they were given to the jury. In addition, PNM does not challenge the jury's finding that PNM failed to use its best efforts to promptly and amicably resolve the billing dispute, nor does it challenge the jury's finding that PNM's breach of the dispute resolution clause was the proximate cause of Diamond D's damages. An unchallenged finding by the trial court is binding on appeal. *Stueber v. Pickard,* 112 N.M. 489, 491, 816 P.2d 1111, 1113 (1991). Because we have rejected PNM's interpretation of the contract, and sufficient evidence was presented below to support Diamond D's claims that PNM breached the dispute resolution provision and that the breach was the proximate cause of the damages, we affirm the award of $365,000 for breach of the dispute resolution clause.

{29} In so doing, we wish to note that PNM cannot justifiably complain about the court's refusal to determine as a matter of law that the termination clause took precedence and controlled over the dispute clause. PNM drafted the contract. An express promise in a contract requiring a party to take certain action that can be rendered superfluous and useless simply upon giving notice of termination of the contract, or by terminating the contract, is illusory. A dispute resolution provision like the one in the contract at issue is for the salutary purposes of preserving an ongoing business relationship and reducing delay and cost. A contracting party whose form of contract contains a dispute resolution provision juxtaposed with a purported at-will termination provision without an unambiguous, clear, obvious, and explicit explanation of the differences between the provisions and a statement that the contract can be terminated whether or not a party uses its best efforts to resolve any particular dispute is simply inviting litigation. We see no error in denying PNM's request to take the case from the jury where PNM has set the contract up to unambiguously obligate itself to work out disputes while at the same time appearing to give itself unbridled discretion to disregard that obligation by terminating the contract under the at-will termination clause.

3. Adequate Pits

{30} At trial, the jury found that PNM breached the remediation contract by suspending work from March 9, 1998, until April 12, 1998, when the termination took effect. PNM argues that the jury erred in making this finding for two reasons: (1) the terms of the contract allowed PNM to suspend work for any reason and (2) the evidence showed that the parties did not intend to extend the adequate pits requirement through the winter months, given that the regular remediation work could not be performed efficiently during this period, and the parties had agreed to suspend work during the previous winter.

{31} While it is true that the termination clause gave PNM the right to suspend work for any reason, the clause also required that PNM give Diamond D a certain number of days notice before the suspension became effective. PNM's strained interpretation of its right to suspend work would render the notice requirement superfluous insofar as PNM could terminate the contract and suspend work on the same day, effectively resulting in an immediate termination that was contrary to the contract. We will not read a particular provision of a contract such that another provision is rendered meaningless. *See Mayfield Smithson Enters.,* 120 N.M. at 14, 896 P.2d at 1161.

{32} PNM argues that because the parties agreed to suspend work during the previous winter and PNM representatives made no assurances that the wet pit work would continue through to the spring season, PNM did not breach the contract. We view PNM's argument as a claim that the evidence was insufficient to sustain the jury's finding. In reviewing PNM's claim, we view the evidence in the light most favorable to support the jury's verdict, drawing all reasonable inferences and resolving all disputed facts in favor of the verdict. *Ponder*, 2000–NMSC–033, ¶¶ 6–7, 129 N.M. 698, 12 P.3d 960; *see also C.R. Anthony Co.*, 112 N.M. at 509, 817 P.2d at 243.

{33} Although Diamond D agreed to a shutdown the previous winter, the evidence showed that Diamond D did not agree to the shutdown prior to the termination of the contract. To the contrary, the parties had agreed that Diamond D would continue to work through the winter of 1997–1998. In addition, PNM reserved the equipment necessary for completing the wet pit work and told Diamond D not to schedule this equipment for any other jobs. Diamond D's understanding that PNM would provide an adequate number of pits for it to remediate was evidenced by Diamond D's declination of other work during this period. Although PNM representatives may have said that they could not guarantee that work would be sufficient to keep Diamond D busy until April, Diamond D representatives testified otherwise.

{34} PNM representatives testified only that they were unsure whether the available wet pit remediation projects would last until April because they could not accurately predict how much time would be required to remediate each wet pit. Although PNM believed it could suspend the winter work at any time, there was no evidence that anyone at PNM conveyed this belief to Diamond D.

{35} The president of Diamond D testified that the five pits assigned in January 1998 were sufficient to keep Diamond D busy until the regular remediation project resumed in April 1998. When PNM suspended work on March 9, 1998, Diamond D was still working on the first of these five pits and had yet to begin work on the remaining four pits. We hold that this evidence is sufficient to support the jury's verdict that PNM breached the adequate pits provision of the contract by failing to provide Diamond D with pits from March 9, 1998, until April 12, 1998.

B. Punitive Damages

1. *Standard of Review*

{36} PNM suggests that this Court should review the sufficiency of the evidence underlying the jury's award of punitive damages de novo. This is an incorrect statement of the standard of review in this case involving solely a challenge to the sufficiency of the evidence. As with all challenges to the factual findings, we review the findings underlying the jury's award of punitive damages to determine whether those findings are supported by substantial evidence. *Allsup's Convenience Stores, Inc.*, 1999 NMSC 006, ¶ 28, 127 N.M. 1, 976 P.2d 1. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* On appeal, all disputed facts are resolved in favor of the jury's findings, all reasonable inferences are indulged in support of the verdict, and all evidence and inferences to the contrary are disregarded. *Haaland v. Baltzley*, 110 N.M. 585, 588–89, 798 P.2d 186, 189–90 (1990).

2. *Discussion*

{37} An award of punitive damages for breach of contract may be sustained on appeal only if the evidence shows a culpable state of mind. *Allsup's Convenience Stores, Inc.*, 1999–NMSC–006, ¶ 53, 127 N.M. 1, 976 P.2d 1. We require "the presence of aggravated conduct beyond that necessary to establish the basic cause of action in order to impose punitive damages." *Teague–Strebeck Motors, Inc. v. Chrysler Ins. Co.*, 1999–NMCA–109, ¶ 78, 127 N.M. 603, 985 P.2d 1183 (order on motion for rehearing). A defendant acts with a culpable state of mind when the evidence shows that the defendant acted with reckless disregard for the rights of the plaintiff or that the defendant knew that its actions could harm the interests of

the plaintiff but failed to exercise care to avoid such harm. *See Paiz v. State Farm Fire & Cas. Co.*, 118 N.M. 203, 211, 880 P.2d 300, 308 (1994).

{38} PNM argues that there was no evidence that PNM failed to attempt resolution of the billing dispute with a culpable state of mind because (1) the PNM executive responsible for the decision to terminate reasonably interpreted the contract to allow termination without attempting resolution of the underlying dispute and (2) the ambiguity of the contract, namely whether the dispute resolution and termination provisions conflicted, precluded a finding that PNM acted recklessly or wantonly. We disagree with both contentions.

{39} The evidence showed that PNM initiated its audit of Diamond D in February 1998. That same month, PNM wrote to Diamond D asking Diamond D to respond to the overbilling identified by the auditors. Diamond D responded to this request the following day by submitting corrected invoices and explaining that the errors were due to clerical errors. Without checking to see if Diamond D had complied with its request for information, PNM suspended the contract five days later.

{40} In its letter suspending the contract, PNM explained that the suspension was justified because no work authorizations had been issued as required by the contract. Other evidence showed, however, that no work authorizations had been issued to Diamond D in the two years prior to the billing dispute. Although PNM had an absolute right to suspend or terminate the contract with adequate notice, the fact that it premised its suspension on the lack of a work authorization when other evidence suggested that the real reason for the suspension was the billing dispute supports an inference that PNM understood its obligation to quickly and amicably resolve its dispute with Diamond D, but wantonly or recklessly disregarded this duty.

{41} After receiving the letter suspending its remediation work, Diamond D repeatedly and urgently attempted to contact PNM officials to request a meeting to attempt resolution of the billing dispute. Without exception, the officials contacted refused to discuss the dispute with Diamond D, instead referring Diamond D to other PNM employees or promising to get back to Diamond D, but failing to do so.

{42} The evidence also showed that PNM employees were aware of the dispute resolution provision as a result of their experience managing PNM contracts. As mentioned above, this provision was part of the general contract provisions drafted by PNM and included with all construction contracts. In addition, PNM employees testified that they understood the potential harm to Diamond D caused by PNM's refusal to use its best efforts to attempt an amicable and quick resolution to the billing dispute. For example, they understood that PNM's failure to pay Diamond D's invoices during the pendency of the dispute would put Diamond D in "a bind." In addition, PNM employees understood that as long as the dispute continued, Diamond D would not be awarded other contracts with PNM and, in fact, they communicated with other departments to encourage those departments to deny Diamond D's bids. Finally, although PNM was able to quickly respond to the removal of Diamond D by assigning another company to finish the wet pit work, Diamond D was unable to recover due to its previous commitment of equipment to PNM and its inability to secure additional PNM contract work. Ultimately, Diamond D was forced out of business.

{43} Furthermore, PNM's allegation that the contractual provisions were ambiguous does not preclude an award of punitive damages. The ultimate question is whether PNM's interpretation of the contract was reasonable such that its actions in breaching the contract could not be said to be undertaken with a culpable state of mind. *See Kueffer v. Kueffer*, 110 N.M. 10, 13, 791 P.2d 461, 464 (1990). After reviewing the record, we conclude that PNM's interpretation of the contract during the time it refused to meet with Diamond D was unreasonable and was in wanton disregard of Diamond D's rights. *Cf. id.* (upholding denial of punitive damages when evidence failed to show that defendant's interpretation of ambiguous contract

was based on culpable mental state). The PNM executive responsible for the decision not to work with Diamond D, Toni Ristau, testified that she understood the contract to allow her to immediately and indefinitely suspend work under the contract by merely refusing to issue work authorizations. In addition, she testified that she understood the contract to give PNM the discretion to decide what an adequate number of pits to remediate would be. She described the scope of her discretion as follows: "[The contract] says that the contractor can't go ahead until we tell them to. We decide what's an adequate number of pits. It might be one pit, it might be zero pits, it might be 50 pits at any given point in time." Finally, she testified that she did not attempt to resolve the billing disputes with Diamond D because she understood the contract to require Diamond D to formally notify PNM of an alleged contract dispute before the dispute resolution clause was triggered. In support of this interpretation, she described the billing errors as "problems," not as disputes. Later, however, she testified that she refused to meet with Diamond D because, shortly after the billing dispute arose, Diamond D indicated its intention to hire a lawyer "to get you guys to talk to us."

{44} We conclude that substantial evidence supports the jury's determination that PNM acted with a culpable mental state when it breached its contract with Diamond D. PNM's interpretation of the contract was in wanton disregard of Diamond D's rights to PNM's best efforts at dispute resolution and to an adequate number of pits to remediate during the pendency of the termination. In addition, the evidence showed PNM was aware that its failure to meet with Diamond D to resolve the billing dispute would likely result in harm to Diamond D and not only failed to exercise care to avoid such harm, but took action to exacerbate that harm by urging other PNM departments to penalize Diamond D during the pendency of the dispute. For these reasons, we affirm the jury's award of punitive damages. *See Paiz,* 118 N.M. at 210–11, 880 P.2d at 307–08.

C. Post Judgment Interest

{45} Section 56–8–4(A) 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-quarters 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 or the judgment is based on tortious conduct, bad faith, intentional or willful acts, in which case interest shall be computed at the rate of fifteen percent.

{46} Diamond D argues that we should interpret Section 56–8–4(A) broadly, as imposing the higher 15 percent interest rate on all judgments awarding punitive damages. In support of this conclusion, Diamond D asserts that the terms "tortious conduct, intentional, bad faith or willful acts" reveal a legislative intent to impose the penalty of the higher interest rate whenever a judgment is based on the kind of culpable mental state justifying an award of punitive damages. Diamond D argues that the terms used in Section 56–8–4(A) are broader and more inclusive than the terms justifying punitive damages. As such, according to Diamond D, "every type of conduct justifying punitive damages under New Mexico law is included within the scope of one or more of the terms listed" in Section 56–8–4(A).

{47} PNM counters that Section 56–8–4(A) should be interpreted narrowly, as allowing the 15 percent interest rate to be applied solely to judgments based on tortious conduct, bad faith, or a specific factual finding that a defendant acted intentionally or willfully. PNM argues that this conclusion is mandated by the rule of statutory construction that the legislature should be presumed to act with knowledge of common law definitions, *see Harger v. Structural Servs., Inc.,* 121 N.M. 657, 662–63, 916 P.2d 1324, 1329–30 (1996), particularly the specific definitions attached to different culpable mental states under New Mexico law. PNM concludes that the legislature intentionally omitted other culpable mental states from its list of

judgments warranting the higher interest rates.

1. Standard of Review

{48} Issues of statutory construction and interpretation are questions of law, which we review de novo. *State v. Shaulis–Powell*, 1999–NMCA–090, ¶ 17, 127 N.M. 667, 986 P.2d 463; *Bajart v. Univ. of N.M.*, 1999 NMCA 064, ¶ 7, 127 N.M. 311, 980 P.2d 94. Our primary goal in interpreting statutes is to give effect to the legislature's intent. *State v. Martinez*, 1998–NMSC–023, ¶ 8, 126 N.M. 39, 966 P.2d 747. When possible, we give effect to the clear and unambiguous language of a statute. *See Whitely v. N.M. State Pers. Bd.*, 115 N.M. 308, 311, 850 P.2d 1011, 1014 (1993); *State v. Adam M.*, 2000–NMCA–049, ¶ 5, 129 N.M. 146, 2 P.3d 883. If the statute is ambiguous, however, we must resort to principles of statutory construction. *Citation Bingo, Ltd. v. Otten*, 121 N.M. 205, 211, 910 P.2d 281, 287 (1995). "A statute is ambiguous if reasonably informed persons can understand the statute as having two or more meanings." *Bd. of Educ. v. State Dep't of Pub. Educ.*, 1999–NMCA–156, ¶ 18, 128 N.M. 398, 993 P.2d 112.

{49} Here Diamond D interprets Section 56–8–4(A) as describing a wide range of culpable mental states warranting the higher post-judgment interest rate, a range which includes wantonness or recklessness insofar as these mental states are functionally synonymous with wilfulness and intention. PNM, on the other hand, interprets the section as describing a limited range of causes of actions, namely those based in tort or bad faith or requiring a specific finding of intention or wilfulness. We conclude that both interpretations are reasonable given that the terms used by the legislature encompass both culpable mental states and causes of action. We conclude that Section 56–8–4(A) is ambiguous, and therefore we resort to principles of statutory construction to ascertain the legislature's intent. *See Teague–Strebeck Motors, Inc.*, 1999–NMCA–109, ¶ 64, 127 N.M. 603, 985 P.2d 1183 ("[O]ur task of interpreting Section 56–8–4(A) is made more difficult by the absence of any apparent rationale for having the rate of post-judgment interest depend on the nature of the cause of action.").

{50} We find three such principles to be helpful in our interpretation of Section 56–8–4(A). First, we consider the legislative purpose behind the statute in order to best effectuate the intent of the statute and accomplish its objectives. *Peterson v. Wells Fargo Armored Servs. Corp.*, 2000–NMCA–043, ¶ 14, 129 N.M. 158, 3 P.3d 135. Second, we use statutes concerning similar subject matter, relevant common law principles, and public policy to guide us in our interpretation. *See Investment Co. of the Southwest v. Reese*, 117 N.M. 655, 658, 875 P.2d 1086, 1089 (1994) (determining legislative intent of ambiguous statute from similar statutes, relevant common law principles, and policy considerations). Finally, we read the provisions of the statute "together with statutes pertaining to the same subject and seek to achieve a harmonious result." *State v. Lopez*, 2000–NMCA–001, ¶ 5, 128 N.M. 450, 993 P.2d 767; *see also Key v. Chrysler Motors Corp.*, 121 N.M. 764, 769, 918 P.2d 350, 355 (1996).

2. Discussion

{51} An award of post-judgment interest serves two purposes. First, post-judgment interest compensates a plaintiff for being deprived of compensation from the time of the judgment until payment of the judgment debt by the defendant. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835–36, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990). Second, post-judgment interest "serves a salutary housekeeping purpose . . . by creating an incentive for unsuccessful defendants to avoid frivolous appeals and by minimizing the necessity for court-supervised execution upon judgments." *Bailey v. Chattem, Inc.*, 838 F.2d 149, 152 (6th Cir.1988); *see also Brinn v. Tidewater Transp. Dist. Comm'n*, 113 F.Supp.2d 935, 938 (E.D.Va. 2000).

{52} Prejudgment interest serves similar purposes. In New Mexico, prejudgment interest may be awarded under either NMSA 1978, § 56–8–3 (1983), or Section 56–8–4(B). Section 56–8–3 allows pre-

judgment interest as a matter of right in cases based on money due by contract, money received to the use of another and retained without the owner's consent, and money due on the settlement of matured accounts. The purpose of an award of prejudgment interest under Section 56–8–3 is to compensate a plaintiff for the lost opportunity to use the money owed between the time the plaintiff's claim accrued and the time of judgment. *Sunwest Bank v. Colucci*, 117 N.M. 373, 377, 872 P.2d 346, 350 (1994). Section 56–8–4(B), on the other hand, gives a trial court the discretion to award prejudgment interest "as a management tool or penalty to foster settlement and prevent delay in all types of litigation." *Sunwest Bank*, 117 N.M. at 378, 872 P.2d at 351. In essence, the threat of an award of prejudgment interest under Section 56–8–4(B) ensures that the compensation due to a plaintiff is not unduly delayed by a defendant's dilatory practices. *Weidler v. Big J Enters., Inc.*, 1998–NMCA–021, ¶ 52, 124 N.M. 591, 953 P.2d 1089.

{53} Based on our comparison of the statutory schemes for awarding pre- and post-judgment interest, we conclude that the legislature intended to leave the appropriate rate of post-judgment interest to the discretion of the trial court in cases where a judgment is not based on tortious conduct, bad faith, or a specific finding of intention or willfulness, but where the evidence shows that a defendant's liability to a plaintiff is based on intentional or willful actions. *See Bustos v. Bustos*, 2000–NMCA–040, ¶ 22, 128 N.M. 842, 999 P.2d 1074 (remanding for a determination of whether the 15 percent interest should apply to an award of child support arrearages where evidence indicated father willfully withheld support).

{54} Under Section 56–8–4(A), a trial court must impose post-judgment interest at the rate specified by the statute. *See Sunwest Bank*, 117 N.M. at 379, 872 P.2d at 352. The statute does not give a trial court the discretion to deny post-judgment interest. *Id.; see also Bustos*, 2000–NMCA–040, ¶¶ 20–21, 128 N.M. 842, 999 P.2d 1074. *But see Gonzales v. N.M. Dep't of Health*, 2000–NMSC–029, ¶ 38, 129 N.M. 586, 11 P.3d 550 (relying on cases involving interest as proof of damages or decided before Section 56–8–4(A) became mandatory to determine that the award of post-judgment interest was discretionary). All judgments for the payment of money must be assessed a minimum of eight and three-quarters percent interest unless a lower interest rate is specified in a written instrument on which the judgment is based. Section 56–8–4(A). This basic interest rate ensures that the first purpose of the statute is met, namely that a plaintiff is recompensed for being deprived of compensation from the time of the judgment until the time the defendant pays the judgment debt. In addition, the basic interest rate fulfills the second purpose of the statute in most cases, by discouraging the defendant from unnecessarily prolonging the case by filing frivolous appeals or by forcing the plaintiff to seek a court-supervised execution on the judgment.

{55} When a judgment is based on tortious conduct, bad faith, or a finding that the defendant acted intentionally or willfully, a court must award interest at the higher rate of 15 percent. *Id.; see also Teague–Strebeck Motors, Inc.*, 1999–NMCA–109, ¶ 61, 127 N.M. 603, 985 P.2d 1183. This increased penalty is warranted when the facts of a particular case show that the defendant has acted culpably in the past and therefore may be in need of additional encouragement to timely pay the judgment debt owed to the plaintiff.

{56} The purposes of both prejudgment and post-judgment interest differ from the purposes of punitive damages. Punitive damages are awarded to punish and deter wrongful conduct committed with a culpable state of mind. *Paiz*, 118 N.M. at 210–11, 880 P.2d at 307–08. While we agree with Diamond D that the award of punitive damages requires a greater degree of culpability than the award of compensatory damages in most tort cases, we disagree that this compels the conclusion that the legislature had punitive damages in mind when it amended Section 56–8–4(A) to provide the higher rate of interest. As noted by PNM, had the legislature intended such a broad reading of the post-judgment interest stat-

ute, it would have explicitly included judgments awarding punitive damages in its list of judgments warranting the higher rate. *See In re Petition of PNM Gas Servs.*, 2000–NMSC–012, ¶ 73, 129 N.M. 1, 1 P.3d 383 (stating that appellate courts assume that the legislature is aware of the law in effect at the time a statute is enacted).

{57} We recognize that the " 'interpretation of well-defined words and phrases in the common law carries over to statutes dealing with the same or similar subject matter.' " *Harger*, 121 N.M. at 662–63, 916 P.2d at 1329–30 (quoting 2B Norman J. Singer, Sutherland Statutory Construction § 50.03, at 103 (5th ed.1992)). In this case, although the terms "willful," "wanton," and "bad faith," for example, are frequently used interchangeably in our case law, we have repeatedly maintained the distinction between them. *See Romero v. Mervyn's*, 109 N.M. 249, 256, 784 P.2d 992, 999 (1989) (recognizing that the nuances distinguishing terms describing culpable mental states justify retaining the various terms to guide a jury's discretion in awarding punitive damages). We will not conclude that the legislature intended to impose the higher interest rate in all cases in which a defendant acts with a culpable mental state. Nonetheless, we also will not conclude that the legislature intended to limit the higher rate to those judgments that include the magic words, "intentional" or "willful." Instead, we conclude that the legislature intended the phrase "intentional or willful acts," when read in conjunction with "tortious conduct" and "bad faith," to provide a guide for a trial court to determine which post-judgment interest rate should apply when the facts show that a defendant acted culpably.

{58} "Tortious conduct" has been defined as an act or omission that subjects an individual to liability under the principles of tort law. *See* Restatement (Second) of Torts § 6 (1965). In tort law, conduct may be actionable whether the actor intends harm or not. *See id.* cmt. a. Nonetheless, the most common of the tort causes of action require a finding that a defendant acted negligently, recklessly, or intentionally. *See id.* "Bad faith" has been defined both as a cause of action, *see generally* UJI 13–1701 to –1718 NMRA 2001 (instructions for bad faith claim against an insurer), and as a mental state, *see* UJI 13–1827 NMRA 2001 (listing bad faith as grounds for punitive damages). In the context of insurance, we have defined "bad faith" as "reckless disregard, in which the insurer *utterly* fail[s] to exercise care for the interests of the insured in denying or delaying payment on an insurance policy." *Jackson Nat'l Life Ins. Co. v. Receconi*, 113 N.M. 403, 419, 827 P.2d 118, 134 (1992) (internal citations and quotation marks omitted); *see also* NMSA 1978, § 52–1–54(I) (1993) (defining bad faith as conduct amounting to "fraud, malice, oppression or willful, wanton or reckless disregard" of a plaintiff's rights).

{59} Willful conduct has been defined as "the intentional doing of an act with knowledge that harm may result." UJI 13–1827. "Reckless conduct," by contrast, is defined as "the intentional doing of an act with utter indifference to the consequences." *Id.* Finally, "wanton conduct" is defined as "the doing of an act with utter indifference to or conscious disregard for a person's [rights] [safety]." *Id.* Two characteristics distinguish these three terms: (1) the intention of the actor and (2) the degree of knowledge of the possible consequences of an action possessed by the actor at the time of the act. If a defendant is found to have acted willfully, clearly the higher post-judgment interest rate applies. *See* § 56–8–4(A); *Teague–Strebeck Motors, Inc.*, 1999–NMCA–109, ¶ 61, 127 N.M. 603, 985 P.2d 1183. If, on the other hand, the evidence shows only wantonness, the basic interest rate must apply because a finding of wantonness does not include a finding of either willfulness or intention. When the evidence shows recklessness, however, it is for the trial court to determine whether the defendant's conduct is more like willfulness or more like wantonness and to award the appropriate interest rate based on that finding.

{60} In the case at bar, the jury was instructed that to award punitive damages, it must first find that PNM acted either wantonly or recklessly. As such, it was up to the

trial court to decide whether the evidence showed that PNM had acted with the intent necessary to support an award of the 15 percent interest rate. *See Bustos*, 2000-NMCA-040, ¶ 22, 128 N.M. 842, 999 P.2d 1074. After reviewing the record, we conclude that the trial court did not abuse its discretion in denying Diamond D's request for the higher rate. *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.").

{61} Although the evidence showed that PNM acted with utter indifference to Diamond D's rights under the contract and understood that its failure to respond to Diamond D's attempts to resolve the billing dispute could harm Diamond D, Diamond D has not directed us to evidence sufficient to support a finding that PNM intended to breach the contract and thereby harm Diamond D. In addition, we note that the punitive damages award was high in this case and conclude that the court may have weighed the amount of punitive damages in light of the degree of PNM's culpability in deciding to award the lower rate. This balancing of the equities is an appropriate exercise of discretion. *Cf. Gonzales v. Surgidev Corp.*, 120 N.M. 133, 150, 899 P.2d 576, 593 (1995) (stating that trial court should take into account all equitable considerations when exercising discretion to award prejudgment interest under Section 56-8-4(B)); *State ex rel. Bob Davis Masonry, Inc. v. Safeco Ins. Co.*, 118 N.M. 558, 561, 883 P.2d 144, 147 (1994) (stating that similar considerations must be made when awarding prejudgment interest under Section 56-8-3).

{62} In conclusion, if a plaintiff wants to insure that a judgment is assessed the higher 15 percent interest rate in a case not based in tort or bad faith, the plaintiff must specifically request that the factfinder make a finding of intention or willfulness. If such a finding is not made, and the evidence indicates that the defendant acted with a culpable mental state approximating intention or willfulness, the award of the higher interest rate will be left to the sound discretion of the trial court.

III. CONCLUSION

{63} For the reasons discussed herein, we affirm the judgment and the award of compensatory and punitive damages. Likewise, we affirm the trial court's imposition of post-judgment interest at the rate of eight and three-quarters percent.

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

WE CONCUR: JAMES J. WECHSLER, Judge and JONATHAN B. SUTIN, Judge.

2001-NMCA-080

33 P.3d 669

STATE of New Mexico, Plaintiff-Appellee,

v.

Sebastian GOMEZ, Defendant-Appellant.

No. 21,672.

Court of Appeals of New Mexico.

Aug. 27, 2001.

Certiorari Denied, No. 27,141, Oct. 10, 2001.

Patricia A. Madrid, Attorney General, Katherine Zinn, Assistant Attorney General, Santa Fe, NM, for Appellee.

Phyllis H. Subin, Chief Public Defender, Susan Roth, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

SUTIN, Judge.

{1} Defendant Sebastian Gomez appeals his convictions of criminal sexual penetration (CSP) of a minor, criminal sexual contact (CSC) of a minor, and kidnaping. The issues on appeal center on the trial court's exclusion of the child's inconsistent statements, the propriety of the court's comments on the child's testimony, and Defendant's decision not to accept the trial court's offer of a mistrial based on improper jury instructions. We reverse on the first two issues, and affirm on the third.

I. Exclusion of Inconsistent Statements

A. Background

{2} The State's main witness was the seven-year-old victim (Victim), who gave an unsworn, investigative Safehouse interview (Safehouse Interview), videotaped a few days after the incident at issue and ten months before trial. At trial, Victim testified, out of the presence of Defendant but before the trial court, through a videotape made specifically for trial pursuant to NMSA 1978, § 30–9–17 (1978) and Rule 5–504(B) NMRA 2001. Parts of each videotape were inconsistent, in whole or in part, with statements contained in the other.

{3} Defense counsel, in his cross-examination of Victim during the trial video, asked Victim whether she had told the truth on different occasions. Victim agreed that she had told her mother the "whole truth" and her father the "same truth." Defense counsel then asked her if she remembered giving the earlier Safehouse Interview and whether she had been truthful then. Victim agreed that she had "told [the Safehouse counselor] the whole truth, too" and that what she described during her trial testimony was "pretty much the same thing." Finally, Victim agreed that "the truth should be the truth, the same thing," implying within the context of the questioning that there was only one accurate version of the facts. There was no further mention of the prior Safehouse Interview during the videotaped trial testimony.

{4} Victim's trial testimony on direct examination was that one evening she was walking back from a visit to her aunt's house when she met Defendant, her next-door neighbor, who grabbed her. She said that he wrapped his arms around her and carried her against his chest, in a way that she could not see or scream, to the bedroom in his trailer next to her home where she was violated. Victim described the incident with some specificity.

{5} After the jury had seen and heard the videotaped trial testimony, both the direct and cross-examinations, defense counsel sought to introduce the Safehouse Interview as impeachment by a prior inconsistent statement under Rule 11–613(B) NMRA 2001. Rule 11–613(B) reads:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Subparagraph (2) of Paragraph D of Rule 11–801.

The State objected to the admission of the Safehouse Interview. Defense counsel countered that showing the Safehouse Interview videotape was proper under Rule 11–613(B), because during his cross-examination of Victim he reminded her of the Safehouse Interview, and Victim agreed that she consistently told the same truth in the Safehouse Interview as in her trial testimony.

{6} The trial court denied the admission of the Safehouse Interview videotape reasoning that Rule 11–613(B) prohibited its admission unless the child was available to deny or explain the inconsistencies. The trial court also thought the State would be impermissibly deprived of its opportunity to rehabilitate its complaining witness. The trial court never viewed the Safehouse Interview to determine its relevance or whether it contained crucial impeachment evidence.

{7} The differences between the two videotaped statements were substantive. Victim's Safehouse Interview testimony was that De-

fendant transported her by choking her from behind with her shirt and hair, and that Victim could not see him "at all" before he grabbed her. Ten months later at trial, Victim testified she saw Defendant "standing there" as she walked toward her home. She was asked, "He was facing you?" she responded, "Yes." Contrary to her Safehouse Interview testimony, she said he carried her in a bear-hug way that covered her eyes and mouth.

{8} During the Safehouse Interview, Victim said she did not see Defendant's "private," but at trial she said that she could see Defendant's "number one" [private part].

{9} In the Safehouse Interview, Victim was asked about penetration of her vulva, "Did he go inside?" She responded, "He kinda did . . . a little bit . . . [he] just poked." At trial, though, Victim stated, "I can't remember" whether she was penetrated and when asked if Defendant touched her "inside," Victim remembered being touched between the legs and demonstrated that Defendant touched her first from the front, then from the back, but showed no penetration.

{10} When asked during the Safehouse Interview whether his finger went inside her anus, Victim clearly answered, "No." Ten months later during direct examination at trial, the State asked, "He put a finger inside you?" Victim responded, "Yes, it felt like ['the' or 'a'] big finger." On cross-examination at trial, however, Victim stated that Defendant "pinched" her, the pinch caused "pain," and "he didn't stick his hand in the hole."

{11} During the Safehouse Interview, Victim said she kicked Defendant in the stomach to get away, but at trial she stated that she slapped him on the face to get away. During the Safehouse Interview, Victim said she only pushed Defendant's door to get out of his trailer and run away. At trial, she described in some detail how she had unhooked a sliding chain lock to get away. During the Safehouse Interview, Victim stated that Defendant told her he would kill her if she told anyone. Ten months later at trial, Victim embellished her testimony in that she said he said "when he escaped from jail," he would "do it again," kill her, and hurt her family if she told anyone.

B. Discussion

{12} Abuse of discretion is the standard of review on appeal of a trial court's ruling admitting a prior inconsistent statement pursuant to Rule 11–613. *State v. Morales,* 2000–NMCA–046, ¶ 16, 129 N.M. 141, 2 P.3d 878. Substantively, the "Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' " *Davis v. Alaska,* 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Id.* at 316, 94 S.Ct. 1105; *see State v. Fairweather,* 116 N.M. 456, 463, 863 P.2d 1077, 1084 (1993). Impeachment is crucial to effective cross-examination because it gives a party the opportunity to discredit a witness, so the jury properly has a way to determine whether a witness is untruthful or inaccurate. *Davis,* 415 U.S. at 316, 94 S.Ct. 1105. This is especially "important in the case of . . . the testimony of [an individual] whose memory might be faulty." *Id.* at 316 n. 4, 94 S.Ct. 1105 (internal quotation marks and citation omitted).

{13} Defendant does not contend he did not have the opportunity to cross-examine the chief witness against him. He complains he was deprived of his right to impeach her by demonstrating inconsistencies in her testimony. Not having been made aware of the Safehouse Interview statements, the jury could not compare those statements with her trial testimony made ten months later and was denied the opportunity to fully evaluate the Victim's credibility.

{14} As noted in the Advisory Committee Notes in regard to federal rule 613(b), "[t]he traditional insistence that the attendance of the witness be directed to the statement on cross-examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposite party an opportunity to examine on the statement, with no specification of any particular time or sequence." The federal rule, identical to our

Rule 11–613(B), permits departure from the traditional, although often still preferred, method of confronting a witness with his inconsistent statement prior to its introduction in to evidence. *United States v. Moore,* 149 F.3d 773, 781 (8th Cir.1998); *United States v. Hudson,* 970 F.2d 948, 954–55 (1st Cir.1992); *Wammock v. Celotex Corp.,* 793 F.2d 1518, 1521–22 (11th Cir.1986). Rule 11–613(B) permits the same departure. Where a prior inconsistent statement of a prosecution witness is proffered after the witness has already testified, the statement may still be admitted as long as the witness is given an opportunity to explain or deny the statement and the opposing party is given an opportunity to examine the witness on the statement. This procedure fits within the "overriding mandate" regarding evidence, including impeachment evidence, which is that it be "relevant evidence that enhances the possibility of ascertaining the truth and doing justice." Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 607.03[2][b] (2d ed.2001); *see also* Rule 11–401 NMRA 2001 (definition of relevant evidence); Rule 11–402 NMRA 2001 (admissibility of relevant evidence); Rule 11–403 NMRA 2001 (exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time).

{15} The State created the Safehouse Interview videotape and was aware of its content. Victim was the only witness to the crucial facts at issue in the case. Defense counsel's cross-examination of Victim regarding the Safehouse Interview necessarily alerted the State to Defendant's interest in the Safehouse Interview. Although defense counsel did not at the time of the trial video confront Victim with contradictions between specific trial and specific Safehouse Interview statements, the State, aware that statements in the Safehouse Interview could prejudice its case, could have anticipated a defense strategy of proffering the Safehouse Interview at trial. The State could have followed up during the trial video by examining Victim on the content of the Safehouse Interview, or, as it did, could have awaited trial and sought to exclude the Safehouse Interview if proffered.

{16} That the State had the opportunity for rehabilitation, rather than whether the prosecutor chose to question Victim on her inconsistencies, is a key here to determining whether Rule 11–613(B) was satisfied. *Cf. State v. Lucero,* 109 N.M. 298, 304, 784 P.2d 1041, 1047 (Ct.App.1989) (court not persuaded by defense counsel who knew about a child's prior consistent statements offered under Rule 11–801(D)(1)(b) NMRA 2001 to rebut charge but argued that he could not cross-examine her about the statements because the opposing party did not elicit them on direct examination). The record does not reflect any showing by the State that it could not have questioned Victim further at the time of the trial video. Nor does the record reflect any showing by the State that it could not have recalled Victim during the trial for further questioning either in person or in another videotaped deposition. During her videotaped trial testimony, Victim stated she would agree to be questioned in front of the jury as long as Defendant was not present in the room. In exercising its discretion under Rule 11–613(B), under circumstances such as those in this case, the court should not merely assume that a witness cannot be recalled, or that judicial economy or inconvenience would be significant factors with regard to affording the opportunities stated in Rule 11–613(B). *See Hudson,* 970 F.2d at 953–56 (citing *United States v. Barrett,* 539 F.2d 244, 254–56 (1st Cir.1976) for the proposition that "defense counsel need not in the circumstances necessarily have had to confront [the witness] with the earlier inconsistent statements prior to their offer as part of the defense case; and that there was no basis for assuming that he could not be recalled by the government or that judicial economy and convenience would have justified the trial court's ruling.").

{17} In looking at the Rule 11–613(B) foundation requirements, in circumstances such as those in this case, the trial court should consider various factors, including: the statements alleged to be inconsistent; the unique circumstances based on the Section 30–9–17 trial video juxtaposed with the Safehouse Interview video taken ten months earlier by the State; the availability of and

practicality of recalling Victim in person or through another trial video; the significance of the issues to which the inconsistent statements relate; and the statements' probative value. The court should also determine whether the foundation requirements should be waived in "the interests of justice," under Rule 11-613(B) using much the same analysis. *Weinstein's Federal Evidence* § 613.05[4][b].

{18} The Safehouse Interview contained significant contradictions to Victim's trial testimony, about a range of details of the charges. The jury was denied the opportunity to assess the credibility of Victim and inform its determination of the facts by viewing the changes in the testimony of the seven-year-old victim over the ten months between the two video sessions. The trial court erred in refusing to admit the Safehouse Interview for the jury's review without first engaging in a full analysis of all factors important to an informed exercise of discretion.

II. Court's Comments

{19} Victim's taped trial testimony concluded with words from the trial court: "[Victim], you did very well. I'm very proud of you.... [Y]ou did very well and we're all very proud of you, that you came here and you told us the truth." This portion of the videotape was shown to the jury without objection.

{20} "A trial judge should studiously avoid making any remark or statement in the presence of the jury concerning factual issues or which may be construed as conveying his opinion concerning the merits of the case." *State v. Sanchez,* 112 N.M. 59, 66, 811 P.2d 92, 99 (Ct.App.1991). When a comment, taken in context, can fairly be said to be a comment by the trial court on the credibility of a witness, reversal is appropriate. *See, e.g., State v. Henderson,* 1998-NMSC-018, ¶ 17, 125 N.M. 434, 963 P.2d 511. The comments of the trial court gave rise to a presumption of prejudice because they suggested to the jury that the court thought Victim was telling the truth in her trial testimony. *See State v. Ortiz-Burciaga,* 1999-NMCA-146, ¶ 10, 128 N.M. 382, 993 P.2d 96.

{21} Defendant did not preserve this error below. He has raised the issue as a matter of fundamental error, citing *State v. Osborne,* 111 N.M. 654, 662, 808 P.2d 624, 632 (1991), ("The doctrine of fundamental error, even though it applies only under exceptional circumstances, does apply to prevent a miscarriage of justice[,] ... if the question of guilt is so doubtful that it would shock the conscience to permit the conviction to stand.") (internal quotation marks and citations omitted).

{22} Our Supreme Court recently examined the fundamental error doctrine exception to our general appellate rules in *State v. Traeger,* 2001-NMSC-022, ¶¶ 17-25, 130 N.M. 618, 29 P.3d 518. Because we reverse on the issue of exclusion of the Safehouse videotape testimony, we need not, and do not, decide whether the comments of the court require a fundamental error result under *Traeger.* We take this opportunity, however, to say that the court's affirmation of Victim's credibility, when combined with the exclusion of the Victim's inconsistent statements, substantially increase the concern that the comments interfered with the independence of the jury and bring the issue to the brink of fundamental error. On remand, no such comments should be made.

III. Jury Instructions

{23} Defendant asserts his convictions are illegal because the jury instructions on CSP and CSC were impermissibly confusing to the jury, *see State v. Parish,* 118 N.M. 39, 42, 878 P.2d 988, 991 (1994), and violated Defendant's constitutional protection against double jeopardy. *Herron v. State,* 111 N.M. 357, 358-61, 805 P.2d 624, 625-28 (1991). The jury received one instruction on CSC and one instruction on CSP. Both included language referring to either "the vulva or the anus," even though some evidence supported CSC and CSP of each orifice. During the trial conference settling jury instructions, defense counsel argued that the instructions were vague and confusing. His concern was that the jury could convict Defendant of both the greater offense of CSP and the lesser offense of CSC based on the same conduct: "Be-

cause it's not clear what the activity for Count 1 is, and not clear what Count 2 is, . . . for the same conduct, they could find him guilty of both and we would not know." The prosecutor explained that she tried to avoid overcharging and maintained it was proper under the evidence to charge one count of "touching" (CSC) and one count of penetration (CSP)—and argue both in terms of both the anus and the vulva.

{24} As predicted by defense counsel, the jury was confused by the instructions, as shown by their question during deliberation: "Is it true that if we find the Defendant guilty of sexual penetration in one event, the Defendant is *not* guilty of sexual contact?" Counsel conferred with the court at length about what answer should be sent back to the jury. The court suggested that jury confusion was so great that a mistrial was required, stating, "Now's the time to declare the mistrial and start it over." The State asked the court to answer the jury's question. Defense counsel agreed: "I think that's the thing to do, rather than declare a mistrial." So without objection, the court prepared its response: "Yes, you can find penetration *or* contact with respect to the anus AND you can find penetration *or* contact with respect to the vulva."

{25} We agree with the State that though Defendant raised serious concerns about the jury instructions, he waived any error on this issue by declining the trial court's offer of a mistrial. That is, Defendant has no right to ask for a new trial on the issue of faulty jury instructions after he rejected the court's offer to declare a mistrial. *State v. Musgrave,* 102 N.M. 148, 150, 692 P.2d 534, 536 (Ct.App. 1984).

{26} On remand, however, we suggest the parties and trial court review *Herron* before preparing the jury instructions. 111 N.M. at 361, 805 P.2d at 628. Under the facts presented at the original trial in this case, the parties are entitled to instructions for one count of kidnaping plus one count of CSP with a step-down instruction for the lesser-included offense of CSC. Pursuant to *Herron,* we see no break in Defendant's "continuous attack" to support conviction of more that one count of CSP. *Id.* Using the same rationale, CSC can only be charged as a lesser-included offense of the one CSP. *Id.*

IV. Conclusion

{27} We reverse and remand this case for retrial consistent with this opinion. The parties should note that a new ruling supported by new findings on whether Victim will testify by videotaped deposition pursuant to Section 30–9–17 and Rule 5–504(B) may be required. *Lucero,* 109 N.M. at 305, 784 P.2d at 1048.

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

WE CONCUR: MICHAEL D. BUSTAMANTE, Judge and IRA ROBINSON, Judge.

2001-NMCA-077

33 P.3d 675

Ronald BARBEAU and Leora Barbeau, Plaintiffs–Appellants,

v.

Kim HOPPENRATH, Defendant–Appellee.

No. 20,922.

Court of Appeals of New Mexico.

Aug. 29, 2001.

Alexander A. Wold, Jr., Alexander Wold & Associates, P.C., Albuquerque, NM, for Appellants.

Stephen M. Simone, Simone, Roberts & Weiss, P.A., Albuquerque, NM, for Appellee.

OPINION

CASTILLO, Judge.

{1} Plaintiffs Ronald and Leora Barbeau (Barbeaus) originally filed their personal injury claim (first complaint) against Defendant Kim Hoppenrath (Hoppenrath) and Farmers Insurance Company of Oregon in the United States District Court for the District of Oregon (Oregon federal court) two days before the New Mexico statute of limitations on the claim expired. After the federal magistrate dismissed the suit and denied the motion to transfer venue to New Mexico, Barbeaus filed a second complaint in New Mexico district court attempting to avail themselves of the New Mexico Savings Statute, NMSA 1978, § 37–1–14 (1880). The district court granted summary judgment to Hoppenrath and dismissed the case with prejudice. Barbeaus appeal. We affirm.

I. STANDARD OF REVIEW

{2} The standard of review for a motion for summary judgment is whether there are any genuine issues of material fact and whether the moving party is entitled to summary judgment as a matter of law. *Williams v. Cent. Consol. Sch. Dist.*, 1998–NMCA–006, ¶ 7, 124 N.M. 488, 952 P.2d 978; *see* Rule 1–056(C) NMRA 2001. We consider the facts in the light most favorable to the party opposing summary judgment. *See Gillin v. Carrows Rest., Inc.*, 118 N.M. 120, 122, 879 P.2d 121, 123 (Ct.App.1994). If, however, the facts are not in dispute, and only a legal interpretation of the facts remains,

summary judgment is appropriate. *See Garrity v. Overland Sheepskin Co.*, 121 N.M. 710, 718, 917 P.2d 1382, 1390 (1996). In this case, there are no facts in dispute.

II. BACKGROUND

{3} In response to Barbeaus' second complaint, Hoppenrath filed a motion for summary judgment, to which she attached Barbeaus' first complaint and the entire order entered by the federal magistrate; neither was contested by Barbeaus. The first complaint alleges that Barbeaus were citizens of Oregon and that one of the defendants, Farmers Insurance Company of Oregon, was a citizen of Oregon. Given the nature of the cause of action, the only arguable basis for federal court jurisdiction would be diversity of citizenship. 28 U.S.C. § 1332 (1996). By alleging that the plaintiffs and one of the defendants were all citizens of Oregon, Barbeaus defeated diversity and eliminated subject matter jurisdiction. Therefore, the claim was clearly improperly filed in Oregon federal court.

{4} The federal magistrate's order provides additional information about the prosecution of the case in Oregon. After Hoppenrath filed her motion to dismiss the first complaint on jurisdictional grounds, Barbeaus conceded that there was no personal jurisdiction in Oregon and then filed a motion to transfer venue to New Mexico pursuant to 28 U.S.C. § 1406(a) (1996). Section 1406(a) permits federal courts, "in the interest of justice," to transfer cases to the district in which the case should have been brought. The federal magistrate observed that the attorney for Barbeaus "knew or should have known that there was not subject matter jurisdiction at the time he filed the case." The federal magistrate, recognizing that failing to transfer could result in the inability of Barbeaus to recover due to the statute of limitations, nonetheless refused to transfer because he found that Barbeaus' counsel "was not diligent in this case." The federal magistrate dismissed the case for lack of personal and subject matter jurisdiction, and denied the motion to transfer venue.

{5} Barbeaus then re-filed their action in New Mexico district court within the six-month time limit pursuant to Section 37-1-14. They also filed a motion for summary judgment. Before the district court heard the motions, the parties stipulated to the following facts:

(1) Barbeaus were injured on October 8, 1995, in an automobile accident in Bernalillo County, New Mexico.

(2) On October 6, 1998, Barbeaus filed a complaint against Hoppenrath and Farmers Insurance Company of Oregon in Oregon federal court.

(3) On February 3, 1999, Federal Magistrate Coffin dismissed the case for lack of personal and subject matter jurisdiction.

(4) Hoppenrath was a resident of Wisconsin and had no connections to Oregon.

(5) On May 4, 1999, the case was re-filed in New Mexico.

{6} At the hearing, the district court heard the arguments of the parties. Without explaining its rationale, the district court entered an order granting Hoppenrath's motion for summary judgment and dismissing the case against Barbeaus with prejudice. We review the district court's order de novo.

III. ANALYSIS

{7} The New Mexico Savings Statute reads as follows: "If, after the commencement of an action, the plaintiff fail therein for any cause, except negligence in its prosecution, and a new suit be commenced within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first." Section 37-1-14. There is no dispute that the second suit was timely filed.

{8} Hoppenrath argues for affirmance urging this Court to hold that the New Mexico Savings Statute does not apply to out-of-state cases. We need not reach this issue and specifically decline to do so because we hold that Barbeaus were negligent in the prosecution of their case and, thus, the New Mexico Savings Statute does not apply.

{9} Barbeaus contend that the statute does apply to their case because they were not negligent in its prosecution. First, they argue that the federal magistrate order can-

not be relied upon to show negligence because it was based on speculation and there was no hearing. We do not rely on the magistrate's order except to confirm what appears to be true based on the undisputed facts and the law we apply later in this opinion.

{10} Barbeaus also argue that a party should not be penalized for filing in an improper forum because the choice of forum should be left to the discretion of the plaintiff and that in New Mexico negligence in prosecution only applies to cases that are dismissed for failure to actually prosecute citing to *Gathman–Matotan Architects & Planners, Inc. v. State Dep't of Fin. Admin.*, 109 N.M. 492, 493, 787 P.2d 411, 412 (1990). We address these arguments together.

{11} We agree with Barbeaus that courts should not second guess an attorney's rationale in filing in one jurisdiction or another; however, whatever forum chosen must at least arguably provide personal and subject matter jurisdiction. In this case, Barbeaus waited to file their complaint until two days before the expiration of the statute of limitations. They defeated subject matter jurisdiction by the very allegations in their complaint and then conceded lack of personal jurisdiction. Certainly, if Barbeaus' attorney was unsure of which court would have jurisdiction, he could have filed the case simultaneously in New Mexico and Oregon; this becomes particularly important in light of the extremely short period of time remaining before expiration of the statute of limitations. While Barbeaus would like us to view their actions as strategic, we view them as demonstrating a clear disregard of the elementary requirements of jurisdiction.

{12} Consequently, the key issue before this Court is whether Barbeaus' actions rise to the level of negligent prosecution of their case. Barbeaus would have us hold that "negligence in its prosecution" is limited to only those cases where the action is filed but not actually prosecuted, relying on *Gathman–Matotan.* We disagree. *Gathman–Matotan* characterizes Section 37–1–14 as "a tolling statute, which operates to suspend the running of an otherwise applicable statute of limitations when an action is timely commenced and later dismissed, except when the dismissal is based on a failure to prosecute the action with reasonable diligence." *Id.* at 493–94, 787 P.2d at 412–13. While the *Gathman* court did not specifically define "negligence in its prosecution," it held that failure to prosecute and negligence in the prosecution were one and the same for purposes of Section 37–1–14. Because New Mexico case law has not comprehensively defined what constitutes "negligence in the prosecution," we look to other jurisdictions for guidance.

{13} The Iowa Supreme Court in *Sautter v. Interstate Power Co.*, 563 N.W.2d 609, 611 (Iowa 1997) held that when plaintiffs had knowledge of the facts that would deny them jurisdiction, their failure to file in the correct forum constituted "negligence in the prosecution." *See also Wetter v. Dubuque Aerie No. 568 of the Fraternal Order of Eagles,* 588 N.W.2d 130, 132 (Iowa Ct.App.1998) (where the ultimate and determinative jurisdictional fact was implicitly and peculiarly known only to the defendants and there was no evidence plaintiff was less than diligent in choosing a forum, the Iowa Savings Statute applies).

{14} In *White v. Tucker,* 53 Ill.App.3d 862, 11 Ill.Dec. 636, 369 N.E.2d 90 (1977), the Illinois Court of Appeals held that the plaintiff must have commenced his original cause of action with an honest but mistaken belief that he was doing so in a court of proper jurisdiction in order to be entitled to the benefits of the Illinois Savings Statute. *Id.* 11 Ill.Dec. 636, 369 N.E.2d at 92–93. The court in *White* explained the rationale for the due diligence requirement: unless the applicability of the savings statute is restricted to those cases where any problem with jurisdiction is based on an honest but mistaken belief on the part of a plaintiff, the plaintiff could file a complaint in any jurisdiction at any time prior to the expiration of the limitation period secure in the knowledge that the mere filing of a complaint in any jurisdiction would automatically entitle the plaintiff to re-file the same action in Illinois. *Id.* 11 Ill.Dec. 636, 369 N.E.2d at 92–93.

{15} We agree with the reasoning in these cases. The Savings Statute is intended to protect those who prosecute their action in

a non-negligent manner; the plaintiff must choose a forum that arguably has the power to decide the matter involved.

{16} The district court had before it the first complaint, the federal magistrate order, and the stipulated facts, which together support the conclusion that Barbeaus were negligent in the prosecution of their case. Two days before the expiration of the statute of limitations, Barbeaus filed their first complaint, which on its face defeated subject matter jurisdiction, and then conceded that there was no personal jurisdiction over the remaining defendant. The Barbeaus made no showing that the filing in Oregon federal court was an innocent mistake or an erroneous guess at an elusive jurisdictional fact known only to the defendants or any other circumstance that might serve to excuse what otherwise appears clearly to be negligence. Under the undisputed facts of this case, there was negligence in prosecution as a matter of law. The district court properly granted summary judgment.

IV. CONCLUSION

{17} We do not decide whether the New Mexico Savings Statute applies to out-of-state cases because in this case, the New Mexico Savings Statute is clearly inapplicable based on Barbeaus' negligent prosecution of the case. We affirm the district court's grant of summary judgment to Hoppenrath and the dismissal with prejudice of Barbeaus' complaint.

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

WE CONCUR: LYNN PICKARD, Judge, and MICHAEL D. BUSTAMANTE, Judge.

[redacted]

2001-NMCA-081

33 P.3d 679

Roy KROPINAK, Plaintiff–Appellant,

v.

ARA HEALTH SERVICES, INC., d/b/a Correctional Medical Systems, Defendant–Appellee.

No. 21,311.

Court of Appeals of New Mexico.

Sept. 13, 2001.

[redacted]

Ray Twohig, Ray Twohig, P.C., Albuquerque, NM, for Appellant.

Karen C. Kennedy, Deborah D. Wells, Kennedy, Moulton & Wells, P.C., Albuquerque, NM, for Appellee.

OPINION

WECHSLER, Judge.

{1} In this termination of a professional services contract case, we review our Supreme Court's holding in *Melnick v. State Farm Mutual Automobile Insurance Co.*, 106 N.M. 726, 749 P.2d 1105 (1988), declining to recognize a claim for breach of an implied covenant of good faith and fair dealing in an at-will employment contract. We reiterate that New Mexico law does not permit such a claim when the parties have expressed their intent in an unambiguous written contract. We affirm the district court's grant of summary judgment dismissing the claim for breach of an implied covenant of good faith and fair dealing.

Facts

{2} The facts in the summary judgment record are undisputed. Defendant ARA Health Services, Inc., d/b/a Correctional Medical Systems (CMS) held a contract with the State of New Mexico Department of Corrections to provide medical services to inmates at the New Mexico State Penitentiary. Plaintiff Dr. Roy Kropinak, a licensed physician, entered into a separate agreement with CMS to provide medical services as an independent contractor under CMS's contract with the Department of Corrections. The term of the agreement was for one year from February 19, 1990 to February 18, 1991, with the ability to renew for one-year terms thereafter "unless either party gives written notice to the other party of its intention to terminate ... no later than sixty (60) days prior to the last day of the then-existing term." (Emphasis deleted.) The agreement further stated that "either party may terminate this agreement at any time with or without cause by giving the other party sixty (60) days prior written notice of such termination." CMS provided Plaintiff a letter dated October 20, 1993, terminating the agreement effective December 19, 1993.

{3} In his affidavit submitted in response to the motion for summary judgment, Plaintiff states that during his employment, he observed CMS staff engage in "many unsafe, unethical, possibly illegal, and sub-standard medical practices and procedures." Plaintiff's employment responsibilities included reporting and cooperating with persons investigating compliance with the consent decree in the federal civil rights case which concerned the adequacy of medical care provided New Mexico prisoners. He reported deficiencies in medical care to the expert retained by the special master in the consent-decree litigation and was interviewed by an independent licensed physician retained by the Department of Corrections to investigate allegations of medical treatment deficiencies made by Plaintiff and others. CMS terminated Plaintiff the day following his interview with the

independent physician. CMS did not state a reason for the termination. The gravamen of Plaintiff's complaint is that CMS violated the implied covenant of good faith and fair dealing in its agreement with Plaintiff by terminating Plaintiff for reporting the deficiencies in medical services provided inmates and cooperating with the independent physician.

{4} The district court granted CMS's motion for summary judgment. Plaintiff's appeal raises the sole issue of whether New Mexico law entitles him to raise a claim based on the implied covenant of good faith and fair dealing. Because Plaintiff's position on appeal raises a question of law arising out of undisputed facts, we apply a de novo standard of review. *Farmers Ins. Co. v. Sedillo,* 2000–NMCA–094, ¶ 5, 129 N.M. 674, 11 P.3d 1236.

Application of Melnick v. State Farm Mutual Automobile Insurance Co.

{5} Generally, in the absence of an express provision on the subject, a contract contains an implied covenant of good faith and fair dealing between the parties. *Watson Truck & Supply Co. v. Males,* 111 N.M. 57, 60, 801 P.2d 639, 642 (1990); *Spencer v. J.P. White Bldg.,* 92 N.M. 211, 214, 585 P.2d 1092, 1095 (1978). Under the implied covenant of good faith and fair dealing, courts can award damages against a party to a contract whose actions undercut another party's rights or benefits under the contract. *Watson Truck & Supply Co.,* 111 N.M. at 60, 801 P.2d at 642. Our Supreme Court has nevertheless refused to apply this implied covenant to override an express at-will termination provision in an integrated, written contract. *Melnick,* 106 N.M. at 731, 749 P.2d at 1110; *Bourgeous v. Horizon Healthcare Corp.,* 117 N.M. 434, 438, 872 P.2d 852, 856 (1994).

{6} In *Melnick,* State Farm terminated Melnick's insurance agency contract. *Melnick,* 106 N.M. at 727, 749 P.2d at 1106. The district court directed a verdict for State Farm, concluding that the implied covenant was not violated because State Farm did not act in bad faith. *Id.* The Supreme Court affirmed the district court without regard to the issue of bad faith, concluding solely that the cause of action for breach of the implied covenant did not lie because the employment contract contained an express at-will termination provision contained within a "fully integrated, clear, and unambiguous" contract. *Id.* at 731, 749 P.2d at 1110.

{7} Refusing to vary from the parties' contract, the Supreme Court in *Melnick* reasoned that contractual provisions concerning termination which were not the basis of fraud or unconscionable conduct should be enforced as written and that it could not "change or modify the language of an otherwise legal contract for the benefit of one party and to the detriment of another." *Id.* at 731, 749 P.2d at 1110. The Court noted that an at-will employment contract may be terminated by either an employee or an employer "at any time, for any reason, without liability" in New Mexico and that it was "not inclined to redefine the law of at-will employment contracts." *Id.* at 730, 749 P.2d at 1109.

{8} Plaintiff contends that *Melnick* does not preclude his claim for breach of the implied covenant because the Supreme Court reserved decision on the applicability of "improper motivation, overreaching, or discharge for a reason contrary to public policy." *Id.* at 732, 749 P.2d at 1111. According to Plaintiff, his case is exactly the one the Supreme Court contemplated in which a cause of action for breach of the implied covenant of good faith and fair dealing could be invoked even in an at-will employment contract.

{9} Although we decline to extend *Melnick* as Plaintiff proposes, we can understand Plaintiff's position from the language the Supreme Court used in stating its holding in *Melnick.* The Court appears to "hold" that if Melnick could have shown an "improper motivation, overreaching, or discharge for a reason contrary to public policy," State Farm would have needed to show "good cause or an absence of bad faith" for termination to be proper. *Id.* We interpret this language to mean that State Farm would have been required to show good faith or the absence of bad faith if Melnick had shown the proper elements in a tort action.

{10} At the writing of *Melnick*, the law of at-will employment contracts included *Vigil v. Arzola*, 102 N.M. 682, 699 P.2d 613 (Ct. App.1983), *reversed in part on other grounds by*, 101 N.M. 687, 687 P.2d 1038 (1984), and *overruled in part on other grounds by Chavez v. Manville Products Corp.*, 108 N.M. 643, 649, 777 P.2d 371, 377 (1989). In that case, this Court recognized the cause of action of retaliatory discharge as a tort when an employer violates a clear mandate of public policy in the termination of an employee. *Arzola*, 102 N.M. at 688, 699 P.2d at 619. This aspect of *Arzola* remains the law in New Mexico. *See, e.g., Garrity v. Overland Sheepskin Co.*, 1996-NMSC-032, ¶¶ 13-27, 121 N.M. 710, 917 P.2d 1382; *Michaels v. Anglo Am. Auto. Auctions, Inc.*, 117 N.M. 91, 92, 869 P.2d 279, 280 (1994); *Chavez*, 108 N.M. at 647-50, 777 P.2d at 375-78.

{11} Because the Supreme Court expressly stated that it did not intend to redefine the law in *Melnick*, we do not believe that it intended to infuse the tort of retaliatory discharge into the implied covenant in at-will termination cases. The Court in *Arzola* was clear in its refusal to embrace retaliatory discharge within the scope of a claim for breach of the implied covenant in such cases. *Arzola*, 102 N.M. at 688, 699 P.2d at 619. Indeed, the *Melnick* opinion itself discusses the delicate balance of the interests of employers and employees in employment contracts. *Melnick*, 106 N.M. at 732, 749 P.2d at 1111. The Supreme Court expressed the need for parties to a contract to rely upon basic contractual principles to receive the benefit of their bargain. *Id.* It observed that an implied restriction upon an employer's ability to discharge an employee in an at-will employment relationship "is inherently unsound." *Id.* Thus, we read *Melnick* to hold that when parties have entered into a clear and unambiguous at-will employment agreement, it is improper to invoke the implied covenant of good faith and fair dealing to vary the at-will termination provision in the written agreement. *See id.* at 731, 749 P.2d at 1110.

{12} Held up against *Melnick* under this analysis, Plaintiff's case cannot withstand a motion for summary judgment. Plaintiff's contract to provide professional services as an independent contractor cannot be meaningfully distinguished from the insurance agency contract in *Melnick*. Both involve a written agreement with an express, unambiguous, and clear at-will termination provision. *Id.* Each of these provisions provides for notice to the other party; Plaintiff's agreement entitled either party to 60-days notice of termination, and the *Melnick* agreement required only written notice delivered to the other party. *Id.* Plaintiff does not contend that his agreement was incomplete in any fashion. Therefore, the nature of Plaintiff's agreement does not give us pause in applying *Melnick* to uphold the parties' contractual agreement as to termination and to not interfere with the balance of interests the parties crafted in the description of their bargain. *Id.* at 732, 749 P.2d at 1111.

{13} Furthermore, we do not believe that *Bourgeous* aids Plaintiff's position. In *Bourgeous*, our Supreme Court recognized a cause of action for breach of the implied covenant of good faith and fair dealing based on an employment contract which was not at-will, but the Court limited the remedy to contract. *Bourgeous*, 117 N.M. at 438-39, 872 P.2d at 856-57 ("[T]ort remedies are not available for breach of the implied covenant in an employment contract."). Plaintiff argues that *Bourgeous* has similarities to his case because of his claims of improper motive and discharge in violation of public policy. But, as we have discussed, in the at-will employment setting the claim of retaliatory discharge for violation of a clear mandate of public policy may be asserted in tort, not breach of the implied covenant. Indeed, Plaintiff originally brought tort claims against Defendant in another action, but such claims were dismissed in federal court on statute of limitations grounds.

Conclusion

{14} In *Bourgeous*, our Supreme Court described its holding in *Melnick* both as having "declined to recognize a cause of action in an at-will contract for breach of an implied covenant of good faith and fair dealing," and as having "declined to 'apply an implied covenant of good faith and fair deal-

ing to override express provisions addressed by the terms of an integrated written contract.' " *Bourgeous,* 117 N.M. at 438, 872 P.2d at 856 (quoting *Melnick,* 106 N.M. at 731, 749 P.2d at 1110). With this reading of *Melnick,* we cannot agree with Plaintiff that the *Melnick* Court invites us to extend the implied covenant of good faith and fair dealing to cover bad faith conduct of improper motivation, overreaching, or discharge for a reason contrary to a clear mandate of public policy. Consistent with the reasoning of *Melnick,* when the termination is based on an express, unambiguous, and clear at-will termination right, such conduct is only actionable to the extent it constitutes the tort of retaliatory discharge as described in *Arzola.* Therefore, we affirm the district court.

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

WE CONCUR: M. CHRISTINA ARMIJO, Judge, JONATHAN B. SUTIN, Judge.

2001-NMCA-087

33 P.3d 683

Jose L. MADRID a/k/a Joe L. Madrid, Plaintiff-Appellee,

v.

Medardo MARQUEZ, Defendant-Appellant.

No. 20,838.

Court of Appeals of New Mexico.

Sept. 19, 2001.

Robert D. Montgomery, Albuquerque, NM, for Appellee.

Sally Ann Hagan, J.D. Behles & Associates, P.C., Albuquerque, NM, for Appellant.

OPINION

CASTILLO, Judge.

{1} Based on certain oral representations, Jose Madrid and his wife Celia, now deceased, transferred the title to their home to Medardo Marquez. When Marquez attempted to evict the Madrids from their home, the Madrids filed suit against Marquez and others alleging fraud, breach of contract, outrage, and prima facie tort, and requested recission and equitable reformation. After a bench trial, the district court found in favor of Madrid and ordered alternative relief: Madrid could reimburse Marquez for his expenditures related to the transfer and upkeep of the property in the amount of $56,261.96 and rescind the deed, thus returning the title to the property to Madrid, or in the alternative, Madrid could retain a life estate in the real estate with a remainder interest in Marquez. The district court also awarded Madrid $20,000 in punitive damages. Marquez appeals arguing: (1) the district court improperly awarded punitive damages; (2) there was not substantial evidence supporting the award of punitive damages or the finding of an oral agreement; (3) the statute of frauds bars enforcement of the oral contract; and (4) the district court abused its discretion in permitting two witnesses to testify. We affirm.

BACKGROUND

{2} Jose and Celia Madrid and Marquez were neighbors; their backyards shared a common property line. In early 1997, the Madrids took out a loan secured by a mortgage on their home. By mid 1997, they were having difficulty in making the payments. Additionally, the Madrids were suffering from a variety of medical problems. Mar-

quez was aware of the financial and medical problems suffered by the Madrids. According to the Madrids, Marquez offered to allow the Madrids to remain in their home rent free for the remainder of their natural lives and to care for them in return for a deed to the Madrid home. The Madrids accepted Marquez's offer. In late 1997, Marquez arranged for a closing at which the Madrids executed a warranty deed transferring their home to Marquez; the deed contained no language with regard to the promised life estate. Marquez refinanced the property and paid off the existing Madrid mortgage. After obtaining the deed to the Madrid home, Marquez began harassing, threatening, and intimidating the elderly and ill couple and ultimately attempted to force the Madrids from their home. The Madrids then contacted an attorney and this litigation ensued.

I. Punitive Damages

{3} Marquez's primary argument is that punitive damages cannot be recovered without recovery of compensatory or nominal damages. *See, e.g., Sanchez v. Clayton,* 117 N.M. 761, 767, 877 P.2d 567, 573 (1994); *Hudson v. Otero,* 80 N.M. 668, 671, 459 P.2d 830, 833 (1969), *overruled on other grounds by Allsup's Convenience Stores, Inc. v. N. River Ins. Co.,* 1999-NMSC-006, 127 N.M. 1, 976 P.2d 1; *Montoya v. Moore,* 77 N.M. 326, 330-31, 422 P.2d 363, 365-66 (1967); *Crawford v. Taylor,* 58 N.M. 340, 343, 270 P.2d 978, 979-80 (1954); *Gonzales v. Sansoy,* 103 N.M. 127, 129-31, 703 P.2d 904, 906-08 (Ct. App.1984). While we agree that Marquez correctly states the general law of New Mexico regarding punitive damages, none of the cases cited consider the specific question of whether punitive damages may be awarded in equity. This is a case of first impression in New Mexico. Upon review of the purpose and the history of punitive damages in general and the law in other jurisdictions, we believe justice is better served by allowing the award of punitive damages in those equity cases where the conduct of the wrongdoer warrants punitive damages in order to deter clearly unacceptable behavior.

{4} Punitive damages are defined as "sums awarded in addition to any compensatory or nominal damages, usually as punishment or deterrent levied against a defendant found guilty of particularly aggravated misconduct, coupled with a malicious, reckless or otherwise wrongful state of mind." 1 Dan B. Dobbs, *Law of Remedies* § 3.11(1), at 455 (2d ed.1993) (footnote omitted). Punitive damages punish the wrongdoer and serve as a deterrent; the award does not measure a loss suffered by the plaintiff. *Sanchez,* 117 N.M. at 766, 877 P.2d at 572; *Sansoy,* 103 N.M. at 129, 703 P.2d at 906 (stating that punitive damages serve as a warning to others). Punitive damages are based on the wrongdoer's misconduct, such as acting fraudulently and in bad faith. *Gonzales v. Surgidev Corp.,* 120 N.M. 151, 154, 899 P.2d 594, 597 (1995); *Sansoy,* 103 N.M. at 129, 703 P.2d at 906.

{5} Historically, the judicial system in the United States was patterned after the English system with separate courts of law and equity. 1 *Dobbs, supra,* § 2.1(1), at 55 56. Punitive damages could be awarded only in a court of law. *Recent Developments—Punitive Damages Held Recoverable in Action for Equitable Relief,* 63 Colum. L.Rev. 175, 176 (1963). Over the years, the court structure evolved and separate court systems for law and equity no longer exist; instead, most jurisdictions now have a merged system of courts of law and equity. *Id.* at 177; 1 Linda L. Schlueter & Kenneth R. Redden, *Punitive Damages* § 4.1(A)(3), at 128 (4th ed.2000). New Mexico has a merged system. *Hall v. Bryant,* 66 N.M. 280, 284, 347 P.2d 171, 173 (1959).

{6} During the evolution of the combined system, a split of authority developed regarding the award of punitive damages in equity. Marquez urges us to adopt the majority rule that no punitive damage awards are made in equity because punitive damages are traditionally awarded for vengeance or punishment, and equity is not the place for such a remedy. *Livingston v. Woodworth,* 56 U.S. 546, 549-50, 15 How. 546, 14 L.Ed. 809 (1853); *Stolz v. Franklin,* 258 Ark. 999, 531 S.W.2d 1, 5 (App.1975); *Seal v. Hart,* 755 P.2d 462, 465 (Colo.Ct.App.1988); *Beals v.*

Washington Int'l, Inc., 386 A.2d 1156, 1159–60 (Del.Ch.1978); *Superior Const. Co. v. Elmo*, 204 Md. 1, 104 A.2d 581, 583–87 (1954); *Fleischer v. James Drug Stores, Inc.*, 1 N.J. 138, 62 A.2d 383, 387 (1948).

{7} On the other hand, other jurisdictions follow a more modern trend and award punitive damages in equity in order to facilitate judicial administration, to deter misconduct, and to completely serve justice. *See, e.g., Youngblood v. Bailey*, 459 So.2d 855 (Ala. 1984) (awarding punitive damages for fraudulent behavior in loss of an automobile); *Haskins v. Shelden*, 558 P.2d 487 (Alaska 1976) (awarding punitive damages in replevin); *Starkovich v. Noye*, 111 Ariz. 347, 529 P.2d 698 (1974) (in banc) (awarding punitive damages in reformation of a joint venture agreement for fraudulently inducing plaintiff to sign agreement); *Vill. of Peck v. Denison*, 92 Idaho 747, 450 P.2d 310 (1969) (awarding punitive damages for interfering with plaintiff's water rights); *Charles v. Epperson & Co.*, 258 Iowa 409, 137 N.W.2d 605 (Iowa 1965) (awarding punitive damages for misappropriation of funds in transaction to a company); *Tideway Oil Programs, Inc. v. Serio*, 431 So.2d 454, (Miss.1983) (en banc) (allowing punitive damages as a relief in chancery court); *Gould v. Starr*, 558 S.W.2d 755 (Mo. Ct.App.1977) (awarding punitive damages in equity for dishonest conduct as a trustee); *I.H.P. Corp. v. 210 Cen. Park S. Corp.*, 12 N.Y.2d 329, 239 N.Y.S.2d 547, 189 N.E.2d 812 (1963) (awarding exemplary damages when injunctive relief granted).

{8} We find the modern approach to be more persuasive. Requiring an award of compensatory damages as a prerequisite to an award for punitive damages is a technical rule that should not be applied blindly, without an appreciation for its underlying rationale. As noted by the Idaho court in *Denison:*

> The reason for such a requirement is that it first insures that some legally protected interest has been invaded. It prevents the assessment of punitive damages against one who may have caused damage without legal injury. There is no reason why an award of equitable relief may not fulfill this same function, for in either case it is necessary first to show an invasion of some legally protected interest.

Denison, 450 P.2d at 314–15. New Mexico law allows a plaintiff who establishes a cause of action in law, to recover punitive damages as long as the wrongdoer's conduct is willful, wanton, malicious, reckless, oppressive, grossly negligent, or fraudulent and in bad faith. *Sanchez*, 117 N.M. at 767, 877 P.2d at 573; *Sansoy*, 103 N.M. at 129, 703 P.2d at 906. We believe that a person's misconduct must be addressed regardless of whether the underlying case is brought in law or equity. We adopt a similar test for cases brought in equity. A plaintiff must establish a cause of action in equity and the wrongdoer's misconduct must be willful, wanton, malicious, reckless, oppressive, grossly negligent, or fraudulent and in bad faith. Permitting the recovery of punitive damages under these circumstances is a natural development because tradition "should yield to . . . doing complete justice in equity." Gerald J. Robinson, *Punitive Damages in Equity*, 16 Md. L.Rev. 68, 73 (1956).

{9} This case is a prime example of why punitive damages should be awarded in equity. Marquez's fraudulent conduct induced the Madrids to transfer their house to him. Marquez harassed, threatened, and intimidated the Madrids. He made continuing promises to memorialize his promise of a life estate for the Madrids but never put it in writing. He attempted to evict the Madrids. Marquez's fraudulent and intimidating behavior is precisely the kind of behavior that warrants an award of punitive damages. In this case, granting punitive damages serves complete justice by awarding complete relief and by deterring others from committing similar misconduct, thus facilitating judicial administration. The district court properly awarded punitive damages in equity.

II. Substantial Evidence Arguments

{10} Marquez makes two arguments on appeal that we decline to review. He argues that there was no evidence supporting (1) findings of a culpable mental state necessary to sustain the award of punitive damages, and (2) the finding that Marquez orally agreed to give the Madrids a life estate in

the property. In support of these arguments, Marquez presents an incomplete summary of the evidence, in violation of Rule 12 213(A)(3) NMRA 2001 ("a contention that a verdict, judgment or finding of fact is not supported by substantial evidence shall be deemed waived unless the summary of proceedings includes the substance of the evidence bearing upon the proposition"). Most significantly, Marquez fails to present the evidence supporting Madrid's position and then relies on his own testimony which the district court found completely without credibility. Because Marquez does not include the substance of all of the evidence bearing upon the issues of culpable mental state and the oral contract, we hold that he waived such argument. *See Murillo v. Payroll Express,* 120 N.M. 333, 901 P.2d 751 (Ct.App. 1995).

III. Statute of Frauds

{11} Marquez argues that as a matter of law the Statute of Frauds bars enforcement of the agreement. While Marquez acknowledges that substantial performance is an exception to the Statute of Frauds, he would limit our consideration of events to those occurring after closing at the title company and have us ignore the many discussions and acts of the parties that took place well before the closing. Marquez's argument reflects the whole tenor of this case. He continues to argue that since he never agreed in writing to allow the Madrids to keep a life estate, they have no right to the life estate that was orally agreed to. The purpose of the Statute of Frauds is to protect the parties, not to allow one party to defraud the other. *Herrera v. Herrera,* 1999–NMCA–034, ¶ 13, 126 N.M. 705, 974 P.2d 675. The district court enforced an oral promise between Marquez and the Madrids based on partial performance and properly fashioned a remedy that allowed the Madrids to have the benefit of their bargain or rescind the entire agreement. Substantial evidence supports the district court's determination, and we reject Marquez's argument that a written agreement was necessary to convey a life estate to the Madrids.

IV. Testimony of Witnesses

{12} Marquez argues that the district court erred in allowing Barbara Schuessler and Officer Xavier Tapia to testify because the Madrids did not identify them as witnesses until after the date established in the scheduling order. We review the district court's decision for an abuse of discretion. *State v. Lasner,* 2000–NMSC–038, ¶ 16, 129 N.M. 806, 14 P.3d 1282.

{13} The scheduling order required the parties to identify witnesses by March 31, 1999. On May 18, 1999, Madrid filed a supplemental witness list naming Schuessler and Officer Tapia. Discovery concluded on May 21, 1999. Although trial was originally set for June 4, 1999, it was rescheduled for September 7, 1999. Marquez had notice within the discovery period and had adequate time to contact the witnesses or take other action he might have deemed prudent regarding other options. Marquez was not the victim of surprise or other manifest unfairness. *See El Paso Elec. Co. v.. Real Estate Mart, Inc.,* 98 N.M. 570, 572, 651 P.2d 105, 107 (Ct.App. 1982) (holding that trial court did not abuse its discretion in permitting testimony of a witness identified in time to allow opposing counsel the opportunity to interview the witness). The district court did not abuse its discretion in allowing witnesses, Schuessler and Officer Tapia, to testify.

CONCLUSION

{14} We affirm the district court on all issues.

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

WE CONCUR: RICHARD C. BOSSON, Chief Judge and CYNTHIA A. FRY, Judge.

2001-NMCA-083

33 P.3d 887

Sylvia MARTINEZ and Yvonne Lovato n/k/a Yvonne Kullina, Plaintiffs/Appellees,

v.

Benjamin J. ROSCOE, Geraldine M. Roscoe, BJR Racing Stables, Inc., The Brook Apartments, LLC, 3005 San Pablo, LLC, Valle Del Norte Condominiums, LLC, and The Leonard Lounge, LLC, Defendants/Third-Party Plaintiffs-Appellants,

v.

Wendy L. Basgall, Angelica Anaya-Allen, James Orgass, Karen Meyers, Legal Aid Society of Albuquerque, Inc., and Jay D. Hill, Third-Party Defendants/Appellees.

No. 21,703.

Court of Appeals of New Mexico.

April 19, 2001.

Certiorari Denied, No. 26,981, July 11, 2001.

Angelina Anaya-Allen, Legal Aid Society of Albuquerque, Inc., Albuquerque, NM, for Appellees.

Benjamin J. Roscoe, Geraldine M. Roscoe—Pro Se, Albuquerque, NM, for Third-Party Plaintiffs-Appellants.

Briggs F. Cheney, Law Office of Briggs F. Cheney, Albuquerque, NM, for Appellees Basgall, Anaya-Allen, Orgass, Meyers, and Legal Aid Society of Albuquerque, Inc.

Jay D. Hill, Betzer, Roybal & Hill P.C., Albuquerque, NM, for Appellee Jay D. Hill.

OPINION

WECHSLER, Judge.

{1} This case originated as an action to require Benjamin Roscoe (Roscoe) to set aside fraudulent transfers allegedly made to avoid paying judgments entered against him and in favor of Plaintiffs. Roscoe filed a

third-party complaint against Third-Party Defendants Basgall, Anaya-Allen, Orgass, Meyers, and the Legal Aid Society of Albuquerque (collectively referred to as LASA). He also filed a "cross-claim" against Basgall on behalf of 3005 San Pablo LLC (San Pablo), a limited liability company. LASA filed a motion to dismiss with prejudice Roscoe's third-party complaint against it, which the district court granted. The district court also granted Basgall's motion to dismiss San Pablo's claim against her. The dismissal of San Pablo's claim, however, was without prejudice.

{2} The calendar notice proposed dismissal of San Pablo's appeal and affirmance of the dismissal of Roscoe's claims against LASA. Roscoe has filed a memorandum opposing the proposed disposition. For the following reasons, we dismiss San Pablo's appeal and affirm the dismissal with prejudice of Roscoe's third-party claims.

3005 San Pablo LLC's Appeal

{3} San Pablo sought to file its claim against Basgall by acting through its manager, Roscoe, and filing the "cross-claim" pro se. Basgall's answer to San Pablo's third-party complaint sought dismissal of San Pablo's claims, arguing in part that Roscoe could not file the complaint on San Pablo's behalf. No other motion to dismiss was filed by Basgall concerning San Pablo's claims; however, Basgall and other Third-Party Defendants filed a motion to dismiss Roscoe's claims. The district court's order dismissed San Pablo's complaint without prejudice and without specifying the ground for its decision.

{4} San Pablo's notice of appeal and docketing statement have been filed pro se by Roscoe as San Pablo's manager. In its memorandum opposing the proposed dismissal, San Pablo, through Roscoe, argues that no New Mexico statute exists that prohibits corporations or limited liability companies from appearing pro se in state court. It also argues that no court rule prohibits a limited liability company, as opposed to a corporation, from appearing pro se. *Cf.* Rule LR2-116 NMRA 2001 (requiring corporations to be represented by counsel and allowing any papers filed by an unrepresented corporation to be struck by the court). It also argues that NMSA 1978, § 36-2-27 (1999), which prohibits the unauthorized practice of law, has no application to pro se litigants.

{5} This question has not been specifically addressed in New Mexico. In *State ex rel. Norvell v. Credit Bureau of Albuquerque,* 85 N.M. 521, 514 P.2d 40 (1973), our Supreme Court affirmed injunctive relief prohibiting non-attorney employees of a credit bureau from preparing pleadings or appearing on behalf of individuals, partnerships, corporations, associations, or groups of any kind. It did not, however, decide the propriety of pro se appearances on behalf of an artificial entity. *Id.* at 529, 514 P.2d at 48. The United States Supreme Court has also prohibited any artificial entity from being represented by persons who are not licensed attorneys. *See, e.g., Rowland v. California Men's Colony,* 506 U.S. 194, 201-03, 113 S.Ct. 716, 121 L.Ed.2d 656 (1993) (citing cases dating from 1824 forward holding that a corporation may only be represented by licensed counsel). In *Rowland,* the court stated:

> As the courts have recognized, the rationale for that rule applies equally to all artificial entities. Thus, save in a few aberrant cases, the lower courts have uniformly held that 28 U.S.C. § 1654, providing that "parties may plead and conduct their own cases personally or by counsel," does not allow corporations, partnerships, or associations to appear in federal court otherwise than through a licensed attorney.

Id. at 202, 113 S.Ct. 716 (footnote omitted).

{6} As a limited liability company, San Pablo is an association of persons. *See* NMSA 1978, § 53-19-7 (1999). Under federal law, it would be required to appear in federal court through a licensed attorney. *See Rowland,* 506 U.S. at 201-03, 113 S.Ct. 716.

{7} State courts have also required artificial legal entities, including limited liability companies, to be represented by a licensed attorney. *See Int'l Ass'n of Sheet Metal Workers Local 16 v. AJ Mech.,* No. CIV. 99-461-FR, 1999 WL 447459, *1 (D.Or.1999)

(*Local 16*) (determining that a limited liability company must be represented by an attorney and denying its pro se motions with leave to refile through counsel); *Valentine L.L.C. v. Flexible Bus. Solutions, L.L.C.*, 27 Conn. L. Rptr. 378 (Conn.Super.Ct.2000), 2000 WL 960901, *1.

{8} San Pablo attempts to distinguish *Valentine L.L.C.* by asserting that the issue was whether pro se defendant Gordon Lockwood could file his appearance on behalf of the limited liability company, noting that Lockwood was not a licensed attorney and would not be permitted to appear for any person. *See id.* We do not see any distinction from this case in which Roscoe, who is not a licensed attorney, seeks to file pleadings on San Pablo's behalf. Although Roscoe may not have attempted to file a formal appearance on San Pablo's behalf, his attempts to file claims and other pleadings for San Pablo is in essence the same thing. Roscoe is not the same legal entity as San Pablo and he cannot file pro se pleadings on its behalf. We agree with the court in *Valentine L.L.C.* when it stated, "There is no basis for distinguishing a limited liability company from either a corporation or partnership on the question." *Id.*

{9} Similarly, we are not persuaded that the fact that Oregon has a statute requiring corporations to appear only by an attorney renders the holding in *Local 16* inapplicable to the present case. The district court where San Pablo filed its claims had a local rule similar to the law in Oregon requiring corporations to be represented by licensed attorneys. The fact that the court in *Local 16* applied this law not only to corporations but to unincorporated associations, including limited liability companies, is persuasive authority on this point. *See Local 16,* 1999 WL 447459, *1–2.

{10} San Pablo argues that the district court did not rely on Local Rule 2–116 in dismissing its claims. As noted above, the district court did not explain its dismissal of San Pablo's claim. The argument had been made below, however, that Roscoe could not file the claim on San Pablo's behalf. On appeal, this Court will affirm the lower court's ruling if right for any reason. *See generally Westland Dev. Co. v. Romero,* 117 N.M. 292, 293, 871 P.2d 388, 389 (Ct.App. 1994). Local Rule 2–116 provides support for the district court's dismissal in that it requires corporations to be represented by counsel and allows any papers filed by an unrepresented corporation to be struck by the court. The fact that this local rule was not cited by the district court does not preclude this Court from using it as authority to affirm the district court's order.

{11} San Pablo argues that this local rule does not prohibit a limited liability company, as opposed to a corporation, from filing pro se pleadings. Like the court in *Valentine L.L.C.*, however, we are persuaded that there is no basis for distinguishing a limited liability company from a corporation on the question of a pro se appearance by someone who is not a licensed attorney.

{12} San Pablo also argues that there is statutory authority in New Mexico allowing it to file pro se claims. NMSA 1978, § 53–19–58(A) (1993) allows an authorized member of a limited liability company to bring suit in the company's name. This statute provides a mechanism for determining who may make a decision on behalf of the company to bring a lawsuit. It does not allow a member who is not a licensed attorney to provide legal representation for the company. Similarly, NMSA 1978, §§ 53–19–40 and 53–19–42 (1993) provide a mechanism for identifying who may act on behalf of the company during its dissolution. The fact that the statute allows an authorized person to "prosecute and defend suits" does not mean that the statute authorizes that person to file pro se claims on behalf of the company; it means only that the authorized person may make the decision to pursue or defend suits on the company's behalf. Section 53–19–42(B)(1). Nothing in these statutes negates the requirement that a limited liability company be represented by a licensed attorney. *See* LR2–116; *Rowland,* 506 U.S. at 202, 113 S.Ct. 716; *Valentine L.L.C.,* 2000 WL 960901, *1; *Local 16,* 1999 WL 447459, *1–2.

{13} San Pablo also asserts that the appellate rules do not authorize this Court to dismiss its appeal on the ground that the appeal was filed by Roscoe. It argues that

Rule 12–312 NMRA 2001 precisely formulates the grounds upon which an appeal may and may not be dismissed and that this ground does not appear in Rule 12–312. Rule 12–312 provides various sanctions for failing to comply with the appellate rules. It does not provide an exhaustive list of grounds for dismissing appeals. This Court has dismissed numerous appeals on grounds not articulated in Rule 12–312. *See, e.g., Lyman v. Kern*, 2000–NMCA–013, ¶ 1, 128 N.M. 582, 995 P.2d 504 (dismissing an appeal when the appellant failed to file a timely notice of appeal from an order compelling the parties to arbitrate their dispute).

{14} Finally, San Pablo argues that dismissal of this appeal would violate its due process rights. We know of no authority stating that a limited liability company has a due process right to have pleadings signed and filed by its manager who is not a licensed attorney. San Pablo argues that "Appellant's due process rights require the Court to tell the appellant what he must do in order to be heard." In order to be heard, San Pablo must be represented by a licensed attorney. It cannot file "pro se" pleadings through its manager who is not licensed as an attorney.

{15} We dismiss San Pablo's appeal as being improperly filed pro se through Roscoe, because Roscoe and San Pablo are separate legal entities and San Pablo may not file pro se pleadings through its manager who is not a licensed attorney in New Mexico. As we dismiss on this ground, we do not reach the issue of whether the dismissal without prejudice is a final order or other issues raised in San Pablo's docketing statement. *See, e.g., Sunwest Bank v. Nelson*, 1998–NMSC–012, ¶ 9, 125 N.M. 170, 958 P.2d 740 (accepting jurisdiction to review an order of dismissal without prejudice for improper venue because the order disposed of the case to the fullest extent possible in the court in which it was filed).

Benjamin Roscoe's Appeal

{16} Roscoe filed a third-party complaint against LASA. The basis of the claims against LASA was the withholding of funds from different limited liability companies and a corporation, pursuant to writs of garnishment. The third-party complaint also asserted that LASA failed to inform the district court of various matters, including an asserted lack of standing and that the contract between Roscoe and HUD was void ab initio as a basis for recovery.

{17} Roscoe argues that LASA caused writs of garnishment to be issued and served against him individually. He asserts that the record supports his position with a copy of the writ of garnishment that correctly identifies him as the judgment debtor and falsely denominates him as doing business as a corporation and four limited liability companies. In his complaint, he asserted that writs of garnishment were served on the limited liability companies and a corporation which were not the judgment debtor. LASA's answer to the third-party complaint contended that the writs of garnishment were served only on the limited liability companies.

{18} Although the writ of garnishment named "Roscoe d/b/a [the corporation and limited liability companies]," nothing in the record proper indicates that it was in fact served upon or issued against Roscoe individually. Because Roscoe has not demonstrated that any funds belonging to him individually were actually garnished, we affirm the order dismissing his claims against LASA. *See generally Marchman v. NCNB Tex. Nat'l Bank*, 120 N.M. 74, 81, 898 P.2d 709, 716 (1995).

{19} We also affirm the dismissal of his claim seeking to hold LASA liable for failing to inform the district court of potential defenses or other information that may have been favorable to Roscoe's position in an earlier suit. LASA did not owe Roscoe, an adverse party, a duty of care. *See Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*, 106 N.M. 757, 761, 750 P.2d 118, 122 (1988) (stating that an attorney has no duty to protect the interest of a non-client adverse party). We also affirm the dismissal of Roscoe's claim that the individual Third-party Defendants should be disbarred or other disciplinary action taken against them. The New Mexico Supreme Court and its Disciplinary Board have exclusive jurisdiction over these matters. *See* Rule 17–201 NMRA 2000.

Conclusion

{20} We dismiss San Pablo's appeal as being improperly filed by its manager who is not a licensed attorney. We affirm the dismissal with prejudice of Roscoe's claims against LASA.

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

WE CONCUR: RICHARD C. BOSSON, Chief Judge, and M. CHRISTINA ARMIJO, Judge.

2001-NMCA-085

33 P.3d 891

Dar HOURIGAN, Plaintiff-Appellee/Cross-Appellant,

v.

Paul CASSIDY, R.J. Kirkpatrick and Lief Ahlm, Individually; and The New Mexico Department of Game and Fish, Defendants-Appellants/Cross-Appellees.

No. 20,895.

Court of Appeals of New Mexico.

July 2, 2001.

Certiorari Denied, No. 27,054, Aug. 13, 2001.

Jeffrey J. Dempsey, John A. McCall, Albuquerque, NM, for Appellee/Cross–Appellant.

Mark D. Jarmie, Rosario Dyana Vega, Ned S. Fuller, Sharp & Jarmie, P.A., Albuquerque, NM, for Appellants/Cross–Appellees.

OPINION

BUSTAMANTE, Judge.

{1} Defendants (Cassidy and Kirkpatrick) appeal a jury verdict in favor of Plaintiff on his claim for violation of his liberty interests. They contend that the trial court erred in denying their claim of qualified immunity. Further, they contend that the evidence was insufficient to support the jury verdict, that the trial court erred in admitting certain evidence regarding incidents that were outside the complaint, and that the trial court erred in submitting a special verdict form that did not include a statement regarding proximate cause. Plaintiff cross-appeals. Plaintiff contends that the trial court erred in refusing to allow him to amend his complaint to include a different claim and in refusing a jury instruction that would have assisted the jury in determining when an investigative stop escalates into an arrest. Having considered the parties' arguments, we affirm the trial court's rulings and the jury verdict.

BACKGROUND AND FACTS

{2} Plaintiff is a resident of the Jemez area. Plaintiff is in the welding business and since leaving work at the Los Alamos Lab has run his own welding business in the Jemez area. Defendants are employees of the New Mexico Department of Game and Fish (Department) who were assigned at different times to the Jemez area for the purpose of enforcing the Game and Fish laws. Shortly after Cassidy began working in the Jemez area in 1988, Plaintiff reported to the Department that Cassidy was appropriating elk horns for personal profit while on duty, in uniform and using a Department vehicle. Plaintiff also reported that Cassidy had wrongfully taken an elk that Plaintiff had shot. Thereafter, Cassidy confronted Plaintiff in public places, falsely stating out loud that he had a crime-stoppers tip on Plaintiff and intimating that Plaintiff was a poacher. There was also testimony that whenever Cassidy saw Plaintiff's truck, he would leave a card on the windshield. Plaintiff testified that as a result of these public confrontations, he began to lose business. There was testimony that in 1989 Cassidy told William Dahl, then a Sandoval County Deputy Sheriff, that he was going to "get Dar Hourigan." Dahl testified he assumed that meant that Cassidy had probable cause to believe Plaintiff was violating the law. Finally, tensions between the two arose to such a level that a

meeting was held between Plaintiff and his attorney and members of the Department, including Cassidy. An agreement was reached that there would be no more public harassment.

{3} In 1993 Cassidy was transferred and Kirkpatrick began working in the Jemez area. Cassidy and Kirkpatrick had been college roommates and had been friends for many years. When Kirkpatrick was assigned to the area, he lived with Goob Barber, who later became the manager of the Baca Ranch. Kirkpatrick, Cassidy, and Barber were quite friendly and spent time together, hunting and gossiping. There was testimony that Barber did not trust Plaintiff. Plaintiff's welding business depended in large part on work for the timber companies working on the Baca Ranch. In 1996 Plaintiff was denied access to the Ranch. He contended that the denial was caused by the friendship among Defendants and Barber. As a result of the denial of access, Plaintiff lost any business that he had with the companies on the Ranch.

{4} In 1994 there was a significant fish kill on the San Antonio River, which runs through Plaintiff's property. Plaintiff reported the kill to Kirkpatrick. Kirkpatrick told Plaintiff to collect the fish and freeze them so that an autopsy could later be conducted. Kirkpatrick did not investigate until several days later. Plaintiff complained that Kirkpatrick was not doing his job because the person who caused the pollution upstream was on good terms with Game and Fish officers. Plaintiff testified that Kirkpatrick became angry and threatened to cite Plaintiff for possessing too many game fish. Plaintiff and his wife then wrote to Senator Bingaman and Representative Richardson about the problems they were having. The Department received letters from both inquiring about what investigation was being conducted.

{5} In 1995 Plaintiff was detained by Cassidy and Kirkpatrick who were investigating an illegal elk kill on the Baca Ranch. Kirkpatrick was told by an employee of the Ranch that the individual responsible for the kill was wearing camouflage, a blue baseball cap, and Danner boots. Kirkpatrick went to Thompson Ridge to investigate. Kirkpatrick called Cassidy to assist him in blocking one of the two exits from the area. Plaintiff, who had left a friend hunting on Thompson Ridge, was seen leaving the area in his truck. Kirkpatrick and Cassidy agreed that Plaintiff should be stopped in order to see what he was wearing. Cassidy stopped Plaintiff at the gate to his property. Cassidy reported to Kirkpatrick that Plaintiff was not wearing camouflage, but had on a blue baseball cap. Kirkpatrick advised Cassidy to hold Plaintiff until he arrived; that he was en route with a witness. There was conflicting testimony regarding whether Plaintiff was told he was under arrest. There was also conflicting testimony regarding whether Cassidy was told that Plaintiff did not meet the description given by the witness. When Kirkpatrick arrived, he looked in Plaintiff's truck for any camouflage, he asked Plaintiff a couple of questions, then he and Cassidy left the scene.

{6} There was conflicting testimony regarding the amount of time that Plaintiff was detained, with Plaintiff testifying that it lasted forty-five minutes, and Cassidy testifying that it lasted about twenty minutes. There was also conflicting testimony regarding whether the detention was acrimonious. During that time, friends who were fishing on Plaintiff's property visited cordially with Cassidy. Cassidy testified that he did not say much to Plaintiff, but prevented him from entering his property until Kirkpatrick arrived. He also testified that Plaintiff was yelling at him, although there was no physical confrontation. Plaintiff's wife attempted to video-tape the encounter, but apparently did not know how to operate the camera and got nothing but people standing around.

{7} In the winter of 1995 Plaintiff was stopped a number of times by Kirkpatrick and other Department officers and asked about hunting licenses. In fact, it was so bad that several of Plaintiff's friends would no longer hunt with him because he was either stopped or followed by Department officers. The following year, on the first day of hunting season, Plaintiff went to his traditional spot and found Game and Fish vehicles throughout the area. Everywhere he went, he was followed by Department officers.

{8} After he was denied access to the Baca Ranch and lost much of his welding business in 1996, Plaintiff filed this lawsuit alleging false arrest for the stop in 1994 and violation of his civil rights by a pattern of harassment intended to ruin Plaintiff's business and reputation. The next day Kirkpatrick sped past Plaintiff's house at a high rate of speed, then came back and asked Plaintiff's wife about a road she had never heard of. Later that summer, Kirkpatrick stopped one of the persons identified as a witness by Plaintiff and began asking him about his testimony in the lawsuit. At the end of that summer, Plaintiff attended a "fire sale" for hunting permits with several of his friends. Both Cassidy and Kirkpatrick were there and threatened Plaintiff with expulsion from the property if he did not stay in the line, treatment that was meted out only to him. Others were allowed to have someone else hold their space in line and rest in chairs set up for that purpose. Ultimately, when Plaintiff's turn came to obtain a permit, his request was denied. However, after his permit was denied, someone later in the line was given a permit for the area that Plaintiff had sought.

{9} Several weeks before trial, Plaintiff moved to amend his complaint to include a claim for retaliation. The trial court denied the motion. At the same time, the trial court denied Defendants' motion for summary judgment on Plaintiff's constitutional claims. Shortly before trial, Defendants also moved in limine to exclude evidence regarding incidents that were either outside the statute of limitations or happened after the complaint was filed. The trial court denied that motion.

{10} At the close of Plaintiff's case, the trial court granted a directed verdict motion on Plaintiff's defamation claims against Defendants. It also denied a directed verdict motion on constitutional claims based on an unreasonable stop and a liberty interest violation. At the conclusion of the trial, Defendants renewed their directed verdict motion on the constitutional claims. The trial court again denied the motion. Defendants objected to Plaintiff's verdict form because it included punitive damages and failed to provide a causation line.

{11} The jury returned a verdict in favor of Defendants on all counts except the liberty interest claim. The jury awarded compensatory damages in the amount of $6,250 against each of the two defendants and punitive damages against each of the same amount. Defendants filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial. Plaintiff filed a similar motion. Both motions were denied. Thereafter, both parties appealed.

APPEAL

Qualified Immunity

{12} The applicability of qualified immunity is a question of law that this Court reviews de novo. *See Silva v. Town of Springer*, 121 N.M. 428, 434, 912 P.2d 304, 310 (Ct.App.1996). "Government officials performing discretionary functions are entitled to qualified immunity from suit under § 1983 as long as 'their conduct [did] not violate clearly established [federal] statutory or constitutional rights of which a reasonable person would have known.' " *Cockrell v. Bd. of Regents*, 1999-NMCA-073, ¶ 8, 127 N.M. 478, 983 P.2d 427 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Once qualified immunity is raised, the court must employ a two-part test. First, the court must determine whether there are sufficient facts to support a finding of a violation of rights. Second, if there has been a violation, the court must determine whether the right was clearly established at the time of the alleged violation. *Cockrell*, 1999-NMCA-073, ¶ 9, 127 N.M. 478, 983 P.2d 427.

{13} Here, Defendants argue that Plaintiff failed to articulate the clearly established right and the conduct that violated that right. Defendants argue that for a right "to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Medina v. City & County of Denver*, 960 F.2d 1493, 1498 (10th Cir.1992). The case, however, does not have to be a factually identical case. *See Clanton v. Cooper*, 129 F.3d 1147, 1156-57 (10th Cir.1997). "[T]here may be circumstances in which the law is

clearly established despite the absence of a case in point." *Dunn v. McFeeley*, 1999-NMCA-084, ¶ 18, 127 N.M. 513, 984 P.2d 760. We believe that this is one of those situations where the right is clearly established even though there is no case directly on point.

{14} Defendants argue that Plaintiff's claimed constitutional violation consists solely of acts by Defendants to humiliate, intimidate, harass, or impugn Plaintiff's good name. This, they argue, does not state a constitutional violation. We agree that generally there is no constitutional claim for defamation or loss of reputation. *Paul v. Davis*, 424 U.S. 693, 712, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). In order to state a liberty interest claim under § 1983, the loss of reputation must be combined with damage to other legal interests. *Id.* Thus, in addition to stigma caused by state actors, there must be some evidence that the state sought to remove or significantly alter life, liberty, or property interests recognized and protected by state law. *Texas v. Thompson*, 70 F.3d 390, 392 (5th Cir.1995). The other legal interests have often been identified in terms of employment or business relationships. *See Colaizzi v. Walker*, 812 F.2d 304, 307 (7th Cir.1987); *Allen v. Denver Pub. Sch. Bd.*, 928 F.2d 978, 982 (10th Cir.1991). The federal cases make it clear that there is a liberty interest in operating a legitimate business. *Thompson*, 70 F.3d at 392. Thus, it is clearly established in federal case law that a liberty interest claim may be raised based on loss of reputation in combination with harm to an established business relationship. *Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 828-29 (11th Cir.1982) (finding where harassment and multiple citations by building code and fire inspectors caused loss of rentals and business, a prima facie liberty interest claim has been stated); *Corbitt v. Andersen*, 778 F.2d 1471, 1475 (10th Cir.1985) (finding that discrediting psychologist's professional standing resulting in present harm to his established business relationships states a liberty interest claim).

{15} Further, this liberty interest claim was clearly established at the time of the actions, which were the basis of this lawsuit. Both *Paul* and *Corbitt* were decided before the pattern of harassment that began in 1988 and culminated in 1996 with Plaintiff losing his business both in the community and on the Baca Ranch. Although Defendants argue that Plaintiff's claim was simply one based on a loss of reputation, the evidence established that Plaintiff claimed that the stigma caused by Defendants resulted in a significant loss to his business; that he, in fact, lost two established business clients due to the Defendants' false statements.

{16} Defendants also claim that their conduct did not violate the law. They argue that the incidents were spread out over a number of years and were few and inconsequential. On the contrary, Plaintiff presented evidence showing a pattern of incidents falsely alleging that he was a poacher, dogging his footsteps whenever he was legally hunting, and threatening him with citation for violation of hunting and fishing laws. All of these actions led to Plaintiff losing business in the area and, ultimately, the denial of any access for Plaintiff to the Baca Ranch. We hold that Plaintiff's allegations were sufficient to overcome Defendants' claim of qualified immunity.

Sufficiency of the Evidence

{17} When considering a claim of insufficiency of the evidence, we resolve all disputes of facts in favor of the successful party and indulge all reasonable inferences in support of the prevailing party. *Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P.2d 177. We do not reweigh the evidence nor substitute our judgment for that of the fact finder. We simply review the record for "such relevant evidence that a reasonable mind would find adequate to support a conclusion." *Landavazo v. Sanchez*, 111 N.M. 137, 138, 802 P.2d 1283, 1284 (1990). "Evidence is substantial even if it barely tips the scales in favor of the party bearing the burden of proof." *Id.* Furthermore, our review is not to determine whether substantial evidence exists to support the opposite result, but whether such evidence supports the result reached. *Las Cruces Prof'l Fire Fighters*, 1997-NMCA-044, ¶ 12, 123 N.M. 329,

940 P.2d 177. Here, Defendants claim that there is not substantial evidence to support the jury's determination of a violation of Plaintiff's liberty interest. Nor, they claim, is there substantial evidence to support the award of punitive damages.

{18} The liberty interest claim was based on a pattern of harassment by both Defendants that caused Plaintiff to lose the association of his friends and caused him to lose business in the area where he lived. Initially, we note that Defendants' brief does not present us with a recitation of the evidence that would support the verdict. Rather, Defendants focus on the evidence that would support the opposite result. Such briefing is not acceptable. *See Martinez v. Southwest Landfills, Inc.*, 115 N.M. 181, 185–86, 848 P.2d 1108, 1112–13 (Ct.App.1993). Appellate courts should be given the fact-finder's view of the facts; that is, the evidence that supports the jury's verdict in favor of Plaintiff. Even though Defendants' brief does not fully comply with the rule, we nevertheless consider the claim of insufficiency of the evidence as our review of all the briefs provides us with the facts that support the jury's verdict.

{19} We believe, viewing the record in the light most favorable to the verdict, that the evidence was sufficient for the jury to find that Defendants violated Plaintiff's liberty interest. There was evidence presented showing that over a period of nearly ten years, Plaintiff was followed by Defendants whenever he was out on public lands. He was subjected to threats of citation for violation of hunting and fishing laws, even though he was never cited, and circulation of unsubstantiated rumors that he was a poacher. We recognize that Defendants were authorized by law to check hunting and fishing licenses and were authorized to give citations for violations of hunting and fishing laws. However, the evidence showed that Defendants appeared to specifically target Plaintiff and his family and friends. They appeared to pointedly follow Plaintiff and watch what he was doing. Their activities reached a point where Plaintiff's friends would not go hunting with him because he was followed by Department officers wherever he went and his license was checked every day. Further, evidence was presented that during this time period, Plaintiff lost so much of his welding business that he had to start a new business. The loss of the welding business was in large part due to the fact that he was no longer given access to the Baca Ranch where much of his welding was done. There was evidence from which the jury could have inferred that access was denied because of the good relations between Defendants and the manager of the Ranch. We find that there was substantial evidence to establish a pattern of harassment of Plaintiff that caused him to lose business and friends.

{20} "[T]o support an award of punitive damages, there must be some evidence, and a corresponding finding, that the wrongdoer had a culpable mental state." *Sunwest Bank v. Daskalos*, 120 N.M. 637, 639, 904 P.2d 1062, 1064 (Ct.App.1995). "The wrongdoer's conduct must rise to a 'willful, wanton, malicious, reckless, oppressive, or fraudulent level.' " *Id.* (quoting *Clay v. Ferrellgas*, 118 N.M. 266, 269, 881 P.2d 11, 14 (1994)). Here, evidence was presented that Defendants' harassment of Plaintiff was done in public, without any evidence of wrongdoing on his part. Further, the evidence established that at times, Plaintiff was actually targeted for investigation by Defendants. The jury could have inferred that Defendants pursued Plaintiff with the intent to harm him. There was sufficient evidence present for the jury to award punitive damages in this case.

Admission of Evidence

{21} We review the trial court's determination regarding the admission or exclusion of evidence for an abuse of discretion. *Cumming v. Nielson's, Inc.*, 108 N.M. 198, 203, 769 P.2d 732, 737 (Ct.App.1988). "In addition, the complaining party on appeal must show the erroneous admission and exclusion of evidence was prejudicial in order to obtain a reversal." *Id.* at 203–04, 769 P.2d at 737–38. Here, Defendants complain about four areas of evidence: (1) Plaintiff's complaint regarding a friend of Cassidy's illegally hunting bear; (2) Plaintiff's complaint about Cassidy collecting elk horns for his personal benefit while on duty; (3) the alle-

gation that Cassidy called Plaintiff a poacher in public and indicated that he had a crime-stopper's tip on Plaintiff; and (4) the allegation that Plaintiff was improperly prevented from getting a hunting license in 1997.

{22} Defendants attack the first three areas of evidence on the basis that they were unrelated to the detentions alleged in the complaint and were beyond the statute of limitations. Defendants contend that the evidence was not relevant and was only presented to allege character in conformity with these incidents. Rule 11–404(B) NMRA 2001 states:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

{23} We disagree with Defendants' assertion that the evidence was not relevant. The evidence was relevant to Plaintiff's liberty interest claim as it tended to show motive, intent, and a pattern of harassment. Plaintiff was not relying on a single act that violated his liberty interest right, but on a pattern of acts that culminated in a loss of business and personal relationships. Acts that are part of a continuing pattern of harassment, even though some of them occurred outside the statute of limitations, are admissible as evidence of the continuing pattern. *Cf. Robinson v. Maruffi*, 895 F.2d 649, 654–55 (10th Cir.1990) (holding that particular wrongful acts occurring outside the statute of limitations period could be considered part of a claim for malicious prosecution conspiracy occurring within the limitations period.)

{24} Defendants argue that the fourth incident, which occurred after the complaint was filed, is clearly irrelevant. However, evidence of a continuing pattern of harassment is allowed. Plaintiff presented other evidence as well to show that the harassment did not stop with the filing of the complaint, but rather continued. Thus, this piece of evidence was relevant to intent as well.

{25} Moreover, Defendants have failed to show how they were prejudiced by the admission of this evidence. *See State v. Gammill*, 102 N.M. 652, 655, 699 P.2d 125, 128 (Ct.App.1985) (concluding that without a demonstration of prejudice, there is no abuse of discretion). We believe that the trial court did not abuse its discretion in allowing evidence that was used to show a pattern of harassment, which was the basis for the liberty interest claim.

Special Verdict Form

{26} Defendants argue that the trial court erred in giving the jury a special verdict form that did not contain a causation element. Defendants argue that the Uniform Jury Instructions require the issue of causation to be in the verdict form. Our review of the Uniform Jury Instructions, however, shows that the issue of causation is included only in the comparative negligence form. *See* UJI 13–2220 NMRA 2001. We believe that is appropriate because the focus in a comparative negligence case is upon causation. We do not believe the Uniform Jury Instructions require the issue of causation to be included in the verdict form for this case.

{27} We review all the jury instructions to determine whether, taken as a whole, they fairly present the issues and applicable law. *See Kestenbaum v. Pennzoil Co.*, 108 N.M. 20, 26, 766 P.2d 280, 286 (1988). While we recognize that the special verdict form given to the jury does not include a causation element, the jury instructions as a whole do properly instruct the jury on the issue of causation. Instruction No. 3 requires the jury to find that the acts of Defendants were the proximate cause of the damages sustained by Plaintiff. Instruction No. 5 defines proximate cause. Thus, the instructions taken as a whole address the question of causation and we find no error in the special verdict form.

CROSS–APPEAL

Amendment of the Complaint

{28} Plaintiff contends that the trial court erred in refusing to allow him to amend his complaint. We review the denial of a motion to amend the complaint for an abuse of discretion. *Fernandez–Wells v. Beauvais*, 1999–NMCA–071, ¶ 15, 127 N.M. 487, 983 P.2d 1006. While amendments should

generally be allowed, we will not reverse the trial court's decision unless there is no reason to support the decision. *Id.* Here, two weeks before trial, Plaintiff sought to amend his complaint to allege a claim of retaliation for exercising his First Amendment rights. Defendants objected on the basis that the amendment was filed late and that they would be deprived of the opportunity to conduct discovery and to assert their qualified immunity defense related to the new claims.

{29} We recognize that amendments should be freely allowed and should be denied only where the motion is unduly delayed or where amendment would unduly prejudice the non-movant. Here, the trial court determined that Defendants would be unduly prejudiced by the amendment. The trial court noted that the new allegations might change trial strategy and that with only one week until trial, that would be unreasonable. We cannot say that the trial court's decision is clearly untenable. *Dominguez v. Dairyland Ins. Co.,* 1997–NMCA–065, ¶ 18, 123 N.M. 448, 942 P.2d 191. ("An abuse of discretion occurs when the court exceeds the bounds of reason, considering all the circumstances before it.") (citations omitted). Rather, we agree that the new allegations had the potential to change how the case would be tried.

{30} Plaintiff urges us to consider whether the evidence that would have been presented on the retaliation issue would have prejudiced Defendants, pointing out that the evidence had already been discovered and was admitted in the case anyway. While we agree that it appears that much of the evidence on the issue of retaliation was already known and, in fact, was admitted at trial, we nevertheless believe that the claim raised different issues than those presented in the liberty interest violation. Defendants would have been required to defend the matter differently in particular with regard to the qualified immunity defense. Given the potential for the amendment to affect trial strategies so close to the trial date, we cannot say it was an abuse of discretion for the trial court to deny the motion to amend the complaint.

Jury Instruction

{31} Plaintiff argues that the trial court erred in refusing to give his requested Instruction No. 8. He argues that the instruction would have given the jury guidance in how to determine when an investigative stop escalates into an arrest. A party is entitled to a jury instruction on his theory of the case if the evidence supports it. *Adams v. United Steelworkers of Am.,* 97 N.M. 369, 374, 640 P.2d 475, 480 (1982). The instruction, however, must be a correct statement of the law. Plaintiff's requested instruction reads:

> Under the Fourth Amendment of the United States Constitution, an investigative detention is a seizure of limited scope and duration and must be supported by a reasonable suspicion of criminal activity.
>
> An investigative detention may escalate into a[n] arrest, which is also a seizure under the Fourth Amendment of the United States Constitution an[d] must be supported by probable cause to believe that the person arrested has committed or is committing a crime.
>
> Each stage of a seizure must be analyzed to determine if the requisite level of suspicion or cause is present at each stage.

{32} Plaintiff argues that the jury needed this instruction in order to assist it in determining when a detention escalates into an arrest. We fail to see how this instruction gives that assistance. The instruction simply states the law regarding the suspicion needed for each kind of stop. The jury had already been given that law in other instructions. Since the jury had already been instructed on the level of suspicion needed for each type of stop, this instruction was simply duplicative. The trial court is not required to give an instruction that has already been covered by other instructions. *See Tipton v. Texaco, Inc.,* 103 N.M. 689, 698, 712 P.2d 1351, 1360 (1985) (finding no error in refusing a duplicative and possibly confusing instruction).

{33} While Plaintiff's brief correctly states the law with regard to when a detention may ripen into an arrest, *see State v. Werner,* 117 N.M. 315, 317–19, 871 P.2d 971, 973–75 (1994), we do not believe that the jury instruction that he requested did so. The refused instruction does not explain when a

detention becomes an arrest, but only what level of suspicion is required to support each stop. The instruction simply stated that at each stage of a seizure, the requisite level of suspicion was required. It does not give the kind of guidance that Plaintiff now contends that he sought to give the jury. We cannot say that the trial court erred in refusing an instruction that was not only duplicative but did not give the guidance that Plaintiff asserts the jury needed.

CONCLUSION

{34} We hold that a liberty interest claim based on a pattern of harassment and intimidation by Department officers that resulted in a loss to Plaintiff's business relationships stated a § 1983 claim of conduct that violated a clearly established right of which a reasonable person would have known. We affirm the trial court's ruling upon the motion to amend the complaint, the evidence, and the jury instructions. We likewise affirm the jury's verdict as supported by substantial evidence.

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

WE CONCUR: JAMES J. WECHSLER, Judge and M. CHRISTINA ARMIJO, Judge.

2001-NMCA-092

33 P.3d 901

TRUCK INSURANCE EXCHANGE, Plaintiff–Appellant,

v.

Deborah J. GAGNON, Don R. Watroba, The Tomato Café, Inc. and Edward White, Defendants,

and

David Smith, Defendant–in–Intervention Appellee.

No. 21,055.

Court of Appeals of New Mexico.

Aug. 23, 2001.

Certiorari Denied, No. 27,132, Oct. 31, 2001.

Lisa P. Ford, Beall & Biehler, P.A., Albuquerque, NM, for Appellant.

Jeffrey A. Dahl, Gordon S. Sargent, Lamb, Metzgar, Lines & Dahl, P.A., Albuquerque, NM, for Appellee.

OPINION

ROBINSON, Judge.

{1} The issue in this case is whether Tomato Café's (café) general comprehensive liability insurance policy covers a claim for sexual harassment of an employee. The trial court ruled that it does and granted summary judgment in favor of Defendants. We hold that the policy excluded coverage for injuries to employees, and reverse.

I. BACKGROUND AND PROCEDURAL POSTURE

{2} David Smith (Smith), formerly a waiter at Tomato Café, filed suit in federal court against the café, its owners, and the manager of the café, claiming sexual harassment and a hostile work environment. Smith contended that in 1996, during the time he worked at the café, his manager, Edward White, sexually harassed him by asking him to lunch repeatedly and touching him in a flirtatious manner, even after Smith had asked White to leave him alone. Smith contended White also harassed him by discussing the different ways White wanted to have sex. Tomato Café had an insurance policy with Truck Insurance Exchange (the insurance company), which defended the action under a reservation of rights, and settled the claim for $20,500.00.

{3} Subsequently, in this action, the insurance company filed for a declaratory judgment that it was not required to pay under the policy. Defendants assigned their claims against the insurance company to Smith, and Smith intervened as a defendant. The insurance company and Smith stipulated to the facts, and each moved for summary judgment on the issue of coverage. The district court granted summary judgment in favor of Smith.

II. STANDARD OF REVIEW

{4} Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Rule 1-056(C) NMRA 2001; *Self v. United Parcel Serv.,*

Inc., 1998–NMSC–046, ¶ 6, 126 N.M. 396, 970 P.2d 582. We review the district court's ruling de novo. *Id.* ¶ 6.

III. INSURANCE COVERAGE

{5} The insurance company contends that sexual harassment is not covered because the policy contains an exclusion for injuries to employees. The insurance company also contends that sexual harassment is not covered because the policy requires "bodily injury," and an "occurrence," which is defined in terms of an "accident." The insurance company argues that there has been no bodily injury or accident.

A. Employee Coverage

{6} The policy provides for the following coverage:

COVERAGE D—BUSINESS LIABILITY

We shall pay all sums for which you may become legally obligated to pay as damages caused by:

1. Bodily Injury, Personal Injury
2. Advertising Injury (subject to Deductible)
3. Property Damage

We shall pay up to the limit of liability for any one occurrence resulting from your business operations arising out of the insured location.

This coverage shall apply at a newly acquired location. It will cease if you do not report such location to us within 30 days of acquisition.

{7} Insurance contracts are construed using the same principles that govern the construction of contracts generally. *Rummel v. Lexington Ins. Co.*, 1997–NMSC–041, ¶ 18, 123 N.M. 752, 945 P.2d 970. The insurance contract is construed as a whole. *Id.* ¶ 20. Any ambiguity is construed against the insurer, and exclusions must be clearly expressed in the policy. *Id.* ¶¶ 22–23. When a court interprets the terms of an insurance policy that is unclear and ambiguous, the reasonable expectations of the insured guide the analysis. *Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000–NMSC–033, ¶ 26, 129 N.M. 698, 12 P.3d 960. However, when the policy language is clear and unambiguous, we must give effect to the contract and enforce it as written. *Id.* ¶ 11.

B. Employee Exclusion

{8} The employee exclusion, which consists of two clauses, is, in pertinent part, as follows:

EXCLUSIONS

We do not pay for:

. . . .

2. Injury to any employee of yours arising out of and in the course of employment; if you are a partnership or a joint venture, to any partner or member of the joint venture.
3. Any obligations we or you may be held liable for under any workmen's or workers' compensation disability benefits law, or any similar law.

{9} In this case, we must decide whether Clauses 2 and 3 exclude coverage for all injuries to employees, or whether they only exclude coverage for worker's compensation injuries. The insurance company argues that the clauses express a blanket exclusion of all injuries to employees. Smith argues that the clauses only exclude coverage for injuries that are covered by workers' compensation. Following the great weight of authority, we agree with the insurance company.

{10} The policy language in our case reflects a common employee exclusion. *See, e.g., Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 418, 420 n. 21 (Minn.1997) (policy does not apply to "bodily injury to any employee of the insured arising out of and in the course and scope of his employment by the insured," and excluded obligations "of which the insured or any carrier as his insurer may be held liable under the workers' or workmen's compensation, * * * or under any similar law" (internal quotation marks and citations omitted)); *Am. Motorists Ins. Co. v. L–C–A Sales Co.*, 155 N.J. 29, 713 A.2d 1007, 1009 (1998) (the policy did not apply to "[a]ny obligation under a workers' compensation, disability benefits or unem-

ployment compensation law or any similar law," or to " '[b]odily injury to . . . [a]n employee of the insured arising out of and in the course of employment by the insured' " (internal quotation marks and citation omitted)).

{11} The overwhelming weight of authority is that employee exclusion clauses in general comprehensive liability policies like the one in this case exclude coverage for sexual harassment of employees. *See I–L Logging Co. v. Mfrs. & Wholesalers Indem. Exch.*, 202 Or. 277, 273 P.2d 212, 220, 222 (in banc) (the purpose of business liability policies is to cover damages to members of the public, as distinguished from damages to employees) *on rehearing* 202 Or. 277, 275 P.2d 226 (1954); *McLeod v. Tecorp Int'l, Ltd.*, 318 Or. 208, 865 P.2d 1283, 1287–88 (Or.1993) (en banc) (employee exclusion precluded coverage for employee's claim of wrongful termination and intentional infliction of emotional distress); *Nat'l Union Fire Ins. Co. v. Kasler Corp.*, 906 F.2d 196, 198–200 (5th Cir. 1990) (employee exclusion applied to injuries to employee sustained when a tool touched a power line); *Omark Indus., Inc. v. Safeco Ins. Co.*, 590 F.Supp. 114, 116–20 (D.Or.1984) (employee exclusion applied to employee discrimination claim); *Am. Motorists Ins. Co.*, 713 A.2d at 1011–14 (employee exclusion applied to wrongful termination claim); *cf. W. Am. Ins. Co. v. Bank of Isle of Wight*, 673 F.Supp. 760, 765–66 (E.D.Va.1987) (emotional injury from wrongful termination is not covered under the employee exclusion); *State Farm Fire & Cas. Co. v. Compupay, Inc.*, 654 So.2d 944, 947 (Fla.Dist.Ct.App.1995) (sexual harassment is not covered because the policy "clearly and unambiguously excludes from insurance coverage an injury to an employee caused by another employee in the course of employment"); *Cornhill Ins. PLC v. Valsamis, Inc.*, 106 F.3d 80, 86 (5th Cir.1997); *Bd. of Educ. v. Cont'l Ins. Co.*, 198 A.D.2d 816, 604 N.Y.S.2d 399, 400 (1993); *David v. Nationwide Mut. Ins. Co.*, 106 Ohio App.3d 298, 665 N.E.2d 1171, 1174 (1995); *Aberdeen Ins. Co. v. Bovee*, 777 S.W.2d 442, 444 (Tex.App.1989); *Smith v. Animal Urgent Care, Inc.*, 208 W.Va. 664, 542 S.E.2d 827, 834–36 (W.Va.2000); *Ottumwa Hous. Auth. v. State Farm Fire & Cas. Co.*, 495 N.W.2d 723, 726–27 (Iowa 1993); *Meadowbrook*, 559 N.W.2d at 419–20 (sexual harassment clearly arises out of employment and is not covered because it is excluded under the employee exclusion). There are only a few cases to the contrary. *But see SCI Liquidating Corp. v. Hartford Ins. Co.*, 272 Ga. 293, 526 S.E.2d 555, 557 (2000) (holding that "arising out of" is interpreted the same way as in worker's compensation law, and since sexual harassment does not "arise out of" employment under worker's compensation law, employee exclusion does not exclude coverage); *Maine State Acad. of Hair Design, Inc. v. Commercial Union Ins. Co.*, 699 A.2d 1153, 1158–60 (Me.1997) (insurance company had a duty to defend sexual harassment claim because some injuries pled may have arisen outside of work, and some injuries, disparagement and invasion of privacy, might be covered under the language of the policy).

{12} We decline to follow *SCI Liquidating Corp.* and *Maine State Acad. of Hair Design.* We note that *Maine State Acad. of Hair Design* is distinguishable, and not strongly in favor of Smith's position, because it is based on specific facts that some of the incidents occurred outside of work, and the fact that some injuries (disparagement and invasion of privacy) may have been covered under the policy's specific language. *Maine State Acad. of Hair Design*, 699 A.2d at 1158–59.

{13} Despite those authorities, Smith argues that Clauses 2 and 3 should be read together to exclude only workers' compensation injuries. However, the weight of authority is that, read together, the two clauses express a blanket exclusion for all injuries to employees arising out of and in the course of employment whether or not they are covered by workers' compensation. *See Meadowbrook*, 559 N.W.2d at 420; *Am. Motorists Ins. Co.*, 713 A.2d at 1013 (rejecting claim that the policy only excluded workers' compensation claims because to do so would make the "arising out of employment" clause redundant); *McLeod*, 865 P.2d at 1288 n. 6 (clauses must be read together to exclude all claims by employees; contrary interpretation would read the "arising out of" clause out of the policy); *Nat'l Union Fire Ins. Co.*, 906 F.2d at 198–99 (holding that limiting exclusion to workers' compensation claims would

make the other clause, "arising out of," meaningless); *Omark Indus., Inc.*, 590 F.Supp. at 119; *Harnden v. Cont'l Ins. Co.*, 612 S.W.2d 392, 393–96 (Mo.Ct.App.1981); *Fieldcrest Cannon, Inc. v. Fireman's Fund Ins. Co.*, 124 N.C.App. 232, 477 S.E.2d 59, 70–71 (N.C.Ct.App.1996) (holding that the two clauses, read together, exclude all bodily injuries to employees, including intentional infliction of emotional distress and negligent infliction of emotion distress, and are not ambiguous.); *cf. Omni Aviation Managers, Inc. v. Buckley*, 97 N.M. 477, 481, 641 P.2d 508, 512 (1982) (if possible, court will give effect to all parts of the contract and avoid an interpretation that makes a portion superfluous). *But see SCI Liquidating Corp.*, 526 S.E.2d at 557 (holding that "arising out of" is interpreted the same way as in worker's compensation law, and since sexual harassment does not "arise out of" employment under worker's compensation law, employee exclusion does not exclude sexual harassment from coverage); *Fed. Rice Drug Co. v. Queen Ins. Co.*, 463 F.2d 626, 630 (3d Cir. 1972).

{14} Smith also argues that since sexual harassment does not "arise out of" employment for purposes of workers' compensation, *Coates v. Wal-Mart Stores, Inc.*, 1999 NMSC 013, ¶¶ 25–28, 127 N.M. 47, 976 P.2d 999, and *Cox v. Chino Mines/Phelps Dodge*, 115 N.M. 335, 337–38, 850 P.2d 1038, 1040–41 (Ct.App.1993), then as a matter of law it does not "arise out of" employment for purposes of interpreting an insurance contract, and therefore, sexual harassment is not excluded from coverage. Other courts have rejected this argument, recognizing that the policies underlying workers' compensation law are different from those implicated in interpreting an insurance contract. *Am. Motorists Ins. Co.* declined to hold that "arising out of" for purposes of workers' compensation law, is the same as for an insurance policy. *Id.* The court found "More instructive is the clear weight of authority from other jurisdictions that favors enforcement of the employee exclusion to bar coverage for claims similar to that advanced by plaintiff." 713 A.2d at 1011. The court in *Smith*, 542 S.E.2d at 834–36, also rejected an argument that because sexual harassment did not "arise out of" employment for purposes of workers' compensation law, it could not "arise out of" employment for purposes of the employee exclusion of an insurance contract. *Smith* noted that "arising out of" should be treated differently in an insurance context from a workers' compensation context. *Id.* at 835. "The use of workers' compensation law to guide the interpretation of a contract not involving workers' compensation is inappropriate." *Id.* (quoting *SCI Liquidating Corp.*, 526 S.E.2d at 557–58 (Fletcher, J., dissenting)). *Smith* expressly rejected the majority opinion in *SCI Liquidating Corp.*

{15} We agree with the reasoning in both *Am. Motorists Ins. Co.* and *Smith*. By definition, sexual harassment occurs at work. *See Meadowbrook*, 559 N.W.2d at 420 ("It is incongruous to hold that such a claim [hostile work environment] can arise anywhere but in the course and scope of a plaintiffs' [sic] employment."). Moreover, to adopt Smith's argument, we would have to take a position contrary to the vast majority of courts, and hold that sexual harassment is covered by a general comprehensive liability policy. We decline to do so.

{16} Our conclusion that "arising out of," as used in an employee exclusion in an insurance policy, need not be governed by the meaning of the phrase under the Workers' Compensation Act (WCA), and is also supported by *Coates*, which recognized that the workers' compensation scheme addresses concerns different from those addressed by federal civil rights acts. *Coates* refused to hold that the WCA provided the worker's exclusive remedy for sexual harassment. *Coates*, 127 N.M. 47, 976 P.2d 999, 1999–NMSC–013, ¶ 26. Here, the insurance contract deals with different concerns and issues from those underlying the WCA, and we see no compelling reason to conclude that the phrase "arising out of employment" in an insurance policy must be interpreted identically to the phrase when it is used in a workers' compensation context.

{17} We hold that the general comprehensive liability policy in this case excludes coverage for injuries to employees, and consequently does not cover sexual harassment of

employees. We note that Employment Practices Liability Insurance policies that specifically cover sexual harassment, employment discrimination, and similar claims, are readily available to employers. *See McLeod*, 865 P.2d at 1287.

C. Waiver

{18} Smith has also argued that the insurance company may not deny coverage because a different policy, issued to a Tomato Café at another location, contained language specifically excluding sexual harassment from coverage. Smith argues that since the insurance company did not protect itself with similar language in the policy issued to the location in this case, the insurance company has waived any argument that the policy in this case excludes coverage for sexual harassment. We reject this argument. The policy, issued to a different Tomato Café and expressly excluding coverage for sexual harassment, was issued in 1997, a year after the events giving rise to this case. The policy in force at the specific location, and for the relevant time period, is the policy that governs this case. Smith has cited no authority that would require us to hold that the insurance company has waived its right to rely on the policy in force at the location at which, and during the time, the sexual harassment occurred. Smith relies on *Modisette v. Foundation Reserve Ins. Co.*, 77 N.M. 661, 427 P.2d 21 (1967), *Empire West Cos. v. Albuquerque Testing Labs., Inc.*, 110 N.M. 790, 800 P.2d 725 (1990), *Shaeffer v. Kelton*, 95 N.M. 182, 619 P.2d 1226 (1980), and *McMullen v. United Brotherhood of Carpenters & Joiners of Am.*, 34 N.M. 523, 285 P. 489 (1930). These cases are not on point. *Modisette* involved misrepresentations by an insured in an insurance application. *Empire West Cos.* and *Shaeffer* are not insurance cases, and involve acceptance of work that was already performed. *McMullen* held that a union was estopped from denying membership to a member when it had accepted his dues for sixteen years.

CONCLUSION

{19} We reverse and remand with instructions to enter summary judgment in favor of the insurance company.

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

WE CONCUR: RICHARD C. BOSSON, Chief Judge and M. CHRISTINA ARMIJO, Judge.

2001-NMCA-076

33 P.3d 906

STATE of New Mexico ex rel. PUBLIC EMPLOYEES RETIREMENT ASSOCIATION, Plaintiff–Appellant,

v.

Lawrence LONGACRE, Defendant–Appellee.

No. 20,787.

Court of Appeals of New Mexico.

Aug. 24, 2001.

Certiorari Granted, No. 27,135, Sept. 28, 2001.

G.T.S. Khalsa, Santa Fe, NM, for Appellant.

George T. Geran, Santa Fe, NM, for Appellee.

OPINION

BUSTAMANTE, Judge.

{1} Appellant, Public Employees Retirement Association (PERA), appeals from a summary judgment rendered in favor of Defendant/Appellee, Lawrence Longacre (Lawrence), arguing that NMSA 1978, § 10–11–4.2(A) (1997) unconstitutionally limits its ability to recover overpayments made to Maria Longacre, Lawrence's deceased spouse. We agree Section 10–11–4.2(A) violates Article IV, Section 32, of the New Mexico State Constitution and declare that it is unconstitutional.

FACTS AND PROCEDURAL HISTORY

{2} The facts of this case are not in dispute. Maria Longacre (Maria), a member of PERA, applied for and was paid disability retirement pension benefits under Option "A" from the date of her application, on August 1, 1992, to the date of her death on January 15, 1997. Option "A" does not contain a right of survivorship and is the highest pension payable. NMSA 1978, § 10–11–117(A) (1997). Throughout this time Maria was married to Lawrence. NMSA 1978, § 10–11–116(A) (1991) of the PERA Act requires that if the member is married at the time of retirement, PERA must obtain the consent of the member's spouse as to the form of payment and beneficiary selected before the designation is effective. *Id.*

{3} Lawrence's consent was not obtained when Maria elected Option "A" on her retirement pension application and the parties agree that this infirmity rendered the election void. As a result, Lawrence, as Maria's surviving spouse, is eligible, by operation of law, for the payment of survivor pension benefits under Option "C". Section 10–11–116(A)(2). The error was not discovered during her lifetime, and Maria was overpaid benefits under Option "A" in the amount of $7537.90.

{4} An administrative hearing was held before the PERA Board on March 30, 1998, to consider a request by Lawrence, as Maria's survivor beneficiary, for benefits under Option "B". During this administrative hearing, PERA raised the issue of overpayments

to Maria, and whether PERA was limited to recovering only one year of overpayments, pursuant to Section 10–11–4.2(A) of the PERA Act. PERA argued that Section 10–11–4.2(A) unconstitutionally limited recovery to only one year of overpayments, but pointed out that the PERA Board did not have authority to decide the constitutionality of its statutes. On October 28, 1998, the PERA Board issued a decision that granted Lawrence benefits under Option "C" and limited PERA to recovering one year of the overpayments made to Maria.

{5} PERA filed a declaratory judgment action in district court on November 25, 1998, challenging the constitutionality of Section 10–11–4.2(A) under Article IV, Section 32 of the New Mexico State Constitution. The parties filed cross motions for summary judgment. On August 25, 1999, the district court denied PERA's motion for summary judgment and granted Lawrence's cross motion. This appeal followed.

DISCUSSION

A. Standard of Review

{6} We start our inquiry with the presumption that legislative acts are constitutional. *City of Farmington v. Fawcett*, 114 N.M. 537, 540, 843 P.2d 839, 842 (Ct.App. 1992). It is the duty of an appellate court to uphold a statute unless it is satisfied beyond reasonable doubt that the challenged legislation is unconstitutional. *Id.; see also Espanola Hous. Auth. v. Atencio*, 90 N.M. 787, 788, 568 P.2d 1233, 1234 (1977) (holding statute is upheld unless the court is satisfied beyond all reasonable doubt that the challenged legislation violates the constitution). "The burden is therefore upon the party attacking the constitutionality of the enactment to show that the act is invalid." *City of Farmington*, 114 N.M. at 540, 843 P.2d at 842; *see also City of Albuquerque v. Jones*, 87 N.M. 486, 488, 535 P.2d 1337, 1339 (1975).

B. Constitutionality of Section 10–11–4.2(A)

{7} PERA was established by the Public Employees Retirement Act, NMSA 1978, §§ 10–11–1 to –141 (1987, as amended through 1999), as a state agency responsible for administering the retirement program for its qualified members. *Rainaldi v. Pub. Employees Ret. Bd.*, 115 N.M. 650, 651, 857 P.2d 761, 762 (1993). The PERA Board holds all funds in the PERA system in trust for its members. N.M. Const. art. XX, § 22; NMSA 1978, § 10–11–123(B) (1987); NMSA 1978, § 10–11–130(A) (1997). As trustee of the fund, and fiduciary to PERA members, the Board has a duty to collect overpayments for the trust. N.M. Const. art. XX, § 22; Restatement (Second) of Trusts § 254, at 637–38 (1959). Following the principles of trust law, the PERA Board has, by regulation, directed the Executive Director of PERA to "make all reasonable efforts to collect any pension overpayment made for any reason." 2 NMAC 80.800.8.1.

{8} Section 10–11–4.2(A) limits the amount PERA can collect, apparently regardless of the reason for overpayment. The statute provides:

> If an error or omission results in an overpayment to a member or beneficiary of a member, the association shall correct the error or omission and adjust all future payments accordingly. The association shall recover all overpayments made for a period of up to one year prior to the date the error or omission was discovered.

PERA asserts that, by enacting Section 10–11–4.2(A), the legislature violated the clear and unambiguous language of Article IV, Section 32, of the Constitution of New Mexico, which states:

> No obligation or liability of any person, association or corporation held or owned by or owing to the state . . . shall ever be exchanged, transferred, remitted, released, postponed or in any way diminished by the legislature, nor shall any such obligation or liability be extinguished except by the payment thereof into the proper treasury, or by proceeding in court.

{9} The words of constitutions are interpreted by giving words their plain, natural, and usual significance. *City of Farmington*, 114 N.M. at 544, 843 P.2d at 846. "If the language of the constitution is plain, definite, and free from ambiguity, the intent is to be found in the instrument itself." *Id.* Interpretation of a constitution, like a statute, is

an issue of law, subject to de novo review. *State v. Cleve,* 1999–NMSC–017, ¶ 7, 127 N.M. 240, 980 P.2d 23. In addition, the constitution is interpreted "to carry out its spirit, avoiding legal technicalities and subtle niceties." *State ex rel. Udall v. Colonial Penn Ins. Co.,* 112 N.M. 123, 128, 812 P.2d 777, 782 (1991).

{10} Article IV, Section 32 has been construed by New Mexico appellate courts several times. Early New Mexico cases focused their analysis on whether or not the claim involved was an "obligation or liability" owed the state. Starting with this early case law, New Mexico courts declined to draw nebulous distinctions between various kinds of property interests in determining what constitutes an obligation or liability subject to Article IV, Section 32.

{11} For example, in *Asplund v. Alarid,* 29 N.M. 129, 219 P. 786 (1923) the plaintiff, suing as a taxpayer, challenged a statute that exempted from taxation certain property owned by honorably discharged veterans. *Id.* at 137, 219 P. at 789. In addition to providing an exemption in the future, the act was made retroactive and applied to taxes that had already accrued. *Id.* at 133, 219 P. at 787. The Court held that the legislature was "without power" to exempt taxpayers from taxes once the taxes had matured into a liability. *Id.* at 138, 219 P. at 789; *see also Bd. of Educ. v. McRae,* 29 N.M. 85, 88, 218 P. 346, 347 (1923) (repealing tax law cannot have the effect of relieving tax liability during the year the repealing statute went into effect); *State v. State Inv. Co.,* 30 N.M. 491, 500–02, 239 P. 741, 744–46 (1925) (settling suits for disputed taxes for amounts less than the amount claimed to be owing does not violate State Constitution).

{12} In this same vein, New Mexico appellate courts have consistently held that obligations and liabilities owed the state can be forgiven or compromised only if there is a good faith dispute as to the amount owed. *See id.; Lyle v. Luna,* 65 N.M. 429, 437–39, 338 P.2d 1060, 1065–66 (1959); *White v. Sutherland,* 92 N.M. 187, 191, 585 P.2d 331, 335 (Ct.App.1978); *Gutierrez v. Gutierrez,* 99 N.M. 333, 335, 657 P.2d 1182, 1184 (1983); *see also* N.M. Att'y Gen. Op. 71–16 (1971). In this case there is no dispute that PERA overpaid disability pension benefits to Maria in the amount of $7537.90. It also bears noting that Lawrence does not argue to us that he or Maria were misled in any way by PERA. In fact, the record before us reveals nothing about how or why the option designation error first occurred.

{13} We do not think it can be seriously questioned that in common parlance an overpayment of retirement benefits would be an "obligation or liability" within the framework of the Public Employees Retirement Act. Retirees are entitled to benefits under the appropriate option, but no more. Excess payments do not belong to the retiree. Rather they belong to the trust to be used for the benefit of all retirees, and they should be reimbursed to PERA. We perceive no escape from the conclusion that the responsibility to reimburse overpayments is an "obligation or liability . . . owned by or owing to the state" as those words are used in Article IV, Section 32. The unambiguous and intended effect of Section 10–11–4.2(A) is to release retirees of their responsibility to repay anything more than one year of excess benefits received. While we certainly do not question or quarrel with the legislature's apparent concern for the financial well-being of retirees, we are forced to conclude that the method chosen by the legislature is not allowed by Article IV, Section 32.

{14} Lawrence asserts two arguments attempting to demonstrate why this resolution is not appropriate. Lawrence's principal argument is that Article IV, Section 32 "explicitly applies only to currently-due or currently-existing obligations to the State, not any obligation scheduled to come into existence in the future." Thus, he argues that the Constitution only prohibits forgiveness of overpayments accrued from the time Maria began to receive benefits on August 1, 1992, to April 6, 1993, the date Section 10–11–4.2(A) was adopted. Lawrence asserts that overpayments made after the enactment of Section 10–11–4.2(A) were not debts "held or owned by or owing to the state" when the statute took effect. These overpayments, then, are not subject to Article IV, Section 32

because they did not exist at the time of this legislative act.

{15} Lawrence argues in this regard that after adoption of Section 10–11–4.2(A), no matter how long overpayments continue, no obligation or liability is created in the retiree except for the one-year period defined by the statute. The effect of accepting Lawrence's argument would be to say that Section 10–11–4.2(A) redefined the benefits payable under PERA.

{16} Lawrence relies on *Asplund* and *McRae* as authority for this argument. *Asplund* and *McRae* dealt with the constitutionality of forgiving assessed taxes. *See Asplund,* 29 N.M. at 131, 219 P. at 787; *McRae,* 29 N.M. at 86–87, 218 P. at 346. Lawrence's reliance on these cases is misplaced. We, of course, agree that the legislature may eliminate or reduce a tax, as long as it only changes the tax structure prospectively. *See* N.M. Att'y Gen. Op. 91–14 (1991) (stating that there is no future tax debt because the obligation to pay is solely a function of the statutory taxing scheme). However, pension overpayments are not analogous to changes in tax statutes.

{17} In enacting Section 10–11–4.2(A), the legislature did not amend or change any of the underlying retirement benefits or the method by which benefits, including Options "A" or "C", are calculated. We fail to see how Section 10–11–4.2(A) can be deemed to prevent pension overpayments from becoming liabilities or obligations owed to the State. To state the obvious, retirees have no legal right to receive benefit overpayments.

{18} Once an overpayment is discovered, Section 10–11–4.2(A) is applied retroactively to preclude collection of more than one year of overpayments. Section 10–11–4.2(A) is not a static statute designed for a single episode of impact. It is a dynamic statute designed to have effect after its enactment. Section 10–11–4.2(A) cannot be applied without diminishing an obligation or liability owed to the State, and that is why it is in conflict with Article IV, Section 32.

{19} To interpret Article IV, Section 32 as applying only to debts existing when the legislature acts neglects the full import of the language of the provision itself. As a general rule, we will not read words into a statute or constitutional provision when it makes sense as written. *Las Cruces TV Cable v. N.M. State Corp. Comm'n (In re Generic Investigation Into Cable Television Servs.),* 103 N.M. 345, 349, 707 P.2d 1155, 1159 (1985). Equally, we should not construe any part of a statutory or constitutional provision so as to render it meaningless or superfluous. *Denish v. Johnson,* 1996–NMSC–005, ¶ 37, 121 N.M. 280, 910 P.2d 914. Article IV, Section 32 states that "No obligation or liability ... shall *ever* be" affected by legislative action. (Emphasis added.) Giving the word "ever" its plain, natural, and usual significance as constitutional interpretation requires, *City of Farmington,* 114 N.M. at 544, 843 P.2d at 846, broadens the coverage of the constitutional provision. Webster's Third New International Dictionary 788 (1993) defines the adverb "ever" to signify "at all times," "at any period or point of time," and "through an indefinite time." Lawrence's interpretation prohibits application of Article IV, Section 32 to overpayments received after Section 10–11–4.2(A) took effect. His interpretation renders the word "ever" surplusage in the constitutional provision in contravention of the basic canons of constitutional interpretation. Therefore, we interpret the word "ever" to indicate the applicability of Article IV, Section 32 to obligations owed to the State regardless of the time the obligation was incurred.

{20} Lawrence also argues that Section 10–11–4.2(A) is an ordinary statute of limitations applied to the state and that it does not discharge the liability owed, but merely limits the amount of overpayments PERA can recover to a reasonable period. In *State v. Montoya,* 32 N.M. 314, 317, 255 P. 634, 635 (1927), our Supreme Court addressed a similar argument in support of a similar statute. In *Montoya* the state was trying to collect taxes based on an 1897 assessment. The taxpayer interposed in response a statute passed in 1921 which created a presumption that all taxes accrued on property prior to January 1, 1910, had been paid. The statute also discharged all liens

imposed for such taxes and imposed a duty on county treasurers to "mark such taxes paid." *Id.* at 315, 255 P. at 634. The Court held that the release of liens portion of the statute could be enforced but that the release of personal liability for the taxes offended Article IV, Section 32.

{21} The taxpayer urged that if the statute could not be sustained as a discharge or remission of taxes because of Article IV, Section 32, it should be upheld as a statute of limitations, or of repose. *Montoya,* 32 N.M. at 317, 255 P. at 635. In response to this argument the Court stated:

> We fail to discover in this statute, however, the earmarks of an ordinary statute of limitations. A statute which merely bars the remedy is one of repose. It forbids the preferring of stale claims as matter of public policy. But this state is one of presumption of payment, and directs the county treasurers to make record of actual payment. It does not act prospectively as statutes of limitations do. It acts only retrospectively. It allows no time within which the state may proceed on these old taxes before the bar is to fall, as statutes of limitations must do which are to affect private contract obligations. The plain purpose and necessary effect of this section is to remit and release tax obligations. If the Legislature may remit and release them when 11 years old, it may do so when they are but 3 years old. So we doubt the correctness of classifying section 474 as a limitation statute. But the name or classification of the statute does not matter. It is the effect that condemns it. Admitting that it has done nothing more than to bar the remedy, leaving the obligation or liability intact, to be enforced if perchance a future Legislature should repeal section 474, yet the effect has been at least to "postpone" the obligation or liability-result equally obnoxious to the Constitution.

Id. at 317–18, 255 P. at 635.

{22} We can add very little to these observations. Section 10–11–4.2(A) does not look or operate like a statute of limitations or a statute of repose. For example, statutes of limitations typically allow a certain period of time within which to commence an action in the courts for enforcement of an obligation. NMSA 1978, §§ 37–1–1 to –30 (1880, as amended through 1995) (Article 1, Limitations of Actions). Also, statutes of limitations typically do not place limitations on the amount of the recovery so long as the filing deadline is met. To the contrary, Section 10–11–4.2(A) limits recovery to one year of overpayments and places no limit whatsoever on the time within which PERA must act.

{23} Further we fail to see how Section 10–11–4.2(A) serves to further the purpose of all statutes of limitation: protection of defendants from stale claims while providing an adequate period of time for persons of ordinary diligence to act on their claims. *Garcia on Behalf of Garcia v. La Farge,* 119 N.M. 532, 537, 893 P.2d 428, 433 (1995). The difficulties inherent in pursuing stale claims arising primarily from loss of evidence and fading memories are not likely to be present in this context. Once a mistake is discovered, the reason for the error and calculation of the overpayment should be readily available from PERA's own files.

{24} Analyzing Section 10–11–4.2(A) as a statute of repose is not fruitful either. Statutes of repose generally operate to put an end to liability after the passage of a set period of time measured from a defined event. *Id.* Statutes of repose cut off liability regardless of whether claims have ripened or-if ripe-have been discovered by the plaintiff. *Id.* Section 10–11–4.2(A) in contrast does not ground its time prior to repose on the most logical event; that is, at retirement when the error in option selection occurs and PERA's claims become justiciable. Instead it counts backwards from the date the error is discovered. Lawrence thus proposes a statute of repose which is triggered and measured by discovery of the claim by PERA. This is an odd way to craft a statute of repose, to say the least, and we do not believe the legislature intended to craft a statute of repose as the term is normally understood.

{25} On balance, we believe Section 10–11–4.2(A) lends itself most naturally to interpretation as a forgiveness of debt rather than a statute of limitations of any kind.

{26} The dissent rests on three broad grounds. First, it generally agrees with Lawrence's two arguments, though it conflates them in a way Lawrence does not. We have fully responded to Lawrence and need say no more on this count.

{27} Second, it makes a fairness argument which is not supported by the record and which Lawrence does not make. As we have noted, Lawrence has not asserted in this Court any theory of bad faith or wrongful conduct on the part of PERA and thus, he has not made any kind of estoppel argument against PERA to us. *Wisznia v. State Human Servs. Dep't*, 1998–NMSC–011, ¶ 17, 125 N.M. 140, 958 P.2d 98 ("noting that [e]stoppel is rarely applied against the [s]tate and then only in exceptional circumstances where there is a shocking degree of aggravated and overreaching conduct"); *Green v. N.M. Human Servs. Dep't*, 107 N.M. 628, 629, 762 P.2d 915, 916 (Ct.App.1988) (holding that estoppel normally requires showing of (1) conduct amounting to false representation as concealing of facts, (2) knowledge or constructive knowledge of true facts, and (3) an expectation or intent that the other party will rely and act on the representations made). The out-of-state authorities the dissent cites are estoppel theory cases that are simply not relevant to the resolution of this case.

{28} The second facet of the dissent's fairness argument is similarly unsupported. The dissent assumes that the error was entirely PERA's fault. While that may be so, there is nothing in the record before us to support that assumption. It is not appropriate for this Court to make decisions of this kind based on speculation.

{29} We readily agree that in any individual case PERA is better able to absorb any loss. And, again, we do not question the legislature's motives in attempting to help retirees. However, neither of these can be controlling factors in resolving an issue of constitutional interpretation. *See State v. Nunez*, 2000–NMSC–013, ¶ 47, 129 N.M. 63, 2 P.3d 264 (noting that legislature's benign intent cannot cure constitutional violation).

{30} Finally, the dissent asserts that Section 10–11–4.2(A) does not violate the underlying purpose of Article IV, Section 32 which is to "prevent favoritism or relief to people who do not deserve it." (Dissent ¶ 37). We agree that that is one of the purposes of Article IV, Section 32, but it is not its only purpose and that is not the only use to which it has been put. It is difficult to conceive of persons more worthy than our war veterans, yet Article IV, Section 32 was applied to prevent the legislature from granting them tax relief for a single year following World War I. *See Asplund*, 29 N.M. at 133–34, 219 P. at 787–88. *Asplund* illustrates why the dissent's use of a purposive interpretative model to the exclusion of-or to trump-actual language is problematic. It is clearly not appropriate in this context.

CONCLUSION

{31} We hold Section 10–11–4.2(A) is unconstitutional in violation of Article IV, Section 32 of the New Mexico Constitution.

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

I CONCUR: JAMES J. WECHSLER, Judge.

IRA ROBINSON, Judge (dissenting).

ROBINSON, Judge (dissenting).

{33} I respectfully dissent. This case is a good example of the unfairness that results from PERA's position. Mrs. Longacre selected an option for her retirement fund that required her husband's signature as consent, but Mr. Longacre's signature was never obtained. There is no evidence of fraud on the part of the Longacres. It would seem that PERA should have caught such an obvious error when the form was turned in, but did not.

{34} It is reasonable to assume that for any one application that a state employee fills out and reviews in his or her lifetime, a PERA staffer will see and review hundreds and perhaps thousands. It is also reasonable to assume that the PERA staff is in charge of its own paperwork and familiar with the processing of a state employee's application paperwork. Now PERA accepts no responsibility for its error, presents Mr. Longacre with a large bill after his wife has died and

years after the money Mrs. Longacre received has presumably been spent, and argues that the New Mexico Constitution provides support for this inequitable result. I cannot accept that argument.

{35} In my view, the legislature acted constitutionally to address the unfairness that results when PERA is allowed to recover overpayments without limitation. Section 10–11–4.2 is properly characterized as a statute of repose, rather than a statute of limitations, because it limits the remedy, instead of providing that a cause of action must be filed within a certain time period. *See Cummings v. X-Ray Assoc. of N.M.*, 121 N.M. 821, 834–35, 918 P.2d 1321, 1334–35 (1996); *Montoya*, 32 N.M. at 317, 255 P. at 635 (a statute that merely bars the remedy is one of repose). I believe that Section 10–11–4.2(A) is constitutional because the legislature may properly create a statute of repose for overpayments that have not yet accrued. Article IV, Section 32, provides that when the obligation or liability is "held or owned by or owing to the state," it cannot be "extinguished" by the legislature. "Held or owned by or owing to the state" connotes a requirement that the debt is already fixed and definite. Furthermore, a debt must exist before it can be "extinguished." Article IV, Section 32, read as a whole, supports a conclusion that there is no constitutional violation unless the debt is already fixed and definite at the time the legislature seeks to extinguish it.

{36} I see nothing unconstitutional about a law that limits PERA's ability to collect *future* overpayments caused by PERA's own error. The legislature has the power to enact statutes of repose and of limitation. *See Cummings*, 121 N.M. at 827–836, 918 P.2d at 1327–36; *Jaramillo v. State*, 111 N.M. 722, 725, 809 P.2d 636, 639 (Ct.App.1991). Section 10–11–4.2 is presumed valid, and PERA bears the burden of proving it unconstitutional. *See City of Albuquerque v. Jones*, 87 N.M. 486, 488, 535 P.2d 1337, 1339 (1975). I do not believe PERA has met its burden to overcome the presumption of validity. Future overpayments, not yet in existence, are not "obligations" or "liabilities." It is undisputed that at the time the legislature passed Section 10–11–4.2, Mrs. Longacre had been overpaid $969.76. I agree that the existing overpayments of $969.76 could not be forgiven. But the rest of the overpayments, totaling $6566.14, had not yet occurred. I agree with Longacre that at the time the legislature passed Section 10–11–4.2(A), the bulk of the overpayments in this case had not yet occurred, and consequently were not yet "held or owned by or owing to the state." Consequently, the legislature could constitutionally limit PERA's ability to collect overpayments that had not yet occurred.

{37} The purpose of Article IV, Section 32 is to prevent legislative mischief in relieving people of debts that are fixed and definite. It is intended to prevent favoritism or relief to people who do not deserve it. To the extent the statute in question deals with overpayments that have not yet accrued, I do not believe it violates the constitutional prohibition in Article IV, Section 32, or its underlying purpose. This case is more like cases in which the legislature acts to affect liabilities, not yet due, that will become due in the future. For example, the legislature can constitutionally alter a tax rate applicable in the future. *See* N.M. Att'y Gen. Op. No. 91–14. It could be said that Article IV, Section 32 has redefined the notion of debt owed to the state.

{38} The majority is concerned with the impact of the word "ever" in Article IV, § 32, essentially saying that "No obligation or liability of any person, . . . held or owned by or owing to the state, . . . shall ***ever*** be . . . diminished by the legislature." In my reading of this constitutional provision, the word "ever" does not have any force or effect until a debt, "obligation or liability" has reached the stage where it is held or owned by or owing to the state. For the vast majority of PERA's overpayments to Longacre, this had not yet happened at the time the statute took effect.

{39} This case is distinguishable from cases, relied on by the majority, in which the legislature has attempted to relieve taxpayers from taxes that are already due and owing. *See e.g., Asplund*, 29 N.M. 129, 132–33, 219 P. 786, 787 (legislature could not forgive taxes after they had become a fixed and definite liability); *McRae*, 29 N.M. at 88,

218 P. at 347 (poll tax had already been levied and legislature could not act to forgive it); *Gutierrez*, 99 N.M. at 335, 657 P.2d at 1184 (hospital debt was already fixed and definite).

{40} Nor do I agree that *Montoya*, relied on by the majority, is dispositive. In *Montoya*, the statute commanded county treasurers to mark taxes "paid" that were already assessed but were really unpaid. Consequently, *Montoya* is consistent with other New Mexico cases holding that liabilities that have already accrued cannot be forgiven. *Montoya* is distinguishable from this case because the debt in *Montoya* was already fixed and definite. *Montoya*, 32 N.M. at 318, 255 P. at 635 (statute invalid because it sought to prevent state from recovering "judgments for taxes previously assessed"). Contrary to the majority's suggestion, our case does not involve "postponing" a debt. It involves the legislative power to create a statute of repose limiting actions to collect overpayments that will arise in the future, but are not yet in existence.

{41} To the extent Section 10–11–4.2 deals with overpayments that, as of the statute's effective date in 1993, had not yet occurred, I believe it is constitutional. It is within the legislature's power to craft statutes of limitation, *Jaramillo*, 111 N.M. at 725, 809 P.2d at 639, and I do not believe PERA has demonstrated that the statute is unconstitutional. It is not for us to pass on the wisdom of legislative acts, *Madrid v. St. Joseph Hosp.*, 1996–NMSC–064, ¶ 10, 122 N.M. 524, 928 P.2d 250, but the equities underlying this statute are strong. PERA admitted at oral argument that under its theory it can go back fifty or one hundred years to collect overpayments, without any limitation whatsoever. Under the majority's holding, PERA is allowed to impose undue hardship on families years and even decades after the money received by the retiree has been spent. Additionally, accepting PERA's argument means there is no limitation on its actions and no requirement that it act diligently. PERA, on discovering an overpayment, could also wait years before seeking to collect it. Moreover, in this case, there is not a shred of evidence that the Longacres engaged in fraud or misled PERA in any way. It was PERA's error that resulted in overpayments. PERA never questioned the form submitted by Mrs. Longacre and for years mailed what it now claims are incorrect checks. Presumably, the Longacres considered the payments correct and spent the money. Under the circumstances, I do not think it is appropriate to hold that our New Mexico Constitution shields PERA from its error. *Cf. Gonzales v. Pub. Employees Ret. Bd.*, 114 N.M. 420, 425–28, 839 P.2d 630, 635–38 (Ct.App.1992) (equitable estoppel can be applied against the PERA board); *Eldredge v. Utah State Ret. Bd.*, 795 P.2d 671, 675–78 (Ut.Ct.App.1990) (Retirement Board estopped from reducing benefits where it misled retiree by telling him he did not have to purchase prior years of service); *Indursky v. Pub. Employees' Ret. Sys.*, 137 N.J.Super. 335, 349 A.2d 86, 91 (1975) (Board demanded that retiree pay $5302.32 as overpayment for a six-year period; Board was estopped from recovering the overpayments because of "lack of diligence" on Board's part, and requiring retiree to repay would be "inequitable"); *but see, Office of Personnel Management v. Richmond*, 496 U.S. 414, 424–34, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990) (equitable estoppel not applied in favor of a retired Navy employee because Appropriations Clause precluded any payment that did not comply with the applicable statutory condition); *Romano v. Ret. Bd. of Employees' Ret. Sys.*, 767 A.2d 35, 36–43 (R.I.2001) (holding that estoppel is not available against government retirement board where the representations by the board's employees were in conflict with law and ultra vires).

{42} For these reasons, I have concluded that the risk of overpayments should be placed upon PERA, and not the retiree.

{43} Finally, I am concerned that the majority's holding provides a foundation for an argument that tax amnesty programs are also unconstitutional.

{44} For these reasons, I dissent.

2001-NMCA-084

33 P.3d 916

PUEBLO OF PICURIS,
Plaintiff–Appellant,

v.

NEW MEXICO ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT, and Oglebay Norton Specialty Minerals, Inc., Defendants–Appellees.

No. 21,278.

Court of Appeals of New Mexico.

Sept. 14, 2001.

Certiorari Denied, No. 27,172, Oct. 23, 2001.

Douglas W. Wolf, Douglas Meiklejohn, Geoffrey H. Fettus, NM Environmental Law

Center, Santa Fe, NM, Simeon Herskovits, Western Environmental Law Center, Taos, NM, Roger Flynn, Jeff Parsons, Western Mining Action Project, Boulder, CO, for Appellant.

Ted Apodaca, Assistant General Counsel, Energy, Minerals and Natural Resources Department, Stephen S. Hamilton, Louis W. Rose, Montgomery & Andrews, Santa Fe, NM, for Appellees.

OPINION

BOSSON, Chief Judge.

{1} In this case brought under the New Mexico Mining Act (the Mining Act), NMSA 1978, §§ 69–36–1 to –20 (1993, as amended through 1999), we decide for the first time how protesting parties challenge the issuance of a mining permit. In particular, we decide whether the challenge may be brought directly to court by a citizen suit, or must proceed instead through a course of administrative review and appeal to the district court. The district court interpreted the Mining Act to require administrative review and dismissed this citizen suit. We conclude that the district court was correct and affirm the dismissal.

BACKGROUND

{2} Oglebay Norton Specialty Minerals Inc. is the new owner of a mica mine located in Taos County. The former owner of the mine, Franklin Industrial Materials, applied for the mining permit that began this litigation. Oglebay has been duly substituted for Franklin as a party Defendant. Because the legal positions of the two mining companies do not differ materially in this litigation, we will refer to them jointly as the Mining Operator.

{3} Pursuant to the Mining Act, the Mining Operator duly applied for a mining permit with the Director of the Mining and Minerals Division (the Director) of the New Mexico Energy, Minerals and Natural Resources Department (the Department). *See* § 69–36–9(E). The Mining Operator submitted its permit application as an existing mining operation instead of a new mining operation because the mine had produced marketable minerals for at least two years between 1970 and 1993, when the Mining Act became law. *Compare* § 69–36–3(E) *with* § 69–36–3(I) (defining an existing mining operation and a new mining operation). As part of the permitting process, the Mining Operator submitted a closeout plan detailing how the Mining Operator would restore the physical environment of the permit area after closure of the mine. *See* § 69–36–11. Like the rest of the permit application, the closeout plan had to earn the Director's approval before the permit could issue. *See id.*

{4} The Pueblo of Picuris (the Pueblo) is located in the vicinity of the proposed permit area, and the Pueblo opposes the permit because of the impact the mine will have on the environment and other vital interests of the Pueblo. Under the Mining Act, the Pueblo qualifies as a "person" having interests that are or may be "adversely affected" by the issuance of this permit, and thus, the Pueblo has standing to oppose the permit and maintain this legal action. *See* §§ 69–36–14(A), –15(A).

{5} The Pueblo's principal concern focuses on what it contends are critical inadequacies in the proposed closeout plan. Specifically, the Pueblo protests that the closeout plan is unworkable and fails to set aside sufficient space to stockpile waste rock that will be removed from the pit over the anticipated life of the mine. Given what the Pueblo claims is an insufficient stockpile space, the Pueblo then argues that the permit area for the proposed mine should be significantly reduced to accommodate what stockpile space is available.

{6} Illuminating secondary objectives behind its protest, the Pueblo points out that if the Mining Operator subsequently seeks to expand its operation beyond a reduced permit area, it "would be subject to the much more stringent standards required of expansions of existing units beyond approved design limits." Thus, after exhausting a reduced permit area, the Mining Operator would have to meet more exacting, contemporary reclamation standards and "best management practices" that do not pertain to an existing mine operating within the area of its initial permit. *See* § 69–36–7(D). According

to the Pueblo, by underestimating the stockpile space needed, the Mining Operator can secure a larger permit area and purposefully defeat the tougher environmental standards. In the Pueblo's eyes, this is manipulating the permitting process by using "sleight of hand."

{7} During the permitting process the Pueblo expressed these and other concerns to the Director. The Pueblo also submitted written comments directed specifically to the closeout plan and its alleged deficiencies. Despite these concerns, the Director approved the application and issued a permit for the larger area requested by the Mining Operator.

{8} Within a matter of months, the Pueblo filed this civil action in district court seeking declaratory and injunctive relief against both the Department and the Mining Operator (Defendants) alleging violations of the Mining Act as well as various rules and regulations of the Mining Commission (the Commission). *See* § 69–36–6 (creating the Commission). Defendants then moved to dismiss because the Pueblo had not petitioned the Commission for administrative review within the time frame specified in the Mining Act. Agreeing with Defendants, the district court dismissed the Pueblo's complaint with prejudice. The Pueblo appeals from that dismissal.

DISCUSSION

{9} As authority for its suit, the Pueblo cites to Section 69–36–14(A)(1), (2) (hereafter "Section 14"), entitled "Citizens suits," which states:

> A person having an interest that is or may be adversely affected may commence a civil action on his own behalf to compel compliance with the New Mexico Mining Act [69–36–1 to 69–36–20 NMSA 1978]. Such action may be brought against:
>
> (1) the department of environment, the energy, minerals and natural resources department or the commission alleging a violation of the New Mexico Mining Act or of a rule, regulation, order or permit issued pursuant to that act;
>
> (2) a person who is alleged to be in violation of a rule, regulation, order or permit issued pursuant to the New Mexico Mining Act.

In its complaint filed with the district court, the Pueblo alleges that issuance of this mining permit violated the Mining Act as well as various rules and regulations of the Commission and the Department. Therefore, according to the Pueblo, its complaint fits comfortably within the language of Section 14 as an action brought against the Department and the Mining Operator "to compel compliance with the New Mexico Mining Act." The Pueblo also contends that the legislative purpose of the citizens—suit provision—to render government officials and mining companies accountable—supports broad access to the courts and immediate judicial review of the permitting process.

{10} We assume that the legislature did intend to grant comprehensive judicial relief to adversely affected citizens under the Mining Act, and there is no question that the Pueblo falls within the ambit of that grant. We also acknowledge that the Pueblo's complaint alleges "violations of the Act" in one form or another as that phrase is utilized in Section 14. However, this acknowledgment only begins our inquiry.

{11} In Section 69–36–15(A) (hereafter "Section 15"), promulgated contemporaneously with Section 14, the Mining Act provides for "[a]dministrative review":

> "Any order, penalty assessment or issuance or denial of a permit by the director pursuant to the New Mexico Mining Act [69–36–1 to 69–36–20 NMSA 1978] shall become final unless a person who is or may be adversely affected by the order, penalty assessment or issuance or denial of a permit files, within sixty days from the date of notice of the order, penalty assessment or issuance or denial of a permit, a written petition to the commission for review of the order, penalty assessment or issuance or denial of a permit by the director."

In addition, Section 15 provides for a timely hearing on the petition, either before the Commission or its hearing officer, accompanied by a grant of subpoena power and the taking of evidence on the record. The pro-

cess culminates in the Commission's findings of fact and final decision which can be appealed on the record to district court. *See* § 69–36–16(C).

{12} In the case before us, administrative review was available to the Pueblo but, for reasons not apparent from the record, the Pueblo did not pursue that remedy. The real question of this appeal is the effect of opportunity lost. The Pueblo views Sections 14 and 15 as twin alternatives from which the adversely affected party may choose to begin a citizen suit in district court. The Pueblo's case rests entirely on whether administrative review under Section 15 is mandatory or discretionary. Defendants emphasize that administrative review under Section 15 is the only remedy the Mining Act makes available for the specific purpose of challenging the issuance or denial of a permit. Not surprisingly, Defendants argue that the clear language of Section 15 requires the Pueblo to petition the Commission for administrative review instead of proceeding directly with a citizen suit.

{13} Defendants' argument is rooted in the language and purpose of the Mining Act. The legislative use of the phrase "shall become final" in Section 15 implies that administrative review by the Commission is a condition precedent to a subsequent challenge in court. Perhaps, as the Department suggests in its brief, an adversely affected party could file a citizen suit under Section 14 simultaneously with a petition for administrative review under Section 15, but that question is not before us. It is difficult to see how the clear and unambiguous language of Section 15 does not foreclose separate litigation over the same permit and its issuance.

{14} In interpreting a statute, we are guided by statutory sections which focus specifically on a particular subject, and we look only secondarily to more general references elsewhere within the same statute. *See City of Albuquerque v. Redding,* 93 N.M. 757, 759, 605 P.2d 1156, 1158 (1980), *overruled on other grounds by Bybee v. City of Albuquerque,* 120 N.M. 17, 20, 896 P.2d 1164, 1167 (1995); *Kerr–McGee Nuclear Corp. v. Prop. Tax Div.,* 95 N.M. 685, 690–91, 625 P.2d 1202, 1207–08 (Ct.App.1980) (Hendley, J., concurring in part and dissenting in part). We attempt to interpret sections of the same statute in a harmonious manner. *See Key v. Chrysler Motors Corp.,* 1996–NMSC–038, 121 N.M. 764, 769, 918 P.2d 350, 355, *aff'd in part & rev'd in part on other grounds,* 2000–NMSC–010, ¶ 22, 128 N.M. 739, 998 P.2d 575. We indulge in the assumption that when the legislature has before it all sections of a statute at the same time, it intends to give equal weight to each section so as to produce a harmonious product free from internal contradictions and inconsistencies. In the absence of contrary evidence, we assume that the legislature used specific language for a reason, and that it had a purpose in preferring a specific course of action with regard to a certain issue or remedy. *See State v. Santillanes,* 2001–NMSC–018, ¶¶ 7, 11, 130 N.M. 464, 27 P.3d 456; *Gordon v. Sandoval County Assessor,* 2001–NMCA–044, ¶¶ 18–19, 130 N.M. 573, 28 P.3d 1114. This legislative preference supplants a more general, all-encompassing remedy found in the statute that is designed for a general problem or issue.

{15} Here, the citizen-suit section is just such an all-encompassing legislative approach that applies across the board to any "violation of the Act." Without more direction in the Mining Act, a fair inference might permit a citizen suit to challenge the issuance of a permit. But the legislature did provide more specific direction, and it did so in the very next section enacted at the same time it created Section 14. *See* 1993 N.M. Laws, ch. 315, §§ 14, 15. Whereas a citizen suit under Section 14 is available for a wide variety of wrongs the Department or the Commission might commit, or actions that they might fail to take, Section 15 limits administrative review to three specific acts of the Director alone: "order, penalty assessment or issuance or denial of a permit."

{16} Two of the acts under Section 15, penalty assessments and permit issuance, refer to specific statutory functions of the Director that comprise only a small portion of the Director's overall responsibilities. *See* § 69–36–9 (describing Director's responsibilities). For example, administrative review pertains only to permit *issuance;* presumably questions arising over permit *compli-*

ance (including the Director's role) can be raised directly by a citizen suit under Section 14. The Mining Act also provides specialized treatment for penalty assessments imposed by the Director. *See* § 69–36–17 (providing for penalty assessments by the Director or the Commission, an appeal to the Commission, and a special de novo appeal from the Commission to district court). Again, for certain limited functions, the legislature has specified an administrative remedy first, which the protesting party must pursue before proceeding to court.

{17} We follow the legislative lead with respect to administrative and judicial review for the narrow scope of Director activity identified in Section 15. We presume that the legislature had a purpose when it addressed permits and penalty assessments in a separate section of the Mining Act, and when it provided a special procedure for their challenge and appeal. In our view, it would be inconsistent and illogical for the legislature to fashion such a specific course of action for these limited challenges, only to allow citizen suits to by-pass legislative direction at a whim. At the very least, such a suggestion requires more evidence of legislative intent than we have before us.

{18} We also draw a fair inference from the language of Section 14 in support of how we interpret Section 15. Under Section 14(A)(2), citizen suits are authorized for a "violation of a rule, regulation, order or permit issued pursuant to [that A]ct." The specific reference to "permit" in Section 14 can only refer to a citizen suit that seeks to enforce compliance with the terms and conditions of a permit. Reference to "violation of a ... permit" presumes, in turn, that the permit has already issued. Thus, a fair reading of the two sections assigns a different process according to the purpose of the challenge. Issuance of the permit must be challenged under Section 15, while enforcing that permit, once issued, is assigned to citizen suits under Section 14(A).

{19} We also draw guidance from the legislative purpose behind the two sections of the Mining Act. *See State ex rel. Helman v. Gallegos*, 117 N.M. 346, 353, 871 P.2d 1352, 1359 (1994). To be sure, each provides a remedy for adversely affected citizens, and it is apparent that accessible, effective judicial review of agency action is one of the cornerstones of the Mining Act. However, one can glean an additional legislative purpose behind reviewing permit issuance administratively instead of by direct litigation. *See Gordon*, 2001–NMCA–044, ¶¶ 18–19, 130 N.M. 573, 28 P.3d 1114 (resolving conflicting legislative policies).

{20} Permit decisions like the one before us usually involve a multitude of scientific and other technical evidence regarding prospective mining activity. In creating the Commission, the Mining Act designates certain permanent members who have presumptive expertise or experience in the area of mining. *See* § 69–36–6(A) (identifying as voting members of the Commission the director of the bureau of mines and mineral resources of the New Mexico institute of mining and technology, the secretary of environment, the state engineer, the commissioner of public lands, the director of the department of game and fish, and two members of the public representing environmental and mining interests).

{21} We draw a reasonable inference from the mission of the Mining Act and the make-up of the Commission to conclude that the legislature wanted to use the skills and experience of its own commissioners to inform the process of permit issuance. Courts often defer to administrative review when, as here, the issues are fact-intensive and even abstruse. *See State ex rel. Norvell v. Ariz. Pub. Serv. Co.*, 85 N.M. 165, 171, 510 P.2d 98, 104 (1973). Developing a comprehensive record at the administrative level can assist the court in addressing complex matters on appeal. We observe that Commission hearings are empowered with subpoena authority and plenary discovery procedures to help develop a verbatim factual record and comprehensive findings of fact by the Commission. *See* § 69–36–15(D), (E).

{22} Even a cursory review of the Mining Act shows that the Commission has the ultimate responsibility to ensure that mining operators comply with the Act and with the Commission's comprehensive regulations. *See* § 69–36–7 (describing duties of the Com-

mission). Likewise, permit responsibility ultimately rests with the Commission. *See id.* The Commission is not created as a mere rubberstamp of the Director or the Department. To the contrary, we have previously characterized the Director as one "who is in all respects an employee of the Commission" because the Commission has such authority over the Director's exercise of discretion. *Old Abe Co. v. N.M. Mining Comm'n,* 121 N.M. 83, 94, 908 P.2d 776, 787 (Ct.App.1995).

{23} Given the legislative allocation of responsibility weighted heavily on the Commission, it stands to reason that the legislature would repose in that same Commission the power of review necessary to carry out its duties. Put another way, policy reasons persuade us, as they appear to have persuaded the legislature, that a core function like the issuance of a mining permit should not be the decision of the Director alone, but should involve the Commission by direct administrative review.

{24} The Department points out that administrative review is a special, expedited procedure, requiring that the hearing be held within 60 days after filing the petition so that mining operators are not held hostage to interminable litigation before beginning operations. The Department suggests that an appeal process circumscribed by finite temporal boundaries is important to mining operators and to the state's interest in encouraging responsible mining. *See* § 69–36–2 (stating that purposes of the Mining Act include promoting responsible reclamation and mining which is "vital to the welfare of New Mexico"). The Department also predicts chaos if we were to allow collateral litigation to challenge permit issuance years after its approval, when industry activity has already begun in reliance on the permit. Such concerns articulate additional reasons the legislature may have had in mind when it created an administrative appeal process especially for permit issuance.

{25} Thus, there is every reason to conclude that the legislature acted consciously when it created a process of administrative review as the chosen method to challenge permit issuance. On the other hand, we perceive little prejudice to the protesting citizen from exhausting administrative review before seeking judicial review. No such prejudice has been made apparent to us during the course of this appeal.

{26} In response to Defendants' arguments, the Pueblo first protests that if it cannot sue, then as a practical matter, it will be left without any means to challenge the permit. In the Pueblo's case, the 60 day period under Section 15 for petitioning the Commission has long since passed. We acknowledge that our holding will preclude the Pueblo from any further challenge to the issuance of the permit. However, the Pueblo can still look to Section 14 if grounds exist to assert a right under that Section for relief in regard to compliance with the mining permit.

{27} The Pueblo also tries to make a case that Section 15 is merely a notice of appeal statute, providing a time limit for appeals to the Commission in the event the protestant elects to pursue an administrative review. As we have previously indicated, the language and purpose of the Mining Act gives Section 15 a reach far beyond merely establishing a time to appeal.

{28} The Pueblo also refers us to an analogous statute, the Surface Mining Act, on the theory that the two acts set up similar structures to regulate mining activity in New Mexico, and therefore, legislative treatment of an issue in one act may illuminate legislative intent regarding that issue in the other. *See* NMSA 1978, §§ 69–25A–1 to –36 (1979, as amended through 2000) (repealed effective July 1, 2006) (providing for regulation principally of surface coal mining). Our attention is particularly drawn to the citizen-suit section of the Surface Mining Act. *See* § 69–25A–24. We agree that the language of this citizen-suit section is remarkably similar to Section 14 of the Mining Act, and we accept the Pueblo's invitation to treat the two acts as in pari materia. *See* NMSA 1978, § 12–2A–20(B)(6) (1997) (providing that in addition to considering the text and purpose of a statute, courts are to inquire into "a statute or rule on the same or a related subject").

{29} Yet reliance on the language of the Surface Mining Act does not aid the Pueblo's cause. While both acts have a comprehen-

sive and similarly worded citizen-suit provision, the two acts are strikingly dissimilar in regard to administrative review. *Compare* § 69–36–15 *with* § 69–25A–29(G). Under the Surface Mining Act, an appeal to the surface coal mining commission (similar in structure to the Commission in the Mining Act) is permissive only. *See* § 69–25A–29(G) ("Any person who is aggrieved by a decision of the director *may* appeal to the commission for relief." (Emphasis added.)). The Surface Mining Act has none of the language in Section 15 of the Mining Act that the Director's actions "shall become final" unless a petition for review is filed with the Commission.

{30} Commission review under the Surface Mining Act is available for any "decision" of the director. *See* § 69–25A–29(G). In contrast, Section 15 of the Mining Act limits administrative review to an "order, penalty assessment or issuance or denial of a permit by the director." As we have already indicated, the discriminating focus of Section 15 of the Mining Act leads us to conclude that the legislature intended administrative review to apply to all questions concerning permit issuance.

{31} We also observe an asymmetry between the two acts in regard to the parties that adversely affected citizens can sue. The Surface Mining Act expressly empowers citizens to file suit directly against the director of the mining and minerals division, and this is the same director whose decisions the citizen "may" elect to appeal administratively to the commission. *Compare* § 69–25A–24(A) *with* § 69–25A–29(G). Because both sections of the Surface Mining Act apply to the same actions by the same director, it would be easier to conclude that the legislature purposefully designed two avenues of redress—the citizen suit and administrative appeal—as equally acceptable options for a citizen to select under that Act.

{32} With the Mining Act, however, the affected citizen is authorized to sue the "Department" without any mention of the Director, whereas administrative review only applies to actions of the Director. *Compare* § 69–36–14(A) *with* § 69–36–15(A), (C). While, presumably, the Department can be sued for the alleged violations of its Director, the Mining Act's use of different terminology for the two sections, in contrast to the Surface Mining Act, affords additional evidence that the legislature intended to carve out a specific, though perhaps small, universe of Director activity for which administrative review and citizen suit are not synonymous.

CONCLUSION

{33} For the foregoing reasons, we are persuaded by Defendants' arguments, and particularly those of the Department, that the Mining Act required the Pueblo to pursue a timely administrative review with the Commission. The Pueblo having failed to do so, it is barred from pursuing this litigation. We affirm the judgment of the district court dismissing the Pueblo's complaint.

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

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

2001-NMCA-095

33 P.3d 922

STATE of New Mexico, Plaintiff–Appellant,

v.

Israel CHAVARRIA, Defendant–Appellee.

No. 21,739.

Court of Appeals of New Mexico.

Oct. 2, 2001.

Patricia A. Madrid, Attorney General, M. Anne Kelly, Assistant Attorney General, Santa Fe, NM, for Appellant.

Albert J. Costales, Truth or Consequences, NM, for Appellee.

OPINION

SUTIN, Judge.

{1} The State appeals the suppression of Defendant's self-incriminating statements given to investigating law enforcement officers. Defendant was charged with criminal sexual penetration of a female inmate while he was a corrections officer at the Doña Ana County detention center (detention center). The trial court determined Defendant was required to give the statements on pain of losing his job as a corrections officer in violation of the Fifth Amendment to the United States Constitution, and granted his motion to suppress based "on the totality of the circumstances and the involuntary nature of the statements and polygraph exam of the Defendant." We agree with the trial court and affirm.

STANDARD OF REVIEW

{2} In reviewing the grant of a motion to suppress, this Court must determine "whether the law was correctly applied to the facts, viewing [the facts] in a light most favorable to the court's ruling." *State v. Ingram*, 1998-NMCA-177, ¶ 5, 126 N.M. 426, 970 P.2d 1151. When the issue is whether a statement was voluntary, we consider the totality of the circumstances, deferring to the trial court's findings of fact where the evidence conflicts, but reviewing legal issues de novo. *State v. Cooper*, 1997-NMSC-058, ¶ 26, 124 N.M. 277, 949 P.2d 660.

BACKGROUND

{3} Defendant's testimony conflicted with that of his superiors and the investigating officers. We view the testimony in the "light most favorable to the court's ruling," *Ingram*, 1998-NMCA-177, ¶ 5, 126 N.M. 426, 970 P.2d 1151, and conclude the trial court must have decided that Defendant was more credible. We therefore set forth Defendant's version of the facts, while briefly indicating the State's contrasting version.

{4} Defendant was twenty-five years old and had approximately one year of college and one year of experience at the detention center. Upon return from vacation, he was asked to report to detention center administrator Jeff Garbow and also to the center's captain, Joe Alvarez. Defendant was informed he was on administrative leave pending allegations of sexual misconduct against him. Garbow said in a "demanding" tone that Defendant was to report by telephone to Chuck Franco, whom Defendant knew to be a sheriff's deputy, and as such, another county official, to set up an appointment for Franco to take a statement from Defendant. Garbow told Defendant he could not come back to work until he had given Franco a statement. Alvarez instructed Defendant to turn in any property issued by the county, "such as badges, clothes, [and] footwear." One of the men reminded Defendant of the following portions of the detention center's policies and procedures manual requiring employees to:

> Answer truthfully and to the best of their knowledge all questions, specifically directed and limited to the scope of employment and operations of the Facility, which may be asked of them.
>
> Cooperate fully with investigators in any internal investigation and shall be offered all rights and protection provided by law, this manual, and the County regulations.

The manual also stated that:

> Employees may be required as a condition of employment and/or continued employment, to take a polygraph test. The answers given by employees cannot be used against them in any criminal prosecution at a later date. To refuse to take a polygraph test may result in disciplinary action up to and including termination.

{5} Defendant felt obligated under county policy to talk to investigating officials because he was afraid he would lose his job if he did not. He was aware that allegations concerning guards were investigated by the sheriff's office and by internal employees of the jail working together. Defendant called Franco and left a message. They actually conversed when Franco returned the call. Franco said, "I need you to be in my office at 9 a.m." Franco called again early the next morning to confirm that Defendant would be at the sheriff's department at 9 a.m. that same day.

{6} Defendant spent the morning giving statements and taking a polygraph examination at the sheriff's office. Defendant did not feel free to leave at any time during the morning because the door was locked. He also felt that "under [the] policy of the county you are obligated as an employee to talk—to talk to any and all county officials or otherwise making an investigation."

{7} At the sheriff's office, Defendant gave a tape-recorded statement to Franco. Before the recorder was turned on, Defendant asked what was going on. Franco told him he was accused of sexual misconduct. Defendant testified that Franco told Defendant "he would be reading me my rights, for me not to get scared but it was a policy that he had to follow because without [*Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)] all this would be jeopardized." Defendant asked Franco if he needed an attorney. Franco replied that he did not at present. Franco advised Defendant to resign because a resignation would look better on his record than a termination. He told Defendant it was important for Defendant to give a statement "because your job, your family, your life all depend on it."

{8} Franco counseled Defendant to take a polygraph examination to clear himself. Defendant agreed to take the examination because he felt "that my job was in jeopardy." Franco left the room and Frank Ruiz, another sheriff's deputy, came in to administer the polygraph examination. Ruiz recorded the session. Defendant testified he had exchanges with Ruiz after the session was over which were not recorded. It appears Defendant again raised the question whether he needed an attorney. Defendant asked "when was I being charged and [Ruiz] said I don't know at this time if you are or if you're not but we know that you did it, so just come up and let us know." Ruiz then "explained to me [Defendant] that I would have to talk to Mr. Franco again and explain to Franco exactly what I told him [Ruiz], what he had discovered on his polygraph." Ruiz left and Franco came in. Franco told Defendant he had to give another statement. Defendant proceeded to do so.

{9} Ruiz and Franco each separately read Defendant his rights under *Miranda* at some point while the recorder was running. Franco asked if Defendant understood his rights and Defendant replied that he did. Ruiz told him to sign a waiver of his rights. Defendant complied. Defendant did not feel that the *Miranda* warnings gave him a free choice because he felt his job was at stake.

{10} Franco and Ruiz each offered strikingly different testimony. Franco said that the only discussion not on tape consisted of questions about "personal history information," such as Defendant's date of birth and address. He denied ever telling Defendant that Defendant was required to talk. Ruiz testified that all of his conversation with Defendant was recorded. Both men perceived Defendant to be acting voluntarily.

{11} Alvarez, the only detention center administrator to testify, agreed that Defendant was told he would be on administrative leave while the charges were investigated. While at one point Alvarez denied that Defendant was told he had to talk to Franco or that Defendant could not return to work until he had talked to Franco, during cross-examination he agreed that Defendant was told his job was dependent on the outcome of the investigation. Alvarez affirmed that an employee must submit to a polygraph examination during an internal investigation. Alvarez was asked whether employees "were led to understand that it's protocol, it's expected that they cooperate with any criminal investigation of themselves." He replied, "Of any sort. Of themselves, or anybody else, or the jail, or any kind of criminal investigation." Sometimes, if the investigation is "of a serious nature the county will hire an outside entity, the insurance company or somebody, to do it who also would be acting under the county policies." Franco had ongoing contacts with the jail and jail administration involving criminal investigations.

DISCUSSION

{12} The Fifth Amendment to the Constitution of the United States provides that no one shall "be compelled in any criminal case to be a witness against himself." The Fifth Amendment is applied to each state through the Fourteenth Amendment. *See, e.g., Schmerber v. California,* 384 U.S. 757, 760–61, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). Public employees may not be required to waive their Fifth Amendment privilege on pain of losing their jobs. *Garrity v. New Jersey,* 385 U.S. 493, 497–98, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). Public employees "may be compelled to respond to questions about the performance of their duties but only if their answers cannot be used against them in subsequent criminal prosecutions." *Lefkowitz v. Turley,* 414 U.S. 70, 79, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973); *accord Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation,* 392 U.S. 280, 285, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968); *In re Grand Jury Subpoenas Dated December 7 and 8 v. United States,* 40 F.3d 1096, 1102 (10th Cir. 1994).

> Fifth Amendment law for public employees attempts to strike a balance between the employee's privilege against self-incrimination and the state's interest in obtaining information necessary for the advancement of governmental functions. In short, the state has a choice between either demanding a statement from an employee on job-related matters, in which case it [cannot] use the statements in a criminal prosecution, or prosecuting the employee, in which case it cannot terminate the employee for refusing to give a statement.

United States v. Camacho, 739 F.Supp. 1504, 1514–15 (S.D.Fla.1990) (citations omitted).

{13} The issue is one of first impression in New Mexico. *Cf. State v. Gutierrez,* 119 N.M. 618, 622–23, 894 P.2d 395, 399–400 (Ct. App.1995) (discussing *Garrity* in the context of a parolee's claim of violation of his Fifth Amendment right in a parole revocation proceeding, and stating that under *Minnesota v. Murphy,* 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984), "one cannot rely on the *Garrity* exception" simply because of a fear or reasonable belief that the evidence presented to the tribunal will result in adverse consequences).

1. What Test to Apply

{14} Several courts have used a two-part test to apply the doctrine initiated by *Garrity.* Succinctly summarized, this test is: "Fear that loss of employment will result from the exercise of the constitutional right to remain silent must be subjectively real and objectively reasonable." *State v. Lacaillade,* 266 N.J.Super. 522, 630 A.2d 328, 332 (Ct.App.Div.1993), adopting the analysis in *United States v. Friedrick,* 842 F.2d 382, 395 (D.C.Cir.1988); *accord Camacho,* 739 F.Supp. at 1515, 1520; *People v. Sapp,* 934 P.2d 1367, 1372 (Colo.1997) (en banc); *State v. Connor,* 124 Idaho 547, 861 P.2d 1212, 1213–14 (1993).

{15} In considering the *Garrity* doctrine, at least two courts have expressed concern about whether the evidence showed an explicit, actual, overt threat of dismissal for refusal to answer questions. *See United States v. Indorato,* 628 F.2d 711, 715–16 (1st

Cir.1980) (stating implied threat, with no statute or ordinance mandating dismissal for refusal to answer questions, falls outside the *Garrity* "coerced testimony doctrine"); *People v. Coutu*, 235 Mich.App. 695, 599 N.W.2d 556, 560–61 (1999) (holding that because there was no overt, actual threat of dismissal, *Garrity* did not apply). These cases did not employ the *Friedrick* subjective/objective analysis.

{16} Cases applying the subjective/objective test have permitted a determination of a constitutional violation "where the threat of termination is implied rather than explicit." *Camacho*, 739 F.Supp. at 1520; *see Friedrick*, 842 F.2d at 400–02 (basing *Garrity* violation primarily on the government's treatment of the defendant as an employee; on the confusing nature and complexity of the relationships; on the fact that the defendant was ordered by his employer, the FBI, to meet with Department of Justice interviewing personnel; on the fact that the defendant was indisputably obliged to answer all questions truthfully, particularly in view of an FBI internal form providing that an FBI employee's refusal to answer could result in dismissal; and on the fact that defendant was informed the investigation was a joint FBI/DOJ inquiry).

{17} We adopt the two-part, subjective/objective test in determining whether a public employee's statements are involuntary and inadmissible in evidence when it is asserted that the employee was coerced into waiving his Fifth Amendment right against self-incrimination through the threat of losing his job. *See Friedrick*, 842 F.2d at 395; *Camacho*, 739 F.Supp. at 1515, 1520. In applying the test, we "examine the totality of the circumstances surrounding the statements." *Id.* at 1515; *Aguilar v. State*, 106 N.M. 798, 800, 751 P.2d 178, 180 (1988).

{18} "[A] necessary prerequisite to concluding that a subjective belief is objectively reasonable is that the belief derived from actions taken by the state." *Camacho*, 739 F.Supp. at 1515. The constitutional violation does not, however, require proof of coercion through a direct threat based on statute or ordinance, or express policy or rule requiring a waiver of the Fifth Amendment privilege against self-incrimination. The violation can occur without an express, direct threat; that is, taking into consideration the totality of circumstances, the violation can occur where a defendant "subjectively believed that he was compelled to give a statement upon threat of loss of job" and that "belief [was] objectively reasonable at the time the statement was made." *Id.* (emphasis omitted). The State has the burden to prove the statements were voluntary. *Aguilar*, 106 N.M. at 800, 751 P.2d at 180 ("If the state fails to prove voluntariness [of the confession] by a preponderance of the evidence, the trial court must rule that the confession was involuntary as a matter of law.").

2. Analysis and Result

{19} Defendant testified he talked to the investigators because he feared he would lose his job if he did not. Defendant's reaction to the external facts "was entirely understandable." *Friedrick*, 842 F.2d at 400; *see Aguilar*, 106 N.M. at 800, 751 P.2d at 180 (stating the court's analysis involves "the largely inferential determination of how the accused reacted to the external facts"). The evidence, which we must assume the trial court believed, satisfies the subjective part of the test. Defendant's subjective belief alone, however, is not enough to warrant suppression of the statements. We must examine whether his belief was objectively reasonable under all the circumstances.

{20} Defendant's detention center superiors told him he had to talk to Franco and give him a statement, he could not come back until he had done so, and his job depended on his doing so. They called Defendant's attention to the written detention center policy that in internal investigations employees must answer all questions truthfully, must cooperate fully with investigators, and must take polygraph tests or risk termination for refusal. They required that Defendant return all county property, after placing him on administrative leave. They sent Defendant to Franco, a county deputy who had been involved in other investigations around the jail. Franco told Defendant when and where to show up for his interview. He told Defendant that he needed not only to give a state-

ment but also had to submit to a polygraph examination. Franco's ambiguous statement to Defendant about *Miranda* implied the warnings were just a formality. Franco answered in the negative when Defendant asked if he needed an attorney. Franco gave Defendant employment advice, including advising Defendant to resign rather than be terminated, and to give a statement because Defendant's job depended on it. Franco passed Defendant to Ruiz to conduct a polygraph examination.

{21} While these circumstances show it was objectively reasonable for Defendant to believe that Franco was conducting an internal employee investigation for the detention center, that Ruiz was assisting Franco, and that he had to talk or lose his job, the evidence supporting an objectively reasonable belief derived from actions taken by the State does not consist of Defendant's testimony alone. *See Connor*, 861 P.2d at 1213–14 (declining to find defendant's fear of termination objectively reasonable when the only evidence was defendant's testimony). Alvarez conceded that Defendant was told his job depended on talking to Franco, that Franco had worked with jail authorities on other investigations, and that the written personnel policy as reflected in the excerpt quoted above was pointed out to Defendant. Alvarez's insistence that employees had to cooperate with an investigation "of any sort" or "of themselves" lends further credence to the objective reasonableness of Defendant's belief he had to answer questions or lose his job.

{22} In contending that it was not objectively reasonable for Defendant to conclude that this was an internal investigation, the State argues that a twenty-five-year-old detention officer with one year of experience and with one year of college education should have been able to tell the difference between an internal investigation and a criminal investigation. We do not agree. Defendant may not have been explicitly told the investigation was internal, and not criminal, or explicitly told he would be terminated if he did not talk to Franco, but those conclusions were logical and reasonable ones to draw from the totality of the circumstances. We do not place on Defendant an obligation to intuit the true nature of the situation when his supervisors blurred the lines. *See Friedrick*, 842 F.2d at 396, 398 (holding that defendant FBI agent, an Annapolis graduate and a twelve-year veteran of the FBI, who had been given *Miranda* warnings and had immunity from prosecution as a grand jury witness and in internal investigation, could not reasonably be expected to accurately analyze whether questioning pertained to the grand jury proceedings and the internal investigation or to a possible criminal prosecution so as to know whether to claim his privilege against self-incrimination).

{23} We agree with the State that governments have a strong interest in investigating whether their employees have abused the public trust. However, "the state has a choice between either demanding a statement from an employee on job-related matters, in which case it [cannot] use the statements in a criminal prosecution, or prosecuting the employee, in which case it cannot terminate the employee for refusing to give a statement." *Camacho*, 739 F.Supp. at 1514–15. Here the evidence, viewed in the light most favorable to upholding the verdict, shows that the State demanded Defendant give the statements on pain of dismissal if he refused and therefore cannot now use them against him in a criminal prosecution.

{24} Our holding does not prevent government employers in New Mexico from requiring an employee to answer job-related questions or face termination. We simply hold that the employee's statements may not be used in a criminal prosecution of the employee. *In re Grand Jury Subpoenas Dated December 7 and 8*, 40 F.3d at 1102.

CONCLUSION

{25} The trial court had sufficient evidence before it to find Defendant's fear that he would lose his job if he did not talk to investigators was subjectively real and objectively reasonable. Accordingly, the trial court correctly concluded his statements were not voluntary and were therefore obtained in violation of his Fifth Amendment privilege against self-incrimination. We af-

firm the court's suppression of the statements.

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

LYNN PICKARD and M. CHRISTINA ARMIJO, JJ., concur.

2001-NMCA-096

34 P.3d 124

MORIARTY MUNICIPAL SCHOOLS,
Plaintiff–Appellant,

v.

New Mexico PUBLIC SCHOOLS INSURANCE AUTHORITY,
Defendant–Appellee,

and

Arlene Fischer; Richard N. Fischer; Ronny Fouts, CPA; William A. Olmstead, CPA; Norwest New Mexico, N.A.; The Travelers Indemnity Company of Illinois; Underwriters at Lloyd's, London; Sphere Drake Insurance Co., PLC; and CNA Reinsurance of London, Ltd., Defendants.

No. 20,969.

Court of Appeals of New Mexico.

Aug. 21, 2001.

John W. Boyd, Joseph Goldberg, Freedman Boyd Daniels Hollander Goldberg & Cline, P.A., Albuquerque, NM, for Appellant.

Paul D. Mannick, Coppler & Mannick, P.C., Santa Fe, NM, for Appellee.

OPINION

SUTIN, Judge.

{1} Moriarty Municipal Schools (Moriarty) appeals the dismissal of its complaint against New Mexico Public Schools Insurance Authority (the Authority). The complaint alleged that the Authority breached a contract by failing to fully indemnify Moriarty for loss from embezzlement. The issue is whether a member school can sue the Authority in contract in district court. We agree with Moriarty that it can and reverse.

BACKGROUND

{2} A statutory function of the Authority is to provide risk insurance to public schools under the Public School Insurance Authority Act (the Act), NMSA 1978, §§ 22–2–6.1 to –6.10 (1986, as amended through 1999). As a participating school, Moriarty received insurance through the Authority covering embezzlement loss. Insurance policies were issued by private insurance companies. The insurance consists of a layer of self-insured retained coverage for which the Authority is responsible and a layer of excess coverage for which the private insurers issuing the policies are responsible.

{3} Moriarty sought indemnity from the Authority and the private insurers for over $600,000 in embezzlement loss. Based on its determination of covered loss payable by it to Moriarty, the Authority paid Moriarty $250,000. Moriarty and the Authority disagree on the amount of loss covered under the insurance policies. The significant dollar amount of the loss, the long period of time over which the loss occurred (1985 to 1994), and the involvement of several different and overlapping policies, apparently will require a fairly complicated analysis to ultimately determine what amounts the Authority and the private insurers may each be obligated to pay. Moriarty seeks district court adjudication of these obligations in order to avert inadequate or inconsistent determinations that could unfairly limit Moriarty's rightful indemnity recovery. This appeal involves solely Moriarty's claims against the Authority.

{4} Moriarty sued the Authority claiming breaches of contract, the implied covenant of good faith and fair dealing, and fiduciary duty. Moriarty also claimed violations by the Authority of the Insurance Code, NMSA 1978, §§ 59A–16–1 to –30 (1984, as amended through 1999), and the Unfair Practices Act

(UPA), NMSA 1978, §§ 57–12–1 to –16 (1967, as amended through 1999). The Authority moved to dismiss under Rule 1–012(B)(1) and (6) NMRA 2001, asserting several reasons for dismissal. The district court granted the Authority's motion to dismiss without stating a basis for its ruling.

{5} Because this appeal is based on threshold dismissals of Moriarty's claims against the Authority for lack of subject matter jurisdiction under Rule 1–012(B)(1) and failure to state a claim under Rule 1–012(B)(6), we do not address specific policy coverage issues or the specific obligations of the Authority or the private insurers under the policies.

DISCUSSION

A. The Public School Insurance Authority Act

{6} The purpose of the Act "is to provide comprehensive core insurance programs for all participating public schools ... by expanding the pool of subscribers to maximize cost containment opportunities for required insurance coverage." Section 22–2–6.2. The Legislature created the Authority "to provide for ... risk-related coverage." Section 22–2–6.4. The Legislature also created a " 'public school insurance fund' " for the Authority "to carry out the provisions of the ... Act." Section 22–2–6.6(A). In order to procure insurance coverage the Authority collects premiums from participating school districts "sufficient to provide the required insurance coverage," deposits the premiums in the insurance fund, and disburses money from the fund. Sections 22–2–6.6(D), (F), –6.7(C), –6.8(A). A school district must participate in the Authority unless the school district's financial status justifies a waiver granted by the Authority's board of directors. Section 22–2–6.9(A). The Authority has the authority to "negotiate new insurance policies covering additional or lesser benefits," and "maintain all coverage levels required by federal and state law for each participating member." Section 22–2–6.7(F). The Authority may "procure lines of insurance coverage" as well as "self-insure a particular line of coverage." Section 22–2–6.7(F), (G). The Authority is given the power to "promulgate necessary rules, regulations and procedures for implementation of the ... Act." Section 22–2–6.7(E).

{7} By its regulations, the Authority has the power to negotiate, obtain, and modify basic and excess policies, self-insure, and establish pooling arrangements in order to provide risk-related coverages for "entities authorized to participate in the Authority's Coverage"; establish self-insured retention levels and deductibles; offer risk-related coverages to school districts; and issue a Notice of Coverage for each offering to each participating school district. *See* 6 NMAC 50.3.8, 3.9, 6.8. In this litigation the Authority says it has by regulation defined its statutory duty to distribute money from its retained pool by the language in successive insurance policies it purchased from co-defendants Lloyd's and Travelers [1] on behalf of its members. The Authority chose to conform its retained-pool self-insurance duties to terms of the insurance contracts and to "determine[] and disburse[] benefit limits to Moriarty from the insurance pool."

B. Overview of Contentions

{8} Moriarty's complaint alleges the Authority provided coverage through contractual insurance documents insuring Moriarty against the risk of the loss in question after having accepted premiums from Moriarty, and that the Authority breached its insurance obligations by failing to indemnify Moriarty in full for covered losses. Stating that its claims sound in contract, Moriarty argues the averments in its complaint are not susceptible to a Rule 1–012(B)(6) defense and that the district court has jurisdiction to entertain a civil action alleging common law breach of contract under N.M. Const. art. VI, §§ 1, 13.

{9} The Authority's first of two primary lines of attack against Moriarty's non-statutory claims is that the claims are barred by sovereign immunity. Being purely a crea-

1. These companies are shown in the caption. Lloyd's consists of Underwriters at Lloyd's, London, Sphere Drake Insurance and CNA Reinsurance of London, Ltd. Travelers is The Travelers Indemnity Company of Illinois.

ture of statute and not a private insurer, the Authority argues its obligations to participating schools are solely statutory and it can violate only statutory obligations. It argues further that, not only does it not enter into insurance contracts with participating schools, it has no statutory authority to do so. The Authority concludes that, since Moriarty sought relief outside of the Act through a civil action in contract or tort against the Authority, Moriarty's action is foreclosed by the doctrine of sovereign immunity. *See* NMSA 1978, § 37–1–23(A) (1976) (immunity in contract unless valid written contract); NMSA 1978, § 41–4–17(A) (1982) (immunity in tort unless waived).

{10} The Authority's second major line of attack is that a determination by the district court of the Authority's coverage obligation would be unconstitutional under the separation of powers doctrine. *See* N.M. Const. art. III, § 1. The court would be exercising a core function of an administrative agency created by the Legislature. *See Fellows v. Shultz,* 81 N.M. 496, 499–500, 469 P.2d 141, 144–45 (1970); *Cont'l Oil Co. v. Oil Conservation Comm'n,* 70 N.M. 310, 325, 373 P.2d 809, 819 (1962). If not unconstitutional, the Authority continues, the district court action should be rejected under the doctrine of judicial prudential restraint in order "to preserve the delicate balance of power between our political institutions," in reliance on *N.M. Right to Choose/NARAL v. Johnson,* 1999–NMSC–005, ¶¶ 12–13, 126 N.M. 788, 975 P.2d 841 (stating the exercise of discretion to confer standing on claimants who seek to assert claims on behalf of third parties "should be guided by prudential considerations"). Therefore, the Authority asserts, if Moriarty was entitled to any district court judicial scrutiny of the Authority's actions, that scrutiny could only be under the scope of review for administrative decisions under a constitutional writ of certiorari issued by the district court. *See* N.M. Const. art. VI, § 13; *Coe v. City of Albuquerque,* 76 N.M. 771, 774, 418 P.2d 545, 547–48 (1966) (restricting extent of certiorari review restricted to questions of law, including whether administrative body acted fraudulently, arbitrarily, or capriciously, whether the order was supported by substantial evidence, and whether the action was within the scope of authority). The Authority's coup de grace, however, is that Moriarty nevertheless lost any right to seek certiorari because it failed to timely file a petition for issuance of a writ.

{11} Moriarty's ultimate goal is to recover full indemnity based on the policy obligations of both the Authority and the private insurers. Moriarty's view is that it should be up to the Authority and the insurers to iron out the extent to which their respective levels of coverage are obligated. Moriarty is concerned that if the Authority is dismissed and the action proceeds only against the private insurers, the ultimate finding regarding those insurers' excess coverage obligations may leave Moriarty short of full indemnity, without any ability to pursue the Authority for further self-retention amounts for which the Authority could be obligated.

{12} The Authority's ultimate goal is to protect its self-insured retention pool by making its own determination of the extent of its indemnity obligation under the insurance agreements, paying only that amount, and leaving it up to Moriarty to recover the remainder of its unreimbursed loss from the private insurers or others.

{13} The underlying issue is whether the circumstances flowing from the exercise of statutory duty and statutory power establish a contract, the breach of which Moriarty can attempt to enforce in court against the Authority.

C. The Pleadings and the Standard of Review

{14} Moriarty specifically alleges that its civil complaint "concerns the bad faith conduct of [the Authority] . . . in failing to indemnify plaintiff for losses it suffered"; that the Authority "provides and procures insurance for public school[] districts in New Mexico, including Moriarty"; that the Authority "entered into agreements to provide insurance coverage to plaintiff" and "agreed to provide coverage to plaintiff"; that "[p]laintiff has performed each of the obligations and conditions required to be performed by it under its insurance agreements with [the Authority]"; that the Authority breached

"the insurance agreements"; and that the Authority "breached the duty of good faith and fair dealing" and its "fiduciary duty to plaintiff by failing and refusing to indemnify plaintiff."

{15} The Authority's counterclaim against Moriarty alleges that the Authority "provided certain insurance coverage for plaintiff," and paid Moriarty $250,000, "which is the total amount of the self-insured retention that it was required to pay for plaintiff's loss under the terms of the Travelers excess policy." Moriarty admitted in its reply to the counterclaim only that the Authority paid $250,000 to Moriarty. Moriarty mentions in one of its affirmative defenses that in making its claim it relied on "memoranda of coverage describing the insurance coverage" issued by the Authority to Moriarty.

{16} Because this case is before us on appeal of an order granting a motion to dismiss under Rule 1–012(B)(6), we do not consider any documents or evidence outside the pleadings such as, for example, the content of the Lloyd's and Travelers policies or the Authority's memoranda of coverage, or the bases on which the Authority made its determination. *See V.P. Clarence Co. v. Colgate,* 115 N.M. 471, 472, 853 P.2d 722, 723 (1993). The Authority avers in its appellate brief its determination that the Travelers policy "provided retroactive coverage . . . but limited the total coverage to $250,000," and that "the Lloyd's policy, and therefore the schools' self-insurance pool, did not cover losses that remained unreported after [a certain date]." While it is a matter outside the pleadings, we consider this an acknowledgment that the Authority made its ultimate decision through application of policy language.

{17} We review the dismissals de novo. *In re Estate of Harrington,* 2000–NMCA–058, ¶ 12, 129 N.M. 266, 5 P.3d 1070 (subject matter jurisdiction); *Padwa v. Hadley,* 1999–NMCA–067, ¶ 8, 127 N.M. 416, 981 P.2d 1234 (On a Rule 1 012(B)(6) motion, "[w]e accept all well-pleaded factual allegations as true, and resolve all doubts in favor of the sufficiency of the complaint.").

D. Sovereign Immunity

{18} Moriarty maintains its non-statutory claims all sound in contract. Because the Authority is a state governmental entity, Section 37–1–23 requires Moriarty to prove the existence of a valid written contract and permits a Rule 1–012(B)(6) dismissal if Moriarty cannot allege such a contract in its complaint against the Authority. Moriarty alleges that the Authority breached a written contract between Moriarty and the Authority.

{19} The Authority made two distinct decisions as to coverage. The first was what coverage to procure for the participating schools under its statutory obligation to "provide for . . . risk-related coverage." Section 22–2–6.4. This decision was carried out through the purchase of insurance policies issued by Lloyd's and Travelers, along with whatever negotiation and determination of first and excess coverage layers was necessary. The second, based on its reading and application of the terms and conditions of the insurance policies, was to decide the Authority's ultimate indemnity obligation for Moriarty's loss. Moriarty's claim is not that the Authority breached a statutory duty in regard to providing coverage but that the Authority breached its contractual duty to fully pay a covered loss.

{20} Moriarty and the Authority both acted under mandatory provisions of the Act. That is, Moriarty paid premiums for risk coverage that the Authority supplied. Moriarty suffered a loss. The Authority made a unilateral determination of the extent of its self-insured retention obligation, placing Moriarty at risk of inadequate recovery, with no adjudicatory process through which Moriarty could make a record supporting its position on the extent of the Authority's obligation.

{21} Through its statutory power the Authority used mandatory school-paid premiums to negotiate private excess insurance coverage beyond a first layer of self-insured retention coverage. The problem arose when the Authority then determined the limit of its self-insured retention obligation. Moriarty was left on its own to look to the private insurers to recoup the remainder of

the loss, with no remedy against the Authority if a shortfall resulted from the Authority's limitation on its self-insured retention obligation. In making its determination, the Authority engaged in policy obligation decision-making that directly and adversely affected Moriarty, an insured participating member for whom the Authority both procured and provided coverage.

{22} The Authority relies on public employee pension and annual leave cases to argue the non-existence of any contractual right, because no clear and unambiguous intent to create a contractual right appears in the Act. *See Pierce v. State*, 1996–NMSC–001, ¶¶ 31, 33, 40–43, 70, 121 N.M. 212, 910 P.2d 288 (determining that state retirement statutes created vested property rights, but not contract rights, and not an irrevocable or vested tax exemption on retirement benefits; therefore, retired state employees had no claim of unconstitutional impairment of contract based on Legislature's repeal of tax exemption); *Whitely v. N.M. State Pers. Bd.*, 115 N.M. 308, 312–13, 850 P.2d 1011, 1015–16 (1993) (determining that public employees did not have contractual right supporting their claim that a legislative change in their rate of annual leave accrual constituted an unconstitutional impairment of contract).

{23} These cases considering whether legislative changes affecting public employee benefits unconstitutionally impaired contracts are not applicable here. In *Pierce* and *Whitely*, the legislative process affected a class of employee benefits equally. Here, however, the Authority, under at most an implied statutory authority, affected Moriarty's benefits through an individualized, specific determination involving a specific loss and claim of loss. Notwithstanding the Authority's concern about the financial effect on the pool based on the particular loss in this case, the action here is not legislative policy-making for a class of similarly situated persons or entities.

{24} Similarly, the Authority argues that its decisions regarding the disbursement of pooled funds is a political question to be resolved in the legislative and administrative processes, not a matter for adjudication in the court. The Authority can save pooled self-retention funds by limiting distribution within the family of state government. Thus, the extent to which the self-insured retention pool is to be reduced at any particular time is purely an administrative decision because only, and all, participating state school districts are affected by the pay out. The Authority argues the indemnity limits for any loss and how the Authority uses the self-insured retention pool are matters solely under Authority control.

{25} We are not persuaded. The purpose of the Act is to facilitate the economical provision of insurance for public schools through the Authority. The Authority is a creature of statute created in the image of an insurer. Under the Act, the Authority actually provides policies of insurance that insure the school districts. By authorizing the Authority to do so, the Act "by clear and unambiguous terms indicates that the State [can] specifically enter[] into a bargain with a party 'in fact as found in their language or by implication from other circumstances, as affected by rules of law.'" *Pierce*, 1996–NMSC–001, ¶ 17, 121 N.M. 212, 910 P.2d 288 (quoting 1 Arthur L. Corbin, Corbin on Contracts § 1.3, at 9 (rev. ed.1993)). As here, where the Authority is subject to first-party insurance claims based on, for example, a school district's loss from employee theft, we would not characterize the indemnification funds as fungible state agency monies that can be withheld from the school district and, instead, used for general resource allocation. That the Authority's underwriting or budgeting predictions might be disrupted because one school suffers an unexpectedly large loss, or that all participating school districts might suffer economically by substantial depletion of the pool due to an unanticipated loss of one school district, does not transform a contract into a legislative or executive policy.

{26} The Authority cannot escape the realm of contract. Receiving a premium, providing insurance coverage, and denying benefits indicate the existence of a valid, written, enforceable insurance contract under the Act between the Authority and Moriarty, regarding the Authority's first-party obligation. Moriarty therefore states a claim under Rule 1–012(B)(6) for breach of contract

which is not barred by sovereign immunity. We leave for determination on remand whether Moriarty can prove the existence of a valid written contract. We also leave for determination below whether the claims for breach of the implied covenant of good faith and fair dealing and fiduciary duty can be pursued in the face of Section 37-1-23.

E. Separation of Powers

{27} The separation of powers issue centers on whether Moriarty can file a contract action against the Authority invoking the original jurisdiction of the district court, as opposed to being relegated solely to the appellate jurisdiction of the district court.

{28} Article VI, § 13 of the New Mexico Constitution reads:

> The district court shall have **original jurisdiction in all matters and causes not excepted in this constitution,** 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, and supervisory control over the same. 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.

(Emphasis added).

{29} "Original jurisdiction" here means general jurisdiction, which means "those matters known 'to the common law and equity practice of England prior to 1776.'" *Sanchez v. Attorney Gen.*, 93 N.M. 210, 214, 598 P.2d 1170, 1174 (Ct.App.1979) (quoting *In re Forest*, 45 N.M. 204, 207, 113 P.2d 582, 583 (1941)). As to those matters, as well as matters in which jurisdiction is conferred by statute, district courts may take evidence, adjudicate facts, apply law, and decide the merits of a dispute in favor of one party or another. *See* Rules 1-001 to -063 NMRA 2001. *Cf. John Does v. Roman Catholic Church*, 1996-NMCA-094, ¶ 27, 122 N.M. 307, 924 P.2d 273 (discussing the issue of standing and quoting *Asplund v. Hannett*, 31 N.M. 641, 647, 249 P. 1074, 1076 (1926)) ("In our scheme of government, the function of the courts is to declare and apply the law in the decision of justiciable controversies. We are not placed over the other departments of government, generally, to review or interfere with their acts, as the special guardian of the Constitution. Ours is the judicial power.").

{30} At the same time, Article VI, Section 13 grants district courts "appellate jurisdiction of all cases originating in inferior courts and tribunals," and also grants jurisdiction to issue various writs, including writs of certiorari. *State ex rel. Bd. of Comm'rs of State Bar v. Kiker*, 33 N.M. 6, 7, 261 P. 816, 816 (1927).

{31} The distinctions among the original, appellate and writ jurisdictions have significance in this case. The Authority contends a district court is prohibited by the constitutional separation of powers doctrine from substituting its judgment for that of the Authority and thus from hearing and deciding through its original jurisdiction the same question that was decided by the Authority. *See Coe*, 76 N.M. at 774, 418 P.2d at 547-48; *Kelley v. Carlsbad Irrigation Dist.*, 71 N.M. 464, 466-67, 379 P.2d 763, 763-64 (1963); *Cont'l Oil Co.*, 70 N.M. at 325, 373 P.2d at 819. The Authority argues that Moriarty may invoke only the district court's appellate jurisdiction and that the Authority's decision in the present case is reviewable, if at all, only pursuant to a constitutional writ of certiorari issued by the district court.[2] *See*

2. The Authority does not distinguish between appellate and writ jurisdiction. In *Kiker*, the district court issued a writ of certiorari to "inquir[e] whether the relator had power and jurisdiction to make the order which it did make." 33 N.M. at 7, 261 P. at 816. The Court in *Kiker* said this writ jurisdiction "is not appellate jurisdiction," but "the third class of jurisdiction, viz. a supervisory control over all inferior courts and tribunals within its district." *Id.* The Court also stated that "the district courts are specifically authorized to issue ... the writ of certiorari," in the "exercise of their jurisdiction of whatever kind or nature." *Id.* This latter statement would indicate that the district court is authorized to issue writs in the exercise of its original jurisdiction and its

N.M. Const. art VI, § 13; Rule 1–075 NMRA 2001; *Roberson v. Bd. of Educ.*, 78 N.M. 297, 299–300, 430 P.2d 868, 870–71 (1967); *Concerned Residents for Neighborhood Inc. v. Shollenbarger*, 113 N.M. 667, 669, 831 P.2d 603, 605 (Ct.App.1991).

{32} Moriarty contends the district court has original jurisdiction to entertain its civil action in this case pursuant to N.M. Const. art. VI, § 13 and cannot be deprived of that right by the power exercised by the Authority. In Moriarty's view, to bar its claims would violate the separation of powers doctrine because it would effectively eliminate any meaningful judicial scrutiny of the Authority's decision. *See* N.M. Const. art. VI, § 1 (vesting judicial power in the district courts and other tribunals); N.M. Const. art. III, § 1 (explaining separation of powers); *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 173–74, 2 L.Ed. 60 (1803) (upholding the judiciary's power to act as a check on the acts of the executive branch); *Bd. of Educ. v. Harrell*, 118 N.M. 470, 480, 882 P.2d 511, 521 (1994) (discussing the importance of "an evidentiary hearing which comports with the minimum requirements of due process" in determining the type of court scrutiny permitted).

{33} As for appellate jurisdiction, Moriarty and the Authority agree there is no specific statutory right to appeal here. They also agree that no statutory right to seek a writ of certiorari exists. Therefore, NMSA 1978, § 39–3–1.1 (1999), which permits certiorari and appeal when provided by statute, is inapplicable.

{34} Independent of statute, the right to seek a constitutional writ of certiorari in the district court "will lie when it is shown that the inferior court or tribunal has exceeded its jurisdiction or has proceeded illegally," *Regents of Univ. of N.M. v. Hughes*, 114 N.M. 304, 309, 838 P.2d 458, 463 (1992), and generally not when there exists a right to appeal. *Roberson*, 78 N.M. at 300, 430 P.2d at 871; *see also Hughes*, 114 N.M. at 310, 838 P.2d at 464 (reiterating *Roberson*'s statement). Rule 1–075(A) governs but does not itself create a right to obtain a constitutional writ of certiorari to an administrative entity "when there is no statutory right to an appeal or other statutory right of review." Moriarty did not file a petition for a writ of certiorari in the district court.

{35} Based on the record before us, it appears the Authority's decision was made with no hearing and no opportunity for Moriarty to present witnesses, documentary evidence, or argument, or to make a record for judicial review. Rather, the process appears to be nothing more than an insured's demand and a unilateral refusal to indemnify based on coverage defenses or internal policy. The constitutional grant of appellate jurisdiction in all cases originating in inferior courts and tribunals does not apply or preempt original jurisdiction where an administrative board does not "act as an inferior court or tribunal in denying benefits," that is, when no quasi-judicial, adjudicatory proceeding precedes the decision of the administrative board. *Rainaldi v. Pub. Employees Ret. Bd.*, 115 N.M. 650, 653, 857 P.2d 761, 764 (1993). At this point, we see no "case," nor any adjudicatory process of an inferior tribunal or court, that would limit Moriarty to appellate jurisdiction.

{36} Nor does there appear to have been "agency proceedings," with a "record on review" as contemplated under Rule 1–075(C), (H), that would permit effective review by certiorari. The constitutional certiorari process will likely not provide effective judicial scrutiny of an administrative decision in cases such as this. The Authority engaged in the interpretation and application of terms and conditions of insurance policies in deciding the extent of its obligations for Moriarty's covered loss, but there exist no administrative proceedings including an adjudicatory hearing with a record adequate for meaningful judicial review, as contemplated under Rule 1–075(C), (H).

{37} At least as the record on appeal to this Court stands, the district court properly has original jurisdiction over Moriarty's claim. This procedure comports with the adjudication of insurance claims in the private sector. Because the Authority's decision was unilateral, the original jurisdiction

appellate jurisdiction as well as independently through its third class of jurisdiction.

in the district court does not violate the separation of powers doctrine. This gives the parties access to a hearing and adjudication that seems otherwise foreclosed.[3]

{38} The Authority is no stranger to the original jurisdiction of the district court. For example, a school district has sued for a judgment declaring the Authority had a duty to defend the school district. *Lopez v. N.M. Pub. Schs. Ins. Auth.*, 117 N.M. 207, 870 P.2d 745 (1994). Treating the Authority as an insurer, *Lopez* held that the Authority had the duty to defend until it established in the underlying lawsuit that all claims fell within an exclusion. *Id.* at 211, 870 P.2d at 749. In another case, a part-time school district employee sued the Authority to recover damages under an uninsured motorist provision of a school district insurance policy. *Lucero v. N.M. Pub. Sch. Ins. Auth.*, 119 N.M. 465, 892 P.2d 598 (1995). The Supreme Court affirmed the district court grant of summary judgment based on the Authority's defense of lack of coverage. *Id.* at 466–67, 892 P.2d at 599–600. The *Lucero* Court discussed the law of insurer and insured. The Authority has also defended several workers' compensation cases. *See, e.g., Lamay v. Roswell Indep. Sch. Dist.*, 118 N.M. 518, 882 P.2d 559 (Ct.App.1994).

{39} We do not think that the Legislature intended to bind school districts to whatever the Authority might unilaterally decide regarding coverage obligations without some kind of legal adjudication of the Authority's obligations similar to the process available had the school district obtained its own insurance and sought an adjudication of the insurer's obligations. The Act does not set out any procedure for resolution of first-party insurance disputes between a school district and the Authority when a school district loss exists. Absent a legislative intent to the contrary, a school district, as an insured, should have the opportunity to initiate an adjudicatory process on first-party claims such as Moriarty's, with the opportunity to call witnesses, present evidence, and argue its position. *Cf. Harrell*, 118 N.M. at 480, 882 P.2d at 521 (stating that the "right of access to the courts may be satisfied by an evidentiary hearing which comports with the minimum requirements of due process"). Without legislation that provides or enables an administrative hearing or arbitration process, a school district can look only to a district court's original jurisdiction for an effective adjudication.

{40} Moriarty's first-party insurance contract claim against the Authority, which fails to implicate Rule 1–012(B)(6), may be pursued within the district court's original jurisdiction. To the extent Moriarty's other claims sounding in contract and seeking a contract-damages remedy are determined on remand to be legally cognizable, they, too, may be pursued within the district court's original jurisdiction.

F. The Statutory Claims

{41} Moriarty seeks relief against the Authority under both the Insurance Code and the Unfair Practices Act. We choose not to address these claims in this appeal except to reverse the district court's dismissal of them under Rule 1–012(B)(1) or Rule 1–012(B)(6). The viability of these claims is better tested on summary judgment after Moriarty has developed the facts in the context of the various claims and defenses.

G. The Authority's Motion for Supplemental Briefing

{42} After oral argument before this Court, the Authority filed a motion requesting supplemental briefing. Based on what the Authority perceived at oral argument as this Court's apparent concern about the state and nature of the record regarding the Authority's coverage determination, the Authority attaches to its motion regulations that it

3. We leave for another day whether, if the Authority had an administrative adjudicatory process for first-party claims such as Moriarty's, the doctrine of separation of powers would require a school to exhaust that process and seek judicial relief from an adverse administrative decision pursuant to a constitutional writ of certiorari. We also neither explore nor decide whether claims for breach of the duty of good faith and fair dealing or breach of fiduciary duty would be viable in an administrative adjudicatory proceeding or could be asserted separately in an action seeking to invoke the original jurisdiction of the district court.

adopted or that were effective June 29, 2000, relating to and creating an "Administrative Appeal of Authority Coverage Determinations." *See* NMAC § 60.50.16. We deny the motion. The new regulation does not apply to this case. Further, we decline the Authority's invitation at this late stage to remand to the Authority to permit it now to hold an evidentiary hearing and adjudicate the substantive issues. Moriarty filed suit on July 26, 1996. This regulation providing for hearings and administrative records and a procedure for appeal by certiorari is dated June 29, 2000. The Authority did not bring the regulation to the attention of this Court until its motion for supplemental briefing filed on July 10, 2001.

CONCLUSION

{43} We reverse and remand for further proceedings in the district court consistent with this opinion.

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

WE CONCUR: JAMES J. WECHSLER, Judge, and CYNTHIA A. FRY, Judge.

2001-NMCA-093

34 P.3d 133

STATE of New Mexico, Plaintiff–Appellee,

v.

Jason Pete ROPER, Defendant–Appellant.

No. 21,258.

Court of Appeals of New Mexico.

Sept. 7, 2001.

Certiorari Granted, No. 27,154, Oct. 30, 2001.

Patricia A. Madrid, Attorney General, Ann M. Harvey, Assistant Attorney General, Santa Fe, NM, for Appellee.

Phyllis H. Subin, Chief Public Defender, Susan Roth, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

PICKARD, Judge.

{1} This case raises multiple issues concerning the sufficiency of the evidence for Defendant's various convictions and the manner in which he was sentenced for them. We hold that the evidence was in all respects sufficient and that the trial court did not err in any manner in its sentencing decisions.

{2} Although charged with fifteen offenses, including attempted murder, arising out of a shooting from an automobile in which two young men were injured, Defendant was convicted only of two counts of aggravated assault with a deadly weapon (a sawed-off shotgun), one count of conspiracy to commit shooting from a vehicle, and one count of conspiracy to tamper with evidence. The latter count is not at issue in this appeal. Defendant contends that (1) the evidence was insufficient to support the conspiracy to shoot conviction; (2) conviction and sentencing on the two counts of aggra-

vated assault violated double jeopardy; (3) none of the three reasons given by the trial court for increasing Defendant's sentence for aggravating factors was lawful; (4) double jeopardy was violated by using the same facts to convict Defendant for aggravated assault, enhance his sentence with the firearm enhancement, and increase the sentence for aggravating factors; (5) failure to submit the aggravating factors to the jury for a determination beyond a reasonable doubt violated Defendant's due process rights; (6) allowing the two co-defendants to testify against Defendant under plea agreements that provided for leniency violated Defendant's due process rights; and (7) the verdicts are inconsistent. We find no merit in any of the contentions and accordingly affirm.

FACTS

{3} Nineteen-year-old Defendant and two friends, Paul Gutierrez and Samuel Lopez, were drinking in a motel in Albuquerque with Defendant's girlfriend and her sister. Defendant got into an argument with his girlfriend, and he and his friends left the motel to pick up girls. They had two guns in the car, a sawed-off shotgun and a nine-millimeter handgun. It was undisputed that Mr. Gutierrez was the driver of the car, Defendant was the front-seat passenger, and Mr. Lopez was in the back seat.

{4} Mr. Gutierrez's car stopped at a fast-food restaurant where there were girls using a pay phone. One of the girls approached Defendant. She said he was drunk, "ugly," and "running his mouth"; she went back to where her friends were using the phone. In the meantime, there were some young men across the parking lot in front of another restaurant. Mr. Gutierrez was addressing them, "talking garbage" and asking them "what are you claiming?" This question was explained to mean that Mr. Gutierrez wanted to know to what gang the young men belonged. The young men could not hear, and one of them said "What?" Mr. Gutierrez apparently perceived that as a disrespectful response and responded by saying "What" himself in an angry fashion.

{5} The next thing any of the witnesses knew, the shotgun and the nine-millimeter handgun were pointing out of the driver's window of Mr. Gutierrez's car, and multiple shots were fired from the handgun, hitting two of the young men in the parking lot, severely injuring one of them. Several witnesses testified that it appeared to them that the driver, Mr. Gutierrez, was holding the shotgun while the front passenger, Defendant, was shooting the handgun by leaning in front of the driver with the gun out the window. One witness and Mr. Lopez testified that Mr. Lopez had the shotgun. Mr. Lopez said he stuck the shotgun out of the car when Mr. Gutierrez was "talking garbage" to the victims because he wanted to show them that there was a gun in the car. Other witnesses said that Defendant had the shotgun, while Mr. Gutierrez held the handgun. After the shooting, Mr. Lopez bragged to his cousin that he and his friends did a "drive-by" "because some guys were talking shit."

{6} Mr. Gutierrez and Mr. Lopez both testified against Defendant pursuant to deals whereby they were given leniency in return for testifying truthfully, which they understood to mean that they would be expected to testify that Defendant was the person who did the shooting. The jury, however, convicted Defendant only of conspiracy to shoot from a motor vehicle and two counts of aggravated assault with the shotgun, the latter being submitted as lesser included offenses of aggravated battery of the two victims who were shot and injured.

DISCUSSION

1. Sufficiency of the Evidence of Conspiracy

{7} Defendant relies on *State v. Mariano R.*, 1997–NMCA–018, 123 N.M. 121, 934 P.2d 315, to support his contention that the evidence was insufficient. We reversed a conspiracy to shoot conviction in that case on facts similar to the facts of this case: the charge was conspiracy, the underlying offense involved shooting from a vehicle, multiple people in a car were involved, the defendant knew that there were guns in the car, and he was present when one was fired. *Id.* ¶¶ 2, 5. In *Mariano R.*, we said that, while we reviewed the evidence "in light of common knowledge or common experience,"

"common knowledge and experience must not be confused with cynical speculation. In reviewing a determination of guilt, we cannot sanction a view that assumes the worst about human nature. That is an essential message of the presumption of innocence. Evidence is required, more evidence than was presented here." *Id.* ¶ 7 (internal quotation marks and citation omitted).

{8} However, notwithstanding the superficial similarity of the basic facts of *Mariano R.* with the facts of this case, there was much more evidence in this case to sustain a charge of conspiracy to commit shooting from a motor vehicle. It must be remembered that, while conspiracy requires an agreement, the agreement can be nothing more than a mutually implied understanding that can be proved by the cooperative actions of the participants involved. *State v. Smith,* 102 N.M. 512, 514, 697 P.2d 512, 514 (Ct.App. 1985). According to the evidence in the light most favorable to the State, each of the occupants of the vehicle except Defendant were involved in trash-talking with the victims and all were involved in displaying weapons so that the victims would know who they were dealing with. There was evidence that Defendant was the actual shooter of the nine-millimeter handgun, although he was not convicted thereof. From this evidence, the jury could easily infer that all occupants of Mr. Gutierrez's vehicle joined together in a mutually implied understanding to "show up" the young men in the parking lot who were perceived to be members of another gang by shooting at them from the vehicle.

{9} In contrast to *Mariano R.* and other cases on which Defendant relies, in which the defendants were merely acquainted with the perpetrators and present during the crimes, Defendant here was an active participant. The other people in the car were active participants also. The evidence was that at least one of the guns was taken from the motel room to the car. The natural inference was that Defendant and his friends were going out looking for trouble pursuant to a mutually implied understanding that, if trouble were found, the guns would be used. That situation occurred, the guns were used, and one of the friends bragged about it later. The foregoing evidence was sufficient to prove Defendant's guilt of conspiracy to shoot from a vehicle.

2. Separate Convictions for Two Counts of Aggravated Assault

{10} Defendant contends that his convictions and sentences for two counts of aggravated assault stemming from his one act of pointing a shotgun at the two victims violates his rights under the double jeopardy clauses of the state and federal constitutions. Although acknowledging that unitary conduct is only the first step of the inquiry under the analysis set out in *Herron v. State,* 111 N.M. 357, 361, 805 P.2d 624, 628 (1991), Defendant contends that the second step of that analysis requires a decision in his favor because the other factors (time between acts, location of acts, intervening events, distinctions in acts, defendant's intent, and number of victims) all, with the exception of number of victims, support a finding of legislative intent to punish only once for the unitary act. We disagree.

{11} The Court in *Herron* indicated that multiple victims will likely give rise to multiple offenses. *State v. Barr,* 1999 NMCA 081, ¶ 16, 127 N.M. 504, 984 P.2d 185. Nonetheless, Defendant attempts to find comfort in our recent decision in *State v. Castañeda,* 2001 NMCA 052, 130 N.M. 679, 30 P.3d 368 (N.M.Ct.App. 2001). In that case, we held that the defendant's driving while intoxicated with three unrestrained children in the car could amount to only one count of child abuse not resulting in death or great bodily harm. *Id.* ¶ 18. We reasoned that the focus of the legislature and its intent was to punish based on the conduct that could potentially result in physical harm rather than to punish based on the actual result of the conduct. *Id.* ¶ 17. Thus, the defendant's prohibited conduct that could potentially result in physical harm to the children was driving while intoxicated, a single act. We contrasted the case with *State v. House,* 2001 NMCA 011, 130 N.M. 418, 25 P.3d 257, in which the conduct on which the legislature focused was death, and therefore the killing of four people was four offenses of homicide by vehicle even though there was only one act of driving and one

accident. *Castañeda*, 130 N.M. 679, 30 P.3d 368, 2001 NMCA 052, ¶ 16.

{12} Defendant relies on *Castañeda* for the propositions that, had he been convicted of the batteries of the two victims, two counts would be legally supportable because there would be two separate harms, but having been convicted only of assault, only one count is supportable. Defendant's argument is premised on the idea that the assault statutes are designed to protect against the potential physical harm of a battery. We think that Defendant's premise misperceives the legislative intent behind the assault statutes. We stated in *State v. Cowden*, 1996–NMCA–051, ¶ 12, 121 N.M. 703, 917 P.2d 972, that the harm to the victim protected by the assault statutes was mental harm, i.e., putting persons in fear, while the harm protected by the battery statutes was physical harm, i.e., physical injury to persons. Thus, there are distinct actual harms suffered by victims that are protected by each statute. The legislative focus of the assault statutes being the protection of victims from mental harm, it is therefore permissible without offending double jeopardy principles to convict and sentence a defendant for two counts of assault for pointing a gun at two persons at the same time.

{13} Defendant does not challenge the sufficiency of the evidence to support his convictions for aggravated assault. However, as part of his double jeopardy argument, he contends that one of the victims never testified that he was in fear. *See State v. Mata*, 86 N.M. 548, 551, 525 P.2d 908, 911 (Ct.App.1974). This victim testified that he saw the shotgun, stared at it, and then fell on the ground. At that point, he had actually been shot by the handgun. There was abundant evidence that everyone else in the vicinity of the shooting was afraid after seeing the guns pointing out of the car. The inferences from this evidence are sufficient to support a finding of the mental harm on which the assault statutes are focused with regard to this victim.

3. Improper Use of Aggravating Circumstances

{14} Defendant contends that each of the three reasons stated by the trial court for aggravating Defendant's sentence was improper. The trial court's three reasons were that (1) Defendant pointed "a particularly dangerous and fearsome weapon-a sawed-off shotgun" at the victims, (2) the shotgun and other firearm were pointed and fired at a large group of people causing trauma to a large number of victims, and (3) the incident was entirely unprovoked by the actual victims of the shooting or anyone else in the vicinity.

{15} Defendant contends that the first two reasons implicate use of a firearm that is expressly prohibited from being used as an aggravating factor pursuant to NMSA 1978, § 31–18–15.1(B) (1993) (stating that the "judge shall not consider the use of a firearm . . . as [an] aggravating circumstance[ ]"). We disagree. The purpose of Section 31–18–15.1(B) is to insure that a defendant's sentence is not doubly enhanced on the basis of identical facts. NMSA 1978, § 31–18–16(A) (1993) requires a one-year increase in any sentence for a conviction in which a firearm was used in its commission. It is any use of any firearm that invokes Section 31–18–16. The first two reasons given by the trial court are not aggravation because of the mere use of any firearm. Those reasons were that Defendant used a particularly fearsome firearm and the entire episode in which Defendant was involved put a large number of people at risk.

{16} One of the seminal cases in New Mexico on aggravating circumstances is *State v. Wilson*, 97 N.M. 534, 641 P.2d 1081 (Ct. App.1982). That case is dispositive of many of Defendant's contentions relating to the aggravation of his sentence. In particular, as far as the use of the sawed-off shotgun and the use of guns to put large numbers of people in fear, *Wilson* points out, in an analogous circumstance, that "[t]here is a difference between a knifing in a Saturday night social fight and a knifing after lying in wait for the victim." *Id.* at 538, 641 P.2d at 1085. To a like effect here, there is a difference between a basic use of a firearm and a particular use that involves a very dangerous firearm and circumstances that involve a large number of people. Because Section

31–18–15.1(B) prohibits only the basic use of a firearm from being used as an aggravator, there was no error in the trial court's use of other circumstances involving the type of firearm with its potential for use here to create generalized fear and indiscriminate harm.

{17} Defendant contends that the third reason, which he characterizes as "lack of provocation," is an element of the crime of aggravated assault and therefore cannot be used as an aggravating factor. He also contends that provocation can be a mitigating factor and therefore, he reasons, lack of provocation cannot be an aggravating factor in the same way that failure to show mitigation cannot be an aggravating circumstance for death penalty sentencing under *State v. Allen*, 2000 NMSC 002, ¶ 107, 128 N.M. 482, 994 P.2d 728. *See also State v. Callaway*, 109 N.M. 564, 569, 787 P.2d 1247, 1252 (Ct. App.1989), *rev'd on other grounds*, 109 N.M. 416, 785 P.2d 1035 (1990) (holding that while cooperation with authorities may be a mitigating factor, failure to cooperate may not be used to aggravate a sentence).

{18} These cases are not logically probative on Defendant's contentions. Death penalty sentencing is the subject of its own statute, which defines a limited number of aggravating circumstances, and absence of mitigating circumstances is simply not one of them. *See* NMSA 1978, § 31–20A–5 (1981). As explained in *Callaway*, the reason that failure to cooperate cannot be used to aggravate is that it implicates a defendant's right to remain silent. 109 N.M. at 569, 787 P.2d at 1252. There is simply nothing in either the *Callaway* or the *Allen* cases standing for the general proposition that the opposite of a mitigating circumstance can never be used as an aggravating circumstance.

{19} In contrast, the discussion in the *Wilson* case shows that all matters relevant to the event for which Defendant is tried and convicted are circumstances that may aggravate or mitigate and result in an altered sentence. *Wilson*, 97 N.M. at 537–39, 641 P.2d at 1084–86. Therefore, the trial court did not err in relying on the nature of the particular firearm used, the large number of people victimized by the event, and the complete innocence of all bystanders, including the two victims who were shot.

4. Violation of Double Jeopardy in Use of Same Facts

{20} Defendant contends that his double jeopardy rights were violated by the trial court's use of the same facts to triply punish him by (1) the basic sentence for aggravated assault with a deadly weapon, (2) the one-third increase for aggravation, and (3) the one-year increase for the firearm enhancement. As we explained above, the one-third increase for the type of firearm used and accompanying circumstances and potential for harm was not based on the fact alone that a firearm was used. In *State v. Gonzales*, 95 N.M. 636, 639, 624 P.2d 1033, 1036 (Ct.App.1981), *overruled on other grounds by Buzbee v. Donnelly*, 96 N.M. 692, 634 P.2d 1244 (1981), we specifically ruled against the defendant's contention that double jeopardy would be violated by conviction and sentence for aggravated battery with a deadly weapon as well as application of the firearm enhancement because, while all the basic conviction requires is the use of any weapon, the firearm enhancement requires use of a specific type of weapon. Thus, here, there was no error in punishing Defendant with the basic sentence for using any weapon, with the firearm enhancement for using any firearm, and with aggravation for using the particularly fearsome sawed-off shotgun under the circumstances of this case.

5. *Apprendi v. New Jersey*

{21} Defendant contends that the aggravating circumstances statute is unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), in that it does not require the factors used to increase a sentence to be found by a jury based on proof beyond a reasonable doubt. We answered this contention adversely to Defendant in *State v. Wilson*, 2001 NMCA 032, ¶ 4, 130 N.M. 319, 24 P.3d 351, *cert. granted*, 130 N.M. 459, 26 P.3d 103 (2001), and see no reason to revisit the issue here.

6. Violation of Due Process Due to Plea Agreements

{22} Relying on the panel opinion in *United States v. Singleton*, 144 F.3d 1343 (10th Cir.1998), *opinion vacated on rehearing*, 165 F.3d 1297 (10th Cir.1999) (en banc), Defendant contends that his due process rights were violated by the State's "purchase" of the testimony of Mr. Lopez and Mr. Gutierrez. Apart from the fact that the panel opinion did not, by its express terms, state a constitutional rule, 144 F.3d at 1361, we find the en banc opinion more persuasive under the facts of our case, particularly inasmuch as the jury must have viewed a good deal of the co-conspirator testimony with suspicion when it did not convict Defendant for the actual shooting. The danger to Defendant's due process rights was minimal in this case.

7. Inconsistent Verdicts

{23} Defendant claims he should receive a new trial on the conspiracy to commit shooting from a vehicle conviction because (1) there was insufficient evidence to support it as argued in his first issue, (2) when the trial court merged the conspiracy to commit aggravated assault conviction with it, the trial court selected the conspiracy crime that made the least sense inasmuch as Defendant was acquitted of the charges of actually shooting the gun that injured the victims, and (3) conviction of conspiracy to shoot from a vehicle was inconsistent with the acquittal for conspiracy to commit aggravated battery. If there was insufficient evidence to support the conspiracy for which Defendant was convicted and sentenced, the remedy would be a discharge, not a new trial. *See State v. Benton*, 118 N.M. 614, 615, 884 P.2d 505, 506 (Ct.App.1994). Since we have concluded above that there is sufficient evidence, we do not discuss this ground for a new trial further.

{24} Defendant successfully sought to have the trial court merge his two conspiracy convictions. This action was entirely proper because there appeared to be only one conspiracy. *See State v. Jackson*, 116 N.M. 130, 134, 860 P.2d 772, 776 (Ct.App. 1993). Defendant's arguments concerning his alleged acquittal on charges of shooting the gun or conspiracy to commit aggravated battery are not legitimate arguments on appeal. We have frequently said that our business is to review the verdicts of conviction, and not concern ourselves with any alleged acquittals, and thus we do not entertain contentions alleging that the verdicts are irreconcilable. *See State v. Fernandez*, 117 N.M. 673, 680, 875 P.2d 1104, 1111 (Ct.App.1994); *State v. Leyba*, 80 N.M. 190, 195, 453 P.2d 211, 216 (Ct.App.1969). We will not grant Defendant a new trial on this ground.

CONCLUSION

{25} The judgment and sentence are affirmed.

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

WE CONCUR: A. JOSEPH ALARID, Judge, and JONATHAN B. SUTIN, Judge.

2001-NMCA-094

34 P.3d 139

STATE of New Mexico, Plaintiff–Appellee,

v.

Stanley Bryant HILL, Defendant–Appellant.

No. 21,347.

Court of Appeals of New Mexico.

Oct. 4, 2001.

Patricia A. Madrid, Attorney General, James O. Bell, Assistant Attorney General, Santa Fe, NM, for Plaintiff–Appellee.

Phyllis H. Subin, Chief Public Defender, Samantha J. Fenrow, Assistant Appellate Defender, Santa Fe, NM, for Defendant–Appellant.

OPINION

FRY, Judge.

{1} Defendant appeals his convictions for battery on a peace officer and improper display of registration plate. He argues that the district court erred in failing to instruct the jury on: self-defense; the lawfulness of the police officer's actions; resisting, obstructing, or evading a police officer as a lesser included crime of battery on a peace officer; and entrapment. Defendant further argues that the evidence was insufficient to support his conviction for improper display of a registration plate. We hold that the district court should have instructed the jury on self-defense and reverse Defendant's conviction for battery on a peace officer. We further hold that there was sufficient evidence to support Defendant's conviction for improper display of a registration plate. We remand for a new trial in accordance with this opinion. Although we need not resolve De-

fendant's other claims of error, we briefly discuss them.

FACTS

{2} On the night in question, Defendant was visiting his girlfriend at the gas station where she worked. Officers Briseno and Fowler also happened to be at the gas station, and they left the station at about the same time Defendant drove off in his mother's truck. Because the truck's trailer hitch was obstructing the registration sticker on the truck's license plate, the officers pulled Defendant over. Defendant immediately jumped out of the truck and began yelling at the officers. The officers told Defendant to get back in his truck, and he complied. Officer Fowler then asked for Defendant's license and registration, and after checking for warrants, she returned the documents to Defendant. She told Defendant she was not going to cite him but that he should remove the trailer hitch from the truck so that the registration sticker could be seen. Defendant said he was going to report the officers to the chief of police if they continued to harass him. Officer Briseno then asked for Defendant's license and registration again so that he could issue a citation, whereupon Defendant said, "[y]ou guys can see me at my house." The truck began to move forward, and Officer Briseno ran along beside it.

{3} At this point the participants' accounts of the encounter diverge. Defendant testified that the truck's movement was a surprise to him. He said that just before the truck began to move, Officer Briseno, without provocation, struck Defendant's arm with something. Without realizing the truck was in gear, Defendant somehow pressed the throttle with his foot and was surprised when the truck lurched forward. Officer Briseno, hanging onto the truck as it moved forward, struck Defendant in the throat and dug his nails into Defendant's shoulder. According to Defendant, Officer Briseno drew his firearm and Defendant saw him try to pull the trigger twice. Fearing for his life, Defendant testified that he began to kick at Officer Briseno.

{4} By contrast, Officer Briseno testified that when Defendant threatened to complain to the chief of police, he decided to issue a citation in order to document the incident. He asked for Defendant's license again, whereupon Defendant forcefully hit the truck's dashboard with his hand and began to drive away. Officer Briseno reached into the truck, grabbed Defendant's arm, and tried to turn off the ignition key. He testified that Defendant began punching him with his fist, and the truck stalled. Officer Briseno, who did not relish hanging on the side of the truck if Defendant took off at high speed, drew his firearm and ordered Defendant not to start the truck. When Defendant ignored him and attempted to start the truck, Officer Briseno re-holstered his weapon in order to have the use of both hands and tried again to turn off the ignition. Defendant started the truck, leaned over onto the passenger seat and began kicking Officer Briseno with both feet. With the assistance of other officers, Defendant was taken into custody and arrested.

DISCUSSION

I. Jury Instruction on Self Defense

{5} Whether the district court properly refused Defendant's tendered jury instruction is a mixed question of law and fact that we review de novo. *State v. Salazar*, 1997–NMSC–044, ¶ 49, 123 N.M. 778, 945 P.2d 996. We view the evidence in the light most favorable to the giving of the requested instruction. *State v. Vallejos*, 1996–NMCA–086, ¶ 28, 122 N.M. 318, 924 P.2d 727, *aff'd in part and rev'd in part on other grounds*, 1997–NMSC–040, 123 N.M. 739, 945 P.2d 957.

A. Preservation

{6} The State argues that Defendant did not properly preserve this issue for review because his tendered instruction constituted an incorrect statement of the law. Defendant submitted UJI 14–5181, NMRA 2001, "Self-defense; nondeadly force by defendant" with slight, non-substantive variations. The State argues that the instruction proposed to give Defendant an unlimited right of self-defense, while *State v. Kraul*, 90 N.M. 314, 319, 563 P.2d 108, 113 (Ct.App. 1977), limits the right of a person to defend himself against a peace officer. "One may defend oneself against excessive use of force

by the officer. One does not have the right to self-defense when the officer is using necessary force to effect an arrest." *Id.* Because Defendant did not tender a correct written instruction, the State argues Defendant did not properly preserve this issue. *See* Rule 5–608(D) NMRA 2001; *State v. Garcia,* 100 N.M. 120, 125, 666 P.2d 1267, 1272 (Ct.App.1983) ("To preserve error on the refusal of the trial court to give a proffered instruction, the defendant must tender a legally correct statement of law.").

{7} We disagree. The State overlooks the purpose of the rule requiring the tender of a correct instruction, which is to alert the trial court to the defendant's argument. *See Gallegos v. State,* 113 N.M. 339, 341, 825 P.2d 1249, 1251 (1992). In this case, the court clearly understood the type of instruction Defendant wanted and understood that the instruction should be modified to correctly state the law. Judge Birdsall and the attorneys had an extensive discussion about the self-defense issue. The Judge stated that if the jury believed Defendant,

> [t]he jury could have concluded that [Defendant] acted out of fear of immediate death or great bodily harm. Not only did the officer violently grab the defendant, but he also drew his gun and pointed it at [Defendant], who was not engaging in threatening behavior. The evidence could have led the jury to conclude that the officers used excessive force against [Defendant] and that [Defendant] kicked out with his feet merely in an attempt to block the officer from further harming him, not in an attempt to commit a battery.... My concern is there's been testimony. I mean there is some evidence out there.

The State responded, "Right, judge. I agree with you that the evidence is out there." This discussion establishes that the district court was sufficiently alerted to this issue. *See State v. Diaz,* 121 N.M. 28, 33, 908 P.2d 258, 263 (Ct.App.1995) ("[A]n instruction issue had been properly preserved by tender of a uniform jury instruction although the specifically tendered instruction was incorrect."). Having determined that Defendant sufficiently preserved his argument that he was entitled to a self-defense instruction, we now address the merits of the issue.

B. Entitlement to Self Defense Jury Instruction

{8} "An instruction on a claim of self defense or defense of another should be given if there is any evidence, even slight evidence, to support the claim." *State v. Lucero,* 1998–NMSC–044, ¶ 6, 126 N.M. 552, 972 P.2d 1143 (internal quotation marks and citation omitted). A person has a right to self-defense against a police officer when excessive force is used to effect an arrest. *State v. Gonzales,* 97 N.M. 607, 610, 642 P.2d 210, 213 (Ct.App.1982). "One does not have the right to self-defense when the officer is using necessary force to effect an arrest." *Kraul,* 90 N.M. at 319, 563 P.2d at 113. When there are questions as to whether excessive force has been used by a peace officer, "it devolves upon the jury, under the evidence in the case and proper instructions of the court, to resolve these questions." *Gonzales,* 97 N.M. at 610, 642 P.2d at 213 (internal quotation marks and citation omitted).

{9} It was this question of excessive force that posed difficulty for the trial court. In rejecting Defendant's proposed self-defense instruction, the court stated:

> Here's what I'm going to do and I'm not sure for the record which way is right. I'm going to refuse the self-defense instruction. The reason I'm going to do that is that the testimony of the defendant to me does not reach the level-and I'm kind of splitting the baby here-of what we have read, excerpts from *State v. Kraul* and *State v. Brown.* ... However, I do think the defendant is entitled to-I'm going to permit him to make the argument about performing duties of a peace officer as an opposition to the elements offense.

It is apparent from these comments that the judge was concerned that the evidence did not conform to the common law limitations of one's right to defend oneself against a peace officer.

{10} The State argues that Defendant was not entitled to a self-defense instruction because Defendant's use of force

incited Officer Briseno's use of force. *See Vallejos,* 1997–NMSC–040, ¶ 40, 123 N.M. 739, 945 P.2d 957. We are not persuaded. Unless reasonable minds could not differ, the question of whether Defendant was the instigator or the victim should be left to the jury. *See* UJI 14–5191 NMRA 2001 (instructing jury on determining whether defendant was aggressor). If members of the jury believed Defendant's version of events, it would be reasonable for them to conclude that he acted in self-defense. Defendant testified that Officer Briseno physically attacked him without provocation, and Officer Briseno admitted that he grabbed Defendant. Officer Briseno also admitted that he pointed his weapon at Defendant. Defendant testified that his attacks on Officer Briseno occurred solely in reaction to actions which he perceived to be life threatening.

{11} There was sufficient evidence of self-defense that the district judge should have instructed the jury on Defendant's theory, incorporating the limitations applicable to self-defense against a police officer. His failure to do so is reversible error. *See 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.").

{12} Although we reverse based on Defendant's first argument, his remaining arguments are likely to arise again on remand. Therefore, we address each of these arguments in turn in the interest of judicial efficiency. *See State v. Jason F.,* 1998–NMSC–010, ¶ 22, 125 N.M. 111, 957 P.2d 1145.

II. Jury Instruction on Lawfulness of Police Officer's Actions

{13} Defendant argues that he was entitled to a jury instruction on the lawfulness of the police officers' actions. The State contends that this argument was not preserved. We agree.

{14} On appeal, Defendant theorizes that he was not guilty of battery on a peace officer because Officer Briseno was not "[performing] the duties of a peace officer" as those terms are used in the instruction defining peace officer battery. *See* UJI 14–2211, n. 5 (1998) ("If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted."). Defendant claims he tendered two jury instructions consistent with his defense which explained an officer's lawful discharge of duties. However, our review of the record establishes that the tendered instructions related to Defendant's claim of entrapment, not to a definition of lawful police action in the context of battery on a peace officer. Both proffered instructions cited *Vallejos,* 1997–NMSC–040, 123 N.M. 739, 945 P.2d 957, UJI 14–5160 NMRA 2001, and UJI 14–5161 NMRA 2001. The cited authorities relate to entrapment theory. Moreover, Defendant made no argument to the trial court that there should be an instruction explaining a police officer's duties. As a result, Defendant cannot premise error on an argument he failed to make below. *State v. Noble,* 90 N.M. 360, 365, 563 P.2d 1153, 1158 (1977) ("Objections to instructions cannot be raised for the first time on appeal where defendant neither objected to the instructions at trial nor tendered any written request.").

{15} Presumably, at retrial Defendant will tender an instruction on lawful discharge. We leave it to the trial court to determine at that time whether the instruction is appropriate and supported by the evidence.

III. Jury Instruction on Lesser Included Offense of Resisting, Obstructing, or Evading Police Officer

{16} Defendant argues that he was entitled to a jury instruction on resisting, obstructing, or evading a police officer as a lesser included offense of battery on a peace officer. We do not agree. If the evidence adduced at retrial is similar to that presented at the first trial, then a separate instruction on resisting, obstructing, or evading would not be warranted.

> A failure to instruct the jury on a lesser included offense [is] reversible error if: (1) the lesser offense is included in the greater, charged offense; (2) there is evidence tending to establish the lesser included offense and that evidence establishes that

the lesser offense is the highest degree of crime committed; and (3) the defendant has tendered appropriate instructions preserving the issue.

Diaz, 121 N.M. at 30, 908 P.2d at 260 (Ct. App.1995) (citations omitted). We discuss each of these requirements in turn.

{17} With respect to the first requirement, we have previously held that "a defendant cannot commit peace officer battery without having also resisted or abused an officer." *Id.* at 31, 908 P.2d at 261; *see also State v. Padilla,* 101 N.M. 78, 80, 678 P.2d 706, 708 (Ct.App.1983) (holding that resisting an officer is a lesser included offense of peace officer battery; the only difference between the two is that peace officer battery requires the resisting or abusing to culminate in a touching, while resisting does not), *aff'd in part and rev'd in part on other grounds,* 101 N.M. 58, 678 P.2d 686 (1984). We therefore move on to the second requirement and consider whether "there is a rational view of the evidence that would lead the jury to conclude beyond a reasonable doubt that Defendant committed the lesser included offense while still harboring a reasonable doubt that Defendant committed the charged offense." *State v. White,* 1997-NMCA-059, ¶ 14, 123 N.M. 510, 943 P.2d 544. We conclude that there is no such view of the evidence.

{18} The elements of peace officer battery are "the unlawful, intentional touching or application of force to the person of a peace officer while he is in the lawful discharge of his duties, when done in a rude, insolent or angry manner." NMSA 1978, § 30-22-24(A) (1971). The elements of resisting, evading or obstructing a peace officer are "resisting or abusing any ... peace officer in the lawful discharge of his duties." NMSA 1978, § 30-22-1(D) (1981). Here, Defendant admitted that he struck and kicked Officer Briseno—actions which constitute intentional touching and which are therefore consistent with peace officer battery. Even if the jury rejected the officers' versions of the encounter and believed Defendant's testimony, Defendant's actions culminated in "intentional 'touching or application of force in a rude, insolent, or angry manner' " which eliminates resisting, evading or obstructing as the highest degree of offense committed. *Padilla,* 101 N.M. at 80, 678 P.2d at 708 (explaining that peace officer battery culminates in touching while resisting does not).

{19} Defendant argues that the jury could have found that his actions were not *intentional* touching, and therefore that he was guilty of nothing more than resisting, evading, or obstructing. And yet Defendant's testimony was that he had the intent to kick Officer Briseno in order to avoid being shot. *See State v. Gallegos,* 2001-NMCA-021, ¶¶ 8-9, 130 N.M. 221, 22 P.3d 689 (indicating that actions performed in self-defense are intentional). He testified that he did not begin to kick Officer Briseno until he saw Officer Briseno attempting to pull the trigger of his gun. Defendant testified that kicking "was the only thing I could do to even remotely come out halfway hoping to be alive." He went on to say that he kicked Officer Briseno "[j]ust to keep him away from me because this officer was trying to hurt me, not restrain me." Given this testimony, there were only two possible views of the evidence: (1) Defendant was guilty of peace officer battery because he intentionally touched the officer in an angry manner, or (2) Defendant was not guilty because he intentionally and justifiably kicked the officer in self-defense. In either case there was no set of facts under which the jury could have convicted Defendant of only resisting, evading, or obstructing as that offense is defined by law.

IV. Jury Instruction on Entrapment

{20} Defendant claims he was the victim of objective entrapment, and therefore, the district court should have dismissed the charges against him or at least instructed the jury on entrapment theory. He argues that the police department's repeated harassment of him, combined with the officers' issuing a ticket for no legitimate reason, either caused him to commit peace officer battery or constituted outrageous police conduct. We conclude that the court properly refused these instructions.

{21} Our Supreme Court articulated two types of objective entrapment in *Vallejos,* 1997-NMSC-040, ¶ 2, 123 N.M. 739,

945 P.2d 957, both of which involve matters of due process. The first type occurs when "police conduct create[s] a substantial risk that an ordinary person would [be] caused to commit the crime[,]" which we will call "factual objective entrapment." *Id.* The second type occurs when "police conduct exceed[s] the standards of proper investigation[,]" which we will term "normative objective entrapment." *Id.*

{22} Defendant requested instructions on each form of entrapment. As to each form, Defendant argued, both at trial and on appeal, that the objectionable police conduct consisted of the officers (1) stopping Defendant in the continuation of an alleged pattern of harassment and (2) giving Defendant a citation solely in order to punish him for threatening to complain to the police chief. Defendant did not argue that any other police conduct, such as Officer Briseno's alleged assault on Defendant, constituted the basis for the entrapment defense. Defendant's requested jury instruction patterned on UJI 14–5161 alleged the police exceeded permissible conduct because they had "no legal grounds to stop the defendant, and decided to charge him with a crime only after he exercised his First Amendment right to free speech about reporting the behavior of the officer(s) to a superior." We therefore analyze the propriety of entrapment instructions in the context of this theory.

{23} The evidence does not support an instruction on factual objective entrapment. There are two reasons that no reasonable jury could have found that the officers in this case created a substantial risk that an ordinary person would have been caused to commit the crime of peace officer battery.

{24} First, the officers had a legitimate reason to pull Defendant over. Defendant acknowledged that the officers pulled him over because the truck's trailer hitch was obstructing the license plate's registration sticker. Defendant's objection to the stop was that it was the latest in a series of police stops. The truck he was driving was registered in his mother's name, and his sister, who had an outstanding warrant, had a similar name. However, there was no evidence that the same officers had stopped him on any of the prior occasions or that they even knew about the prior stops. Thus, there is no reasonable inference that the officers knowingly participated in a pattern of harassing Defendant.

{25} Second, the officers issued the citation for a purportedly legitimate reason-obstruction of the registration sticker. Defendant contends their only motivation for converting a warning to a citation was Defendant's threat to complain to their superior. Even if this were true, no ordinary person would be caused to commit peace officer battery as a result. People regularly challenge traffic citations without resorting to violence.

{26} The question of normative objective entrapment is an issue of law which we review do novo. *Vallejos,* 1997–NMSC–040, ¶ 39, 123 N.M. 739, 945 P.2d 957. Because there is no dispute about the circumstances of the stop and resulting citation, we decide whether the police conduct was unacceptable as a matter of law. *See* UJI 14–5161, Committee Commentary ("Ordinarily, the judge decides the issue of whether the alleged conduct, if it occurred, was acceptable as a matter of law, leaving for the jury the issue of whether this misconduct did occur."). Again, there is no factual support for a determination that the officers' actions in stopping and citing Defendant exceeded the bounds of proper investigation. The officers' conduct does not "offend[ ] our notions of fundamental fairness," so as to warrant dismissal. *Vallejos,* 1997–NMSC–040, ¶ 8, 123 N.M. 739, 945 P.2d 957 (internal quotation marks and citation omitted). As the court noted in *Vallejos,* "the defense [of objective entrapment] should be used sparingly and reserved for only the most egregious circumstances." *Id.* ¶ 22, 924 P.2d 727 (internal quotation marks and citation omitted). Here, the officers legitimately stopped Defendant and articulated a plausible reason for citing him, actions which by no means constitute "egregious circumstances."

V. Sufficiency of Evidence to Support Conviction of Improper Display of a Registration Plate

{27} We review the sufficiency of the evidence used to support a conviction to deter-

mine whether "a rational jury *could* have found beyond a reasonable doubt the essential facts required for a conviction" *State v. Rojo,* 1999–NMSC–001, ¶ 19, 126 N.M. 438, 971 P.2d 829 (emphasis in original; internal quotation marks and citation omitted). 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.*

{28} Defendant argues that there was insufficient evidence to support Defendant's conviction for improper display of a registration plate. He argues that to be in violation of NMSA 1978, § 66–3–18 (1998), the plate itself must be obscured, not merely the registration sticker.

{29} Section 66–3–18(A) requires "[t]he registration plate [to] be attached to the rear of the vehicle for which it is issued[.] . . . It shall be in a place and position so as to be clearly visible, and it shall be maintained free from foreign material and in a condition to be clearly legible." Although this statute refers specifically to a registration plate, it is clear from reading the other registration statutes that "registration plate" is a broad term comprising everything that evidences registration; including plates, tabs, and renewal stickers. *See, e.g.,* NMSA 1978, § 66–3–17(A) (1995) (stating that "renewals of the registration plate . . . shall cause the [motor vehicle] division to issue a validating sticker"); § 66–3–18(C) (referring to a "registration plate, including tab or sticker"); NMSA 1978, § 66–3–19(A)(5) (1995) (providing for "the issuance of validating stickers . . . to signify the registration of the vehicle[ ]"). Thus, legibility and visibility of the registration plate would include legibility and visibility of any renewal sticker.

{30} There was sufficient evidence to support Defendant's conviction for improper display of the truck's registration plate. Both Officer Briseno and Officer Fowler testified that the renewal sticker was not visible because it was obscured by one of the truck's two trailer hitches. Defendant himself admitted that the hitch, located about an inch from the plate's surface, obstructed part of the plate from some angles. In addition, when Officer Fowler told Defendant he should remove the hitch, Defendant said he had no intention of doing so. The jury could reasonably conclude that Defendant violated the registration laws.

CONCLUSION

{31} Based on the above reasoning, we affirm Defendant's conviction for improper display of a registration plate. We reverse Defendant's conviction for battery on a peace officer and remand to the district court for a new trial with proper instructions to the jury on Defendant's theory of self-defense.

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

WE CONCUR: RICHARD C. BOSSON, Chief Judge and M. CHRISTINA ARMIJO, Judge.

2001-NMSC-032

34 P.3d 593

NEW MEXICO DEPARTMENT OF HEALTH, Petitioner–Respondent,

v.

Fred COMPTON, Respondent–Petitioner.

No. 26,419.

Supreme Court of New Mexico.

Oct. 16, 2001.

Protection and Advocacy System, Inc., Michael C. Parks, V. Colleen Miller, Sandra L. Gomez, Albuquerque, NM, for Petitioner.

New Mexico Department of Health, Beth W. Schaefer, Assistant Attorney General, Santa Fe, NM, for Respondent.

OPINION

SERNA, Chief Justice.

{1} Respondent–Petitioner Fred Compton seeks review of an opinion of the Court of Appeals, arguing that the New Mexico Department of Health (the Department) failed to provide him with a civil commitment hearing within the time limits mandated by NMSA 1978, § 43–1–11(A) (1989) and NMSA 1978, § 43–1–15(B) (1993, prior to 1999 amendment). Compton requests that this Court hold that the statutory time periods should be strictly construed and enforced and that the petitions against him should have been dismissed. We affirm.

I. Facts and Background

{2} Compton was involuntarily admitted to Las Vegas Medical Center (LVMC) on February 18, 1999, for an emergency mental health evaluation. Police initially encountered Compton as a result of threats he made to family members. The admitting psychiatrist at LVMC noted Compton's long history of mental illness, indicated that Compton suffered from a mental disorder as defined in NMSA 1978, § 43–1–3(O) (1993), and assigned a diagnosis of schizophrenia, paranoid type. On February 22, the Department filed two petitions in district court, one for a thirty-day commitment for mental health evaluation and treatment pursuant to Section 43–1–11(A), and another for appointment of a treatment guardian pursuant to Section 43–1–15(B). Following a determination of indigency, the district court, on February 23, appointed counsel to represent Compton in responding to the Department's two petitions.

{3} A hearing was scheduled for February 25. On that date, the district court postponed the hearing for one week due to illness of the assigned judge. The court held a hearing on March 4, fourteen calendar days after Compton's admission to LVMC and eight court days after the filing of the treatment guardian petition. During the hearing, Compton's attorney objected, for the first time, to the failure to hold the hearing within the statutorily mandated time and moved to dismiss both petitions. Compton argued that Section 43–1–11(A) and Section 43–1–15(B) mandated that the hearing be held on February 25.

{4} The district court rejected Compton's argument and found by clear and convincing evidence that Compton presented a likelihood of serious harm to himself or to others as a result of a mental disorder. The court entered orders committing Compton to LVMC for evaluation and treatment not to exceed thirty days and appointing a treatment guardian for him. Compton was discharged on March 25, 1999, less than thirty days after the initially scheduled hearing.

{5} Compton appealed to the Court of Appeals on the sole ground that the postponement of the February 25 hearing violated his statutory rights and required dismissal of the petitions. Compton did not appeal the district court's determination that he presented a likelihood of serious harm to himself or to others as a result of a mental disorder. The Court of Appeals issued an opinion affirming the district court's orders. *N.M. Dep't of Health v. Compton*, 2000–NMCA–078, 129 N.M. 474, 10 P.3d 153. The Court determined that the statutory time limits asserted by Compton were mandatory, but not jurisdictional, and that Compton suffered no prejudice from the seven-day postponement. *Id.* ¶¶ 19–20. This Court then granted Compton's petition for writ of certiorari to the Court of Appeals.

II. Discussion

A. Due Process

{6} Compton does not directly assert a violation of his constitutional right to due process under the Fourteenth Amendment to the United States Constitution. However, he repeatedly refers to the " 'massive curtailment of liberty' " implicated by involuntary civil commitment, relying on the United States Supreme Court's opinions in *Vitek v. Jones*, 445 U.S. 480, 491, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) and *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323

(1979), and argues that the hearing rights at issue in this case have "constitutional underpinnings." Additionally, we note that the special concurrence in the Court of Appeals suggested that "liberty interests are implicated" by this case and expressed concern over the lack of protection "for these violated liberty interests." *Compton*, 2000-NMCA-078, ¶ 23, 129 N.M. 474, 10 P.3d 153 (Armijo, J., specially concurring). As a result, we believe it is necessary to address as a threshold matter the constitutional implications of the procedures used in this case in order to place the statutory time limitations in Section 43-1-11(A) and Section 43-1-15(B) in their proper context.

{7} The United States Supreme Court "repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington*, 441 U.S. at 425, 99 S.Ct. 1804. This Court has also recognized that confinement "impinges [on] the right to liberty." *State v. Rotherham*, 122 N.M. 246, 255, 923 P.2d 1131, 1140 (1996). However, "[t]he state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." *Addington*, 441 U.S. at 426, 99 S.Ct. 1804; *accord Rotherham*, 122 N.M. at 255, 923 P.2d at 1140 (stating that "as long as [individuals] remain dangerous, the State has an interest in committing them to protect [them] and the public"). "In a civil commitment state power is not exercised in a punitive sense." *Addington*, 441 U.S. at 428, 99 S.Ct. 1804. Thus, in order to weigh Compton's liberty interest against the Department's *parens patriae* and police powers, while being "mindful that the function of legal process is to minimize the risk of erroneous decisions," *Addington*, 441 U.S. at 425, 99 S.Ct. 1804, we apply the balancing test established by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), in order to assess the amount of process required by the Fourteenth Amendment. *See Rotherham*, 122 N.M. at 262, 923 P.2d at 1147 (applying *Mathews* to the question of whether criminal commitment requires proof beyond a reasonable doubt). Under *Mathews*, we rely on the following factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous depravation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335, 96 S.Ct. 893.

{8} In New Mexico, involuntary civil commitment is governed by the Mental Health and Developmental Disabilities Code, NMSA 1978, §§ 43-1-1 to -25 (1977, as amended through 1998, prior to 1999 amendments). There are three stages of involuntary civil commitment contemplated by the Code, each with different procedural requirements. As a preliminary measure, the Legislature has created a method for involuntary commitment for emergency mental health evaluation and care. NMSA 1978, § 43-1-10 (1989). Under this provision, a peace officer may transport an individual to an evaluation facility if one of four factors are met: (1) the person is subject to lawful arrest; (2) there are reasonable grounds to believe the person has just attempted suicide; (3) there are reasonable grounds to believe the person presents a likelihood of serious harm to himself or herself or to others as a result of a mental disorder; or (4) a licensed physician or psychologist certifies that the person presents a likelihood of serious harm to himself or herself or to others as a result of a mental disorder. Section 43-1-10(A). A court order is not required to transport the person to an evaluation and treatment facility. Section 43-1-10(B). Upon arriving at the facility, the admitting physician or psychologist must conduct an evaluation to determine "whether reasonable grounds exist to detain the proposed client for evaluation and treatment," the outcome of which will be determinative of whether the person is detained for emergency evaluation and treatment. Section 43-1-

10(E). If the individual is detained, he or she

> shall be informed orally and in writing by the evaluation facility of the purpose and possible consequences of the proceedings, the allegations in the petition, [the] right to a hearing within seven days, [the] right to counsel and [the] right to communicate with an attorney and an independent mental health professional of [the person's] own choosing, and shall have the right to receive necessary and appropriate treatment.

Section 43–1–10(F).

{9} The next stage of commitment contemplated by the Code is a thirty-day period of evaluation and treatment. Section 43–1–11. The Legislature has established a number of procedural protections to accompany this level of commitment. Unlike an emergency transport and detention, a thirty-day commitment must be authorized by a court order and only after a hearing at which "the client shall be represented by counsel and shall have the right to present evidence on [the client's] behalf, including testimony by an independent mental health professional of [the client's] own choosing, to cross-examine witnesses and to be present at the hearing." Section 43–1–11(B). The client "has the right to a hearing within seven days of admission unless waived after consultation with counsel." Section 43–1–11(A).

> Upon completion of the hearing, the court may order a commitment for evaluation and treatment not to exceed thirty days if the court finds by clear and convincing evidence that:
>
> (1) as a result of a mental disorder, the client presents a likelihood of serious harm to himself or others;
>
> (2) the client needs and is likely to benefit from the proposed treatment; and
>
> (3) the proposed commitment is consistent with the treatment needs of the client and with the least drastic means principle.

Section 43–1–11(C). The court must find "more likely than not that in the near future the person will attempt to commit suicide or will cause serious bodily harm to himself [or herself] by violent or other self-destructive means," NMSA 1978, § 43–1–3(M) (1993), or "more likely than not that in the near future the person will inflict serious, unjustified bodily harm on another person or commit a criminal sexual offense, as evidenced by behavior causing, attempting or threatening such harm, which behavior gives rise to a reasonable fear of such harm from the person," Section 43–1–3(N).

{10} The final stage of commitment under the Code is an extended commitment of six months. NMSA 1978, § 43–1–12 (1978). In addition to the procedural protections available under Section 43–1–11, the client has the right to request a six-person jury at the hearing. Section 43–1–12(B). Moreover, regardless of the stage of the involuntary civil commitment proceeding, individuals may have alternative remedies outside of the Code. *See* § 43–1–12(E) ("Nothing in this section shall limit the right of a client to petition the court for a writ of habeas corpus."). Thus, the Legislature has enacted a scheme under which individuals are entitled to progressively greater procedural protection in response to increased periods of involuntary civil commitment.

{11} This case involves the intermediate stage of commitment for a thirty-day evaluation and presents two related due process questions: (1) whether the seven-day time limitation within Section 43–1–11(A) is constitutionally required; and (2) whether the delay of fourteen calendar days between Compton's admission and his hearing violated Compton's constitutional rights.[1] We be-

1. We do not believe it is necessary to address the procedure for the appointment of a treatment guardian pursuant to Section 43–1–15(B) under a *Mathews* test. The appointment of a treatment guardian does not infringe on the liberty interest of being free from involuntary commitment. Although it does infringe on the right to refuse medical treatment, the hearing to be held within three days of the filing of a petition to appoint a treatment guardian, unlike the hearing on the petition for a thirty-day commitment, is a pre-deprivation hearing, meaning that the individual retains the right to refuse treatment until the hearing. *See* § 43–1–15(A) ("If the client is capable of understanding the proposed nature of treatment and its consequences and is capable of informed consent, [the client's] consent shall be obtained before the treatment is performed.").

lieve both of these questions are answered by the *Mathews* balancing test.[2]

{12} Under the first factor of the *Mathews* test, we agree with Compton that he has a significant liberty interest in being free from involuntary commitment. Indeed, "[w]e are acutely aware of the severe curtailment of liberty which involuntary commitment in a mental institution can entail." *Project Release v. Prevost,* 722 F.2d 960, 971 (2d Cir.1983). The precise issue presented in this case, however, is not whether Compton is entitled to a particular procedure, a judicial hearing, as part of an involuntary civil commitment procedure, but whether that procedure must be provided within fourteen calendar days of his initial admission to LVMC. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews,* 424 U.S. at 333, 96 S.Ct. 893 (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)). Thus, we must assess the risk of error from the absence of a judicial hearing in light of Compton's liberty interest in not being involuntarily confined for a period of fourteen days. *See Addington,* 441 U.S. at 425, 99 S.Ct. 1804 (assessing "the extent of the individual's interest in not being involuntarily confined *indefinitely*" (emphasis added)). We weigh this interest against the compelling governmental interest of exercising its *parens patriae* power to protect individuals from themselves and its police power to protect society from dangerous individuals. *See Rotherham,* 122 N.M. at 262, 923 P.2d at 1147 (discussing the "compelling interest" of the State). Assessing the risk of error, we note that, in order to justify emergency detention under Section 43–1–10, at least two individuals must determine whether reasonable grounds exist to believe that the person is a danger to himself or herself or to others, with one of these individuals most likely being a peace officer and the other being a neutral decision-maker who is highly trained in evaluating the psychological condition of the person. *Cf. Parham v. J.R.,* 442 U.S. 584, 613, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) ("In general, we are satisfied that an independent medical decisionmaking process, which includes the thorough psychiatric investigation described earlier, followed by additional periodic review of a child's condition, will protect children who should not be admitted; we do not believe the risks of error in that process would be significantly reduced by a more formal, judicial-type hearing."). We also note that individuals who are involuntarily committed under the Code on an emergency basis have the right to counsel and the right to consult with the attorney and an independent mental health professional. With access to these resources, we are confident that any risk of erroneous deprivation of liberty prior to a judicial hearing can be eliminated through alternative means of relief. *See* Rule 5–802 NMRA 2001 (establishing procedures for filing a writ of habeas corpus). Under these circumstances, we do not believe that the risk of an erroneous deprivation of the liberty interest in not being involuntarily committed by mistake is

But see § 43–1–15(F) (providing for emergency administration of psychotropic medication "necessary to protect the client from serious harm"). As a result, a delay in conducting the hearing does not cause the individual to suffer a deprivation of liberty.

2. The dissent suggests that, by virtue of the clarity of the relevant statutes and the fact that the Legislature has defined the process that is due, "the Legislature has made unnecessary an inquiry into the length of time a person can be involuntarily confined in a mental institution without a hearing." However, it is the Due Process Clause of the Fourteenth Amendment, not the Legislature, that "determin[es] the amount of process appropriate to protect a liberty or property interest as a matter of constitutional right." *State v. Woodruff,* 1997–NMSC–061, ¶ 27, 124 N.M. 388, 951 P.2d 605. To the extent that the dissent's position could be interpreted "to cede to [the legislative branch] so much of [the judiciary's] control over fundamental constitutional protections," *State v. Nunez,* 2000–NMSC–013, ¶ 47, 129 N.M. 63, 2 P.3d 264, we emphasize that it is the judiciary's responsibility to ensure that statutes enacted by the Legislature satisfy the minimum procedural requirements of the Fourteenth Amendment, both on their face and as applied. *See Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 176, 2 L.Ed. 60 (1803) ("It is, emphatically, the province and duty of the judicial department, to say what the law is."); *Nunez,* 2000–NMSC–013, ¶ 48, 129 N.M. 63, 2 P.3d 264 ("It is the role of the judiciary, and not the legislature, to interpret the constitution.").

sufficiently great to require a hearing within fourteen days of admission.

{13} The Court of Appeals reached a similar conclusion in *Garcia v. Las Vegas Medical Center*, 112 N.M. 441, 445–47, 816 P.2d 510, 514–16 (Ct.App.1991), holding that an involuntary civil commitment for a period of twenty days without a judicial hearing did not violate the Due Process Clause of the Fourteenth Amendment. The Court of Appeals noted that the United States Supreme Court has upheld a Connecticut statute which allowed for a commitment of fifteen days based on a physician's certificate of dangerousness due to mental illness, with an additional thirty days' confinement permitted without the requirement of a court order. *Id.* at 447, 816 P.2d at 516 (relying on *Briggs v. Arafeh*, 411 U.S. 911, 93 S.Ct. 1556, 36 L.Ed.2d 304 (1973), *aff'g mem. Logan v. Arafeh*, 346 F.Supp. 1265 (D.Conn.1972)). The Court of Appeals also noted that the Supreme Court of Colorado upheld an involuntary civil commitment statute which contained no mandatory probable-cause hearing but allowed for a hearing within ten days of a request by the patient or the patient's attorney. *Id.* (relying on *Curnow v. Yarbrough*, 676 P.2d 1177 (Colo.1984) (en banc)). In addition, other courts have upheld similar statutes in response to due process challenges. *See, e.g., Project Release*, 722 F.2d at 974–75 (upholding two New York statutes that permitted sixty-day and fifteen-day commitments without a judicial hearing unless requested by the individual due to other procedural protections, such as the right to counsel, afforded under the statutes). These cases recognize the emergency nature of an involuntary civil commitment and that "the threat of harm to the [individual] or others is of such a nature that confinement must take place immediately. When the choice is between a loss of life or health and a loss of liberty for a brief period of time, the preferable alternative is apparent." *Coll v. Hyland*, 411 F.Supp. 905, 910–11 (D.N.J.1976) (per curiam) (holding that, in a general involuntary commitment situation, a preliminary commitment hearing is not constitutionally required because New Jersey law requires that a final hearing be held within twenty days). *See generally* Marybeth Walsh, Note, *Due Process Requirements for Emergency Civil Commitments: Safeguarding Patients' Liberty Without Jeopardizing Health and Safety*, 40 B.C. L.Rev. 673, 677–81 (1999). "It is obvious that the hospital authorities must be allowed some time to conduct adequate testing and observation of the patient so that a diagnosis can be made. Consideration also must be given to the necessities of court administration and the opportunity for counsel to prepare for an effective hearing." *Coll*, 411 F.Supp. at 911.

{14} We conclude that the seven-day hearing requirement in Section 43–1–11 is constitutional on its face and that the procedures employed in the present case adequately protected Compton's constitutional right to due process and did not render the statute unconstitutional as applied. We therefore disagree with the assessment that this case involves "violated liberty interests," and we limit the remainder of this opinion to a discussion of statutory requirements and statutory remedies.

B. Statutory Time Mandates

{15} Compton contends that the time requirements in Section 43–1–11(A) and Section 43–1–15(B) are mandatory and that the appropriate remedy for a violation of the time requirements is dismissal of the petition. We first separately address the time requirements in each statute and then subsequently address the issue of remedies.

{16} Compton argues that Section 43–1–11(A) establishes a mandatory requirement for a hearing within seven days of admission. He asserts that the hearing in the present case exceeded this time limitation by seven days. We begin by correcting Compton's time calculation.

{17} "In computing a period of time prescribed or allowed by a statute or rule, . . . if the period is less than eleven days, a Saturday, Sunday or legal holiday is excluded from the computation." NMSA 1978, § 12–2A–7(E) (1997). Application of this statute yields the following results: Compton's right to a hearing under Section 43–1–11 accrued seven days, excluding weekends, from February 18, his date of admission, which would

have been March 1. The district court conducted the hearing on March 4. Thus, under Section 43–1–11, the hearing was three days late, not seven days late. We consider whether a three-day postponement is permissible under Section 43–1–11(A).

{18} "In construing a particular statute, a reviewing court's central concern is to determine and give effect to the intent of the [L]egislature." *State ex rel. Klineline v. Blackhurst*, 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988). "[T]he plain language of the statute [is] the primary indicator of legislative intent." *Whitely v. N.M. State Pers. Bd.*, 115 N.M. 308, 311, 850 P.2d 1011, 1014 (1993). Looking to the plain language of the statute, Section 43–1–11(A) provides that Compton had "the right to a hearing within seven days of admission unless waived after consultation with counsel." The Court of Appeals has previously interpreted this language to be silent on the issue of postponement of the hearing; the waiver language "furnishes a means by which an individual may waive [the] right to challenge [the] detention. By waiver [the individual] transforms an involuntary commitment into a voluntary one." *State v. Bunnell (In re Bunnell)*, 100 N.M. 242, 244, 668 P.2d 1119, 1121 (Ct.App.1983). We agree with this assessment of the statute. The Legislature has directed that a decision to forgo a hearing to contest a petition for a thirty-day commitment can only be made by an express knowing and voluntary waiver, but Section 43–1–11(A) is silent on the question of whether the district court may postpone the hearing beyond the seven-day requirement. Confronted with legislative silence on this issue, we must determine whether the Legislature intended to allow for postponement of the hearing by looking to the provisions of the Code as a whole and by assessing the purposes of the seven-day time limitation.[3] *See Sunwest Bank v. Nelson*, 1998–NMSC–012, ¶ 14, 125 N.M. 170, 958 P.2d 740 (stating that it is necessary to resort "to other statutory construction aids in order to discern the intent of the Legislature" in the face of legislative silence on an issue); *Roberts v. Southwest Cmty. Health Servs.*, 114 N.M. 248, 251, 837 P.2d 442, 445 (1992) ("Statutes should be construed so as to facilitate their operation and the achievement of the goals as specified by the legislature.").

{19} The Legislature's decision to provide a right to a hearing within seven days of admission reflects a careful balance between the individual's liberty interests and the interest of the individual and society in proper care and treatment. The goal in establishing a seven-day time frame is, on one hand, to ensure that individuals are not erroneously committed against their will and, on the other hand, to ensure that there is a sufficient period of time after the initial commitment and prior to a hearing for the proper diagnosis and emergency treatment necessary to conduct a meaningful and effective judicial review. The time

> after initial commitment before judicial proceedings must be begun is not simply for the purpose of delay. It has a positive aspect as well. There is a compensating advantage to the committed person because in many cases during this period the medical staff at the hospital can adequately alleviate his [or her] mental illness or by use of non-emergency diagnostic procedures determine that he [or she] is not a

3. We reject Compton's argument that the time requirements in Section 43–1–11(A) are jurisdictional. We agree with the Court of Appeals that "the mandatory statutory requirement that a hearing be held within either seven days for a thirty-day commitment or three days to appoint a treatment guardian does not affect the essential power of the district court to adjudicate the issue before it." *Compton*, 2000–NMCA–078, ¶ 15, 129 N.M. 474, 10 P.3d 153. We also agree with the Court of Appeals that the waiver provision of Section 43–1–11(A) indicates that the Legislature did not intend to establish a jurisdictional requirement. *See id.* ¶ 16; *see also Mitchell–Carr v. McLendon*, 1999–NMSC–025, ¶ 25, 127 N.M. 282, 980 P.2d 65 (discussing a time requirement in the Human Rights Act and stating that "we cannot say that the Legislature intended the requirements of this section to be jurisdictional"); *Redman v. Bd. of Regents*, 102 N.M. 234, 239, 693 P.2d 1266, 1271 (Ct.App.1984) (discussing a time requirement for a de novo hearing by the State Board of Education following a teacher's dismissal and concluding that "the legislature did not intend a jurisdictional requirement in the sense that the right to a timely hearing could not be waived").

"danger to himself [or herself] or others." In such cases, the stigma of court record is avoided and the length of confinement is shortened.

Logan, 346 F.Supp. at 1269.

{20} In response to these concerns, the Legislature has provided that, "[i]f the division, physician or evaluation facility decides to seek commitment of the client for evaluation and treatment, a petition shall be filed with the court within five days of admission requesting the commitment." Section 43–1–11(A). This five-day period is, in the Legislature's judgment, a proper amount of time "to evaluate a patient appropriately and to make a determination of the need for continued involuntary hospitalization." Walsh, *supra*, at 690. "It must be remembered that commitment has not been undertaken for the sake of penal detention. The patient is committed for treatment and care, and some knowledge of his [or her] mental condition can be gained by visual observation and diagnostic tests. This takes time." *Logan*, 346 F.Supp. at 1269 (footnote omitted). If the Legislature had required that the filing of the petition and the hearing take place immediately upon admission, many clients might be needlessly detained beyond the initial seven-day evaluation period. *See* Walsh, *supra*, at 684 (discussing commentators' view that, because "many acute psychiatric episodes subside within one to four days, ... many patients whose conditions would have improved sufficiently for discharge in a few days would be retained unnecessarily for long commitment periods"). An immediate hearing "may also harm the patient's clinical interest because it transforms the doctor-patient relationship from a therapeutic to an adversarial one." *Id.* In addition, in order to adequately protect the individual's right to counsel, there must be an adequate amount of time for counsel to review the case and prepare for the commitment hearing. *Coll*, 411 F.Supp. at 911. Any time limitation placed on the hearing requirement must also take into account the administrative burdens of a judicial hearing, including scheduling, availability of judicial staff, and the impact on treatment resources.[4] *See Parham*, 442 U.S. at 605–06, 99 S.Ct. 2493 ("One factor that must be considered is the utilization of the time of psychiatrists, psychologists, and other behavioral specialists in preparing for and participating in hearings rather than performing the task for which their special training has fitted them. Behavioral experts in courtrooms and hearings are of little help to patients."); *Coll*, 411 F.Supp. at 911.

{21} As can be seen, the Legislature's decision to establish a seven-day hearing requirement implicates a number of different factors. Given the Legislature's awareness of the complex relationship between these various factors and of the alternative remedy of filing a writ of habeas corpus, we do not believe that the Legislature intended to establish a rigid seven-day requirement in Section 43–1–11(A). Just as the constitutional right to due process necessarily requires flexibility, *see Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) ("It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands."), we believe the Legislature intended to provide enough flexibility in the procedural time requirement of Section 43–1–11(B) to respond to the particular demands of individual cases. For example, because the Legislature provided five days after admission to file a petition, it is conceivable that a full judicial hearing would be required to be held within two days of the filing of the petition. *See* § 43–1–11(B). Under these circumstances, it is highly foreseeable that a postponement might be necessary for either the parties or the court. *See* Walsh, *supra*, at 690–91 (discussing the conclusions of an ad hoc committee formed to evaluate Massachusetts' emergency commitment procedure and stating "[a]ll of the

4. Although Compton correctly argues that there is no requirement that the hearing be held at LVMC, the decision to do so stems from the notion that "[h]olding the hearings at the hospital[ ] is less disruptive for patients and makes the process seem less criminal in nature.... [I]t also reduces the amount of time that the commitment process takes away from physicians' clinical duties." Walsh, *supra*, at 695.

representatives of the judiciary on the Ad Hoc Committee stated that a minimum of five business days between the filing of the petition and the hearing was necessary for the courts to process the petition, prepare the case file and schedule a judge and other staff to travel to the petitioning hospital to hold a hearing"). In fact, the Court of Appeals has specifically faced a situation in which it was necessary to postpone the hearing required under Section 43–1–11(A). In *Bunnell*, an individual who was involuntarily committed pursuant to Section 43–1–10 argued that his Section 43–1–11 hearing should have been postponed in order to allow his counsel adequate time to prepare. 100 N.M. at 244, 668 P.2d at 1121. The Court of Appeals noted that the potentially short period of time between the filing of a petition and a judicial hearing might result in "little time to prepare" for appointed counsel. *Id.* at 244–45, 668 P.2d at 1121–22. The Court "[b]alanc[ed] the need for a prompt hearing with the importance of a meaningful hearing before imposition of a thirty-day detention" and held that the district court "must grant a short continuance when counsel establishes that he [or she] has not had sufficient time to prepare his [or her] client's case." *Id.* at 245, 668 P.2d at 1122.[5] We believe the need for flexibility articulated in *Bunnell* demonstrates that the Legislature did not intend to establish a rigid time requirement and that a postponement is contemplated by Section 43–1–11(A).[6] For the reasons discussed above, we conclude that the seven-day hearing requirement in Section 43–1–11(A) is subject to postponement for good cause.

{22} Our interpretation of Section 43–1–11(A) accords with the Court of Appeals' interpretation of a different statutory time requirement for an administrative hearing. In *Redman*, the Court of Appeals addressed a statute that provided that a de novo hearing on a teacher's dismissal "shall be held" by the State Board of Education within sixty days of receipt of a notice of appeal. 102 N.M. at 238, 693 P.2d at 1270 (internal quotation marks and quoted authority omitted). The Court determined that the sixty-day requirement was mandatory; however, this mandatory requirement did not prevent post-

5. We note that the Court of Appeals also stated in dicta in *Bunnell* that any postponement requires "an immediate preliminary hearing to determine whether the State can present sufficient evidence to justify holding the individual beyond the seven-day emergency period allowed under § 43–1–10." *Bunnell*, 100 N.M. at 245, 668 P.2d at 1122. However, given the procedural protections in Section 43–1–10, including a physician's or psychologist's determination that reasonable grounds exist to believe that the patient is a danger to himself or herself or to others, and the availability of alternative remedies, we do not believe that the Legislature intended to require a probable cause hearing as a precondition to postponement. We further note that the Court of Appeals stated that, "under current procedures, we do not find it inconceivable that the trial court could appoint counsel immediately before the hearing begins." *Bunnell*, 100 N.M. at 245, 668 P.2d at 1122. Under Section 43–1–10(F), the right to counsel, and the right to consult with counsel, attaches upon admission, and the Department and the district court should endeavor to ensure that counsel be appointed at the earliest opportunity. *See* NMSA 1978, § 43–1–4(A) (1978) ("All clients ... shall be entitled to obtain advice of counsel *at any time* regarding their status under the code." (emphasis added)). *See generally* Walsh, *supra*, at 690 (discussing a committee's conclusion "that immediate appointment of counsel was the single most effective method of protecting a patient's rights"). We do not believe that the statute contemplates the appointment of counsel as late as the beginning of a Section 43–1–11 hearing.

6. We respectfully believe that the dissent misreads *Bunnell*. While the Court in that case did hold that a continuance is appropriate, even mandatory, when the seven-day requirement would prevent a meaningful hearing, the Court did not rule that a continuance was appropriate only under those circumstances. Indeed, the Court was not faced with the question of whether postponement could occur for other reasons, so *Bunnell* does not stand for the proposition that Section 43–1–11(A) precludes postponement "by the State," as suggested by the dissent, or by the court, as occurred in this case. *See Fernandez v. Farmers Ins. Co.*, 115 N.M. 622, 627, 857 P.2d 22, 27 (1993) ("The general rule is that cases are not authority for propositions not considered." (quotation marks and quoted authority omitted)). Nor did the Court in *Bunnell* rely on the waiver language of Section 43–1–11(A) to permit a postponement. The Court determined that the waiver language in the statute concerned only a waiver of the hearing, not a waiver of the time requirement. *Bunnell*, 100 N.M. at 244, 668 P.2d at 1121. Thus, the Court determined that Section 43–1–11(A) implicitly allows postponement when it serves the underlying goals of the statute.

ponement. *Id.* at 239, 693 P.2d at 1271. "On showing of good cause, or with a written waiver, the State Board may extend the time." *Id.* at 240, 693 P.2d at 1272.[7]

{23} Our conclusion that the Legislature intended to permit postponements of a Section 43-1-11(A) hearing for good cause is also supported by the somewhat analogous requirement in Rule 5-604 NMRA 2001 for the commencement of trial in criminal cases. Even though this rule protects the important interest of the prompt adjudication and resolution of criminal cases, *State v. Wilson,* 1998-NMCA-084, ¶ 10, 125 N.M. 390, 962 P.2d 636, district courts may extend the six-month commencement requirement "[f]or good cause shown." Rule 5-604(C). As reflected by the power to order postponement in Rule 5-604(C), "trial courts possess the inherent power to manage their dockets," *State v. Coffin,* 1999-NMSC-038, ¶ 65 n. 3, 128 N.M. 192, 991 P.2d 477, and must have the ability to respond to exigencies that arise in individual cases. We do not believe that the Legislature, by establishing the seven-day hearing requirement in Section 43-1-11(A), intended to prevent the exercise of this power in response to good cause for postponement.

{24} Considering the number of factors at stake in establishing a seven-day hearing requirement and the number of variables that might necessitate a delay in particular cases, we believe that the Legislature intended to allow postponement of the seven-day hearing requirement in Section 43-1-11(A). We therefore hold that Section 43-1-11(A) imposes a mandatory requirement that a hearing be held within seven days of admission unless good cause exists to postpone the hearing. A determination of good cause should take into account any objection by the client, as well as the client's substantial interest in not being mistakenly confined against his or her will. Further, district courts must consider the Legislature's intent to require a prompt hearing on a thirty-day commitment petition in determining whether good cause exists for postponement. Any postponement should be narrowly prescribed and should be allowed only for so long as necessity demands, again taking into account the legislative intent for a prompt judicial hearing.

{25} In this case, the district court scheduled a timely hearing but postponed the hearing for three days beyond the seven-day requirement in Section 43-1-11(A) due to illness of the presiding judge. Compton did not object or make any demand for a hearing or for his release until the scheduled hearing on March 4. Under these circumstances, we believe that good cause existed for a postponement and that the postponement was sufficiently minimal so as not to infringe unduly on Compton's statutory right to a prompt hearing. *Cf. State v. Aaron,* 102 N.M. 187, 191-92, 692 P.2d 1336, 1340-41 (Ct.App.1984) (discussing the requirement of good cause for a continuance and referring to *People v. Watson,* 650 P.2d 1340, 1343 (Colo. Ct.App.1982), in which "good cause was shown when the trial judge became ill"). In addition, as recognized by the Court of Appeals, the postponement did not affect the length of Compton's involuntary commitment because the district court based the thirty-day commitment period on the date of the originally scheduled hearing. *Compton,* 2000-NMCA-078, ¶ 20, 129 N.M. 474, 10 P.3d 153. We conclude that the district court did not err in postponing the Section 43-1-11 hearing.

{26} We now turn to the time requirement in Section 43-1-15(B). We begin by noting that the hearing contemplated by Section 43-1-15(B) serves a different purpose and protects different interests than a commitment hearing under Section 43-1-11. Section 43-1-15(A) governs the administration of "psychotropic medication, psychosurgery,

7. The dissent's suggestion that if the Legislature intended to allow postponement for good cause it could have explicitly so provided would have been equally applicable to the statute at issue in *Redman.* It is worth noting that the Legislature could also have easily provided in Section 43-1-11(A) that postponements are impermissible. As with the statute in *Redman,* Section 43-1-11(A) does not expressly allow or disallow postponement, and "[l]egislative silence is at best a tenuous guide to determining legislative intent." *Swink v. Fingado,* 115 N.M. 275, 283, 850 P.2d 978, 986 (1993). Our resort to "the objective the legislature has sought to accomplish," *id.,* in the face of legislative silence hardly can be said to amount to "judicial surgery."

convulsive therapy, experimental treatment or behavior modification program involving aversive stimuli or substantial deprivations." This statute provides that "[i]f the client is capable of understanding the proposed nature of treatment and its consequences and is capable of informed consent, his [or her] consent shall be obtained before the treatment is performed." Section 43–1–15(A). This statute is intended to protect a client's right to refuse treatment. However, if the physician or mental health professional "believes that the client is incapable of informed consent, he [or she] may petition the court for the appointment of a treatment guardian to make a substitute decision for the client." Section 43–1–15(B). This provision is intended to protect clients' "right to receive necessary and appropriate treatment," Section 43–1–10(F), when they are unable to do so themselves. In order to protect a client's right to refuse treatment, however, there must be a hearing at which the client has the right to be present and the right to representation of counsel, and the court must "find[ ] that the client is not capable of making his [or her] own treatment decisions" before it is permitted to appoint a treatment guardian. Section 43–1–15(B). The "hearing on the petition shall be held within three court days." *Id.* Under Section 43–1–15(B), a hearing for appointment of the treatment guardian should have been held in this case three court days after the filing of the petition on February 22, which would have been February 25, the date of the original hearing. Thus, the hearing for appointment of the treatment guardian was five days late.

{27} Unlike Section 43–1–11, Section 43–1–15(B) does not implicate a client's liberty interest in being free from involuntary commitment. A hearing under Section 43–1–15(B) protects a client's right to refuse treatment and the right to necessary and appropriate treatment. The client retains the right to refuse treatment unless a court makes the appropriate finding following a hearing. Thus, for purposes of the right to refuse treatment, Section 43–1–15(B) provides for a pre-determination hearing. As a result, we believe that the purpose of requiring a hearing within three days is to ensure that clients receive appropriate and necessary treatment at the earliest opportunity. *See* NMSA 1978, § 43–1–7 (1977) ("Each resident client receiving mental health services shall have the right to prompt treatment. . . ."). The short period of time between the filing of the petition and the hearing indicates the Legislature's view of the immediacy and importance of ensuring proper treatment. We assess whether the three-day requirement may be postponed for good cause in light of this purpose.

{28} As the Court of Appeals noted, the language in Section 43–1–15(B), with the use of "shall," is clear and unambiguous and creates a mandatory hearing deadline. *Compton*, 2000–NMCA–078, ¶ 11, 129 N.M. 474, 10 P.3d 153. However, we note that the filing of the petition itself is not mandatory even if the physician or mental health professional believes that the client is incapable of informed consent. *See* § 43–1–15(B) (providing that the physician or mental health professional "*may* petition the court for the appointment of a treatment guardian" (emphasis added)); *see also* NMSA 1978, § 12–2A–4(B) (1997) (" 'May' confers a power, authority, privilege or right."). In addition, Section 43–1–11(D) provides that a court which makes the appropriate findings for a thirty-day commitment "shall hear further evidence as to whether the client is capable of informed consent" for purposes of determining whether to appoint a treatment guardian, regardless of the filing of a petition pursuant to Section 43–1–15(B). Finally, Section 43–1–15(F) provides a mechanism for the emergency administration of psychotropic medication if it is "necessary to protect the client from serious harm" while a petition for appointment of a treatment guardian is pending. As a result, at least in the context of an emergency involuntary commitment under Section 43–1–10 and a thirty-day commitment petition under Section 43–1–11, we believe that a narrowly prescribed postponement of the three-day hearing requirement under Section 43–1–15(B) for good cause will not substantially interfere with the client's "right to prompt treatment," Section 43–1–7. While we caution the district court to make every effort to comply with the statutory time mandate in order to protect the client's

right to treatment, we conclude that the court did not err in postponing the hearing for good cause.

C. Remedy

{29} Compton argues that the proper remedy for a violation of the statutory time limits would be the immediate dismissal of the petition. We disagree.

{30} The Legislature has expressly provided a remedy for a violation of the procedural protections contained in the Mental Health and Developmental Disabilities Code. "Any client who believes that his [or her] rights, as established by this code or by the constitution of the United States or of New Mexico, have been violated shall have a right to petition the court for redress.... The court shall grant relief as is appropriate, subject to the provisions of the Tort Claims Act." NMSA 1978, § 43–1–23 (1978). This statute distinguishes a violation of the time requirements in the Code from the violation of analogous time requirements in other statutes or rules. For example, Rule 5–604(F) expressly provides that upon a failure to comply with the time requirements for commencement of trial "the information or indictment filed against such person shall be dismissed with prejudice." Similarly, in addressing a statutory time requirement that "does not prescribe a result for failure to comply," *Redman*, 102 N.M. at 238, 693 P.2d at 1270, the Court of Appeals has held that "the failure to commence and complete the hearing within sixty days is reversible error, unless the requirement is waived or unless the delay occurred for good cause." *Id.* at 239, 693 P.2d at 1271. In the absence of a statutory remedy, then, "the proper analysis for dismissal is whether the delay prejudiced [the individual.]" *Compton*, 2000–NMCA–078, ¶ 12, 129 N.M. 474, 10 P.3d 153; *accord State v. Budau*, 86 N.M. 21, 22–23, 518 P.2d 1225, 1226–27 (Ct.App.1973) (discussing the requirement of arraignment within fifteen days of the filing of the information or indictment). Given the Legislature's express provision of a remedy in Section 43–1–23, these approaches to analogous time requirements are inapposite. Based on the plain language of Section 43–1–23, we do not believe that the Legislature contemplated dismissal as a proper remedy for a violation of the procedural requirements of the Code.

{31} We also believe that the remedy of dismissal for a violation of the procedural requirements at issue in this case would be inconsistent with the purposes of the Code. First, as mentioned above, Section 43–1–15(B) does not implicate the liberty interest of not being improperly committed involuntarily; instead, it implicates the client's right to informed consent and the client's right to necessary and appropriate treatment. Because Section 43–1–15(B) contemplates a predetermination hearing, the failure to hold the hearing within three court days affects only the right to necessary and appropriate treatment. Thus, not only is the remedy of dismissal not contemplated by Section 43–1–15(B), but it would be entirely antagonistic to the purposes of this statute to order dismissal because such a remedy would prevent individuals from receiving necessary and appropriate treatment. Instead, in order to protect the client's right to necessary and appropriate treatment, and to protect the client from self-inflicted harm, there is a statutory remedy for a violation of Section 43–1–15(B). "If a licensed physician believes that the administration of psychotropic medication is necessary to protect the client from serious harm which would occur while the provisions of Subsection B of this section are being satisfied, he [or she] may administer the medication on an emergency basis." Section 43–1–15(F).

{32} Second, with respect to a violation of the time requirements in Section 43–1–11(A),

> it is not true that the release of a genuinely mentally ill person is no worse for the individual than the failure to convict the guilty. One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma. It cannot be said, therefore, that it is much better for a mentally ill person to "go free" than for a mentally normal person to be committed.

Addington, 441 U.S. at 429, 99 S.Ct. 1804 (citations omitted). In the present case, for example, although Compton "disputes the notion that he was better off being involuntarily

detained and subjected to involuntary mental health institutionalization," he does not dispute the district court's finding by clear and convincing evidence that he presented a danger to himself or others as a result of mental illness necessitating a thirty day commitment. The Court of Appeals noted that "[t]he district court asked [Compton's] attorney to explain what remedy [Compton] had if grounds for commitment existed, and [Compton's] counsel replied, 'that he doesn't receive the treatment which he, in accordance with the doctor's testimony, requires.' " *Compton*, 2000–NMCA–078, ¶ 3, 129 N.M. 474, 10 P.3d 153. This remedy would clearly frustrate Section 43–1–11's purpose of ensuring that individuals who pose a danger to themselves or others as a result of mental illness receive proper care and treatment. Although in a different case a violation of Section 43–1–11(A) might prejudice an individual's right to be free from improper involuntary commitment due to an erroneous finding under Section 43–1–10, we believe that the alternative remedy of filing a petition for writ of habeas corpus provides an adequate safeguard. *See Logan*, 346 F.Supp. at 1269. In light of the urgent need for treatment in these cases, the potentially harmful consequences to either the individual or to others for an improper release, the express provision of a statutory remedy, and the availability of the alternative remedy of habeas corpus, we do not believe that the Legislature intended dismissal of the petition as a proper remedy for a violation of the time requirements in Section 43–1–11 or Section 43–1–15.[8]

III. Conclusion

{33} We conclude that the district court did not err in postponing the Section 43–1–11 hearing for three days due to good cause and the Section 43–1–15(B) hearing for five court days for good cause. We also conclude that dismissal of a petition is not a proper remedy for a violation of the procedural requirements of the Code. We therefore affirm.

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

WE CONCUR: JOSEPH F. BACA, Justice, and PETRA JIMENEZ MAES, Justice.

GENE E. FRANCHINI, Justice (dissenting).

PAMELA B. MINZNER, Justice (dissenting).

MINZNER, Justice (dissenting).

{35} I respectfully dissent. I agree that the issues in this case are not moot, but I believe the statutory provisions at issue represent the clear judgment of the Legislature that Petitioner was entitled to release when he was not provided a hearing within seven days. NMSA 1978, §§ 43–1–10(F), –11(A) (1989). Thus, I believe that the relevant statutory provisions compel us to reverse the Court of Appeals and remand this case to the district court with directions to dismiss the district court's order.

{36} Petitioner has been released from the Las Vegas Medical Center, and we need not restore to him through the mandate of this court the liberty he sought from the district court. Indeed, we cannot restore to him the liberty of which he was deprived. Nevertheless, he represents a class of citizens for whose interests in liberty the Legislature has made specific provision. For other members of that class, the issues raised in this appeal remain undecided. There is the distinct possibility that those issues may recur but evade review. For these reasons, for these citizens, we ought to resolve the issues raised in this case. The Court of Appeals was right to address the issues raised, rather than to dismiss the appeal as moot. *See State v. Bunnell (In re Bunnell)*, 100 N.M. 242, 244, 668 P.2d 1119, 1121 (Ct.App.1983).

8. The dissent suggests that the "only" proper relief in this case is dismissal. We do not rule out the possibility that the "relief" and "redress" to which the Legislature referred in Section 43–1–23 might include dismissal of a petition or release from custody under appropriate circumstances as determined by the district court. However, if the Legislature had intended to require a single remedy that applies uniformly in all cases in which there is a violation of rights, or even a violation of a particular right, it would not have vested the district court with discretion to select "appropriate" relief, and if the Legislature had intended for the relief to be automatic or immediate, it would not have explicitly required that the client petition the court for redress.

{37} Sections 43–1–10(F) and 43–1–11(A) are straightforward. The first provision, concerning emergency mental health evaluation and care, states that "[u]pon arrival at an evaluation facility, the proposed client shall be informed orally and in writing by the evaluation facility of . . . his right to a hearing within seven days. . . ." The second provision, concerning the commitment of adults for a thirty-day period, begins "[e]very adult client involuntarily admitted to an evaluation facility pursuant to Section 43–1–10 NMSA 1978 has the right to a hearing within seven days of admission unless waived after consultation with counsel."

{38} The Court of Appeals attempted to construe these provisions, with reference to our cases, as either jurisdictional requirements or mandatory preconditions. The Court of Appeals concluded that the statutes quoted above "do[ ] not affect the essential power of the district court to adjudicate the issue before it." *N.M. Dep't of Health v. Compton*, 2000–NMCA–078 ¶ 15, 129 N.M. 474, 10 P.3d 153. I respectfully submit that the Court of Appeals addressed the wrong issue. The jurisdictional-mandatory distinction is not applicable to instances of involuntary confinement for mental health purposes. The issue in such cases is not whether the failure to comply with the time limits deprives the district courts of jurisdiction. Rather, the issue is whether the time limits provide a protection or protections that the class of citizens the Legislature was attempting to protect can enforce in the district court. I see no reason to construe the text of the statutes to limit the protection they seem intended to provide.

{39} In addition to the text of the statutes, our case law indicates that the statutes do not contemplate routine continuances. In *Bunnell*, 100 N.M. at 244, 668 P.2d at 1121, the court reasoned that Section 43–1–11(A) "does not provide for postponement but instead furnishes a means by which an individual may waive his right to challenge his detention." The court ultimately held that the seven-day hearing mandated by Sections 43–1–10(F) and 43–1–11(A) could be continued, but only "when counsel [for the person being committed] establishes that he has not had sufficient time to prepare his client's case." 100 N.M. at 245, 668 P.2d at 1122. Moreover, the court noted that "[i]f the trial court grants such a continuance, it must also hold an immediate preliminary hearing to determine whether the State can present sufficient evidence to justify holding the individual beyond the seven-day emergency period." *Id.*

{40} The majority construes *Bunnell* as authority for its conclusion that the Legislature has been silent "on the question of whether the district court may postpone the hearing beyond the seven-day requirement." Majority Opinion ¶ 18. I respectfully disagree. I believe *Bunnell* supports the view that a continuance is only appropriate when: (1) it is requested by the individual being committed, and (2) it serves that person's interests; that is, when it does not violate his or her due process rights. It seems to me that *Bunnell* understood Section 43–1–11(A) to preclude postponement of the seven-day hearing by the State but to permit waiver by the individual being committed.

{41} Due to the clarity of our statutes, we need not decide whether the delay of fourteen calendar days between Compton's admission and his hearing violated his constitutional rights. Had the Legislature intended a "good cause" exception to the seven-day time frame of the statutes in question, it could easily have said so. The addition of the simple phrase "except for good cause shown" would have sufficed. Alternatively, the Legislature could have provided for a hearing "within a reasonable period of time." The Legislature took neither of these approaches. Rather, the Legislature has made unnecessary an inquiry into the length of time a person can be involuntarily confined in a mental institution without a hearing. The Legislature has defined the process that is due, Petitioner has not argued that the Legislature defined his rights too narrowly, and the Court need not address whether the Legislature has defined his rights too broadly.

{42} I conclude that the Legislature has provided a mandatory seven-day time limit for a hearing in involuntary commitment proceedings, although the right may be waived. I also conclude that the Legislature has pro-

vided an express remedy for violations of the statutory provisions at issue. NMSA 1978, § 43–1–23 (1978) states:

> Any client who believes that his rights, as established by this code or by the constitution of the United States or of New Mexico, have been violated shall have a right to petition the court for redress. The client shall be represented by counsel. The court shall grant relief as is appropriate, subject to the provisions of the Tort Claims Act [41–4–1 to 41–4–27 NMSA 1978].

{43} The Court of Appeals noted that "because there is no indication in the record that [Compton] sought to be released on February 25, 1999, or objected to the continuance of his seven-day hearing until the hearing was held seven days later, the district court was unable to grant him dismissal as a remedy." *Compton*, 2000–NMCA–078, ¶ 20, 129 N.M. 474, 10 P.3d 153. The emphasis, however, should not be on the actions taken by individuals to enforce their rights, but rather on ensuring that those rights are not violated in the first place. The waiver provision of Section 43–1–11(A) states that the right to a hearing can be "waived after consultation with counsel." This indicates that waiver is to be an affirmative act. The burden rests with the Department of Health and with the district court to ensure that the hearing takes place within the time limit proscribed by the Legislature. If the individual's rights are nonetheless violated, his or her objection becomes a practical necessity. The practical necessity does not justify treating the absence of an objection as a waiver of any protection the Legislature intended the hearing to ensure and the court to enforce.

{44} The statute speaks of "appropriate" relief being granted. The forgoing analysis leads me to conclude that the only appropriate relief for one who has not been given a mandatory hearing within seven days of his or her commitment is immediate release from the facility. The individual is certainly subject to future confinement, but only if one of the conditions of NMSA 1978, § 43–1–10(A) (1989) is met. Furthermore, the determination that the individual meets one of these conditions must be based on evidence of the person's mental health status at the time of dismissal. To allow re-confinement based on previous evaluations and evidence would render the individual's release meaningless.

{45} The majority suggests that the remedy of dismissal would not serve the public health purposes of involuntary medical confinement. Majority Opinion ¶ 31. I believe that the Legislature has taken into account those purposes in crafting the statutory scheme of which Sections 43–1–10(F) and 43–1–11(A) are part. Ultimately, the nature of the right protected by this statutory scheme compels dismissal when the Department of Health has not provided the district court the necessary evidence within the time limit set by the Legislature. As our courts have said on other occasions in a somewhat different context, legislative therapy, rather than judicial surgery, is required. *E.g., Amoco Prod. Co. v. N.M. Taxation & Revenue Dep't*, 118 N.M. 72, 76, 878 P.2d 1021, 1025 (Ct.App. 1994).

{46} For the foregoing reasons, I respectfully dissent.

I CONCUR: GENE E. FRANCHINI, Justice.

2001-NMCA-067

34 P.3d 611

STATE of New Mexico, Plaintiff–Appellant,

v.

Robert MALLOY, Defendant–Appellee.

No. 21,068.

Court of Appeals of New Mexico.

June 15, 2001.

Certiorari denied, No. 27,019, Aug. 28, 2001.

OPINION

BUSTAMANTE, Judge.

{1} The State appeals an order suppressing evidence obtained pursuant to a duly executed search warrant. The State contends that the trial court erred in determining that the delivery of a redacted affidavit for search warrant at the time of execution of the search warrant violated Rule 5–211(C) NMRA 2001, thus voiding the search warrant. We hold that the requirement of delivery of the affidavit for search warrant is ministerial and, without a showing of prejudice to the defendant, suppression is not warranted. We, therefore, reverse the trial court's order suppressing the evidence obtained pursuant to the search warrants.

BACKGROUND

{2} The police were investigating possible charges of sexual exploitation of children by prostitution and contributing to the delinquency of minors. On December 17, 1998, District Judge Blackmer issued two search warrants, one for Defendant's home and car, and one for his office. At the same time, the State moved to seal the affidavits for the search warrants. The affidavits supporting the search warrants included details that could identify the alleged victims, details of Defendant's sexually explicit requests, and details of the manner and place proposed for exchange of information. In order to protect the ongoing investigation and the identity of the alleged victims, Judge Blackmer ordered that the narrative portions of the affidavits be partially and temporarily sealed.

{3} The search warrants were executed on December 17 and 18, 1998. The copy of the search warrants left with Defendant included the affidavits. However, the portions that had been sealed were redacted. On December 22, 1998, Defendant moved to partially unseal the affidavits. After a hearing on the issue, Judge Blackmer issued an order allowing Defendant copies of the affidavit, except that the names of the alleged victims and civilian witnesses were redacted. Defendant received the affidavits on January 15, 1999. He filed a petition for superintending control to the Supreme Court, requesting full disclo-

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Patricia A. Madrid, Attorney General, Anita Carlson, Assistant Attorney General, Santa Fe, NM, for Appellant.

Ray Twohig, Ray Twohig, P.C., Albuquerque, NM, for Appellee.

sure of the affidavits. That petition was denied on February 3, 1999.

{4} On February 4, 1999, Judge Blackmer issued another search warrant for Defendant's home. The affidavit for that search warrant was also partially and temporarily sealed upon motion of the State. Again, Defendant moved to partially unseal the affidavit for the search warrant. Again, Defendant received copies of the affidavit with the names of the alleged victims and the civilian witnesses redacted.

{5} On February 16, 1999, Defendant was indicted by the grand jury on forty-one felony counts of sexual exploitation of children, criminal solicitation, and contributing to the delinquency of a minor. During the grand jury proceeding, the names of the alleged victims were released to Defendant.

{6} On October 25, 1999, Defendant moved to suppress all the evidence obtained pursuant to the search warrants. The motion was based on several claims, including that the affidavits in support of the search warrants did not provide probable cause for the searches and that the partial sealing of the affidavits prevented compliance with Rule 5–211(C). At the hearing on the motion, Defendant argued only that his motion was based on "the sealing issue."

{7} The trial court, District Judge Allen, determined that "there was ample reason to support the judges' [sic] decision to seal the affidavit if allowed under LR2–111." Judge Allen also found that Defendant "was not prejudiced as [a] result of the sealing nor were any of his constitutional rights violated as a result." The trial court, nevertheless, determined that the search warrants delivered to Defendant at the time of the search were void because they did not include complete, unredacted affidavits as required by Rule 5–211(C). Thus, the court determined, suppression was required. The State appeals.

DISCUSSION

{8} The Fourth Amendment to the United States Constitution protects individuals and their property from unreasonable searches and seizures by the government. Thus, "[t]he essence of the fourth amendment ... is to safeguard the privacy and security of individuals against arbitrary invasion by governmental officials by imposing a standard of reasonableness upon the exercise of those officials' discretion." *City of Las Cruces v. Betancourt*, 105 N.M. 655, 657, 735 P.2d 1161, 1163 (Ct.App.1987). The exclusionary rule requires that evidence obtained in violation of this right to be free from unreasonable searches and seizures be excluded as trial evidence. *See State v. Snyder*, 1998–NMCA–166, ¶¶ 15–16, 126 N.M. 168, 967 P.2d 843. Thus, if the government acted unreasonably in obtaining the evidence, that evidence will be suppressed. *See City of Albuquerque v. Haywood*, 1998–NMCA–029, ¶ 9, 124 N.M. 661, 954 P.2d 93.

{9} A search warrant is used as a means to establish the reasonableness of an intrusion. "The purpose of a warrant is to safeguard individuals against arbitrary intrusion by police officers in the pursuit of suspected criminals." *State v. Bates*, 120 N.M. 457, 460–61, 902 P.2d 1060, 1063–64 (Ct.App. 1995). The warrant "interjects a detached and neutral decision maker between the police and the person to be searched." *State v. Gutierrez*, 116 N.M. 431, 434, 863 P.2d 1052, 1055 (1993). It " 'assure[s] the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.' " *United States v. Gantt*, 194 F.3d 987, 990 (9th Cir. 1999) (quoting *United States v. Chadwick*, 433 U.S. 1, 9, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977)). Thus, the requirement for a warrant prior to government intrusion is a matter of constitutional import. The question here concerns state-imposed procedures for obtaining and executing a search warrant and whether those procedures are of such constitutional import that failure to strictly comply with them requires suppression of the evidence obtained.

{10} Rule 5–211 codifies the procedural requirements for issuance and execution of a search warrant in New Mexico. The rule provides who and what a warrant may be issued for. Rule 5–211(A). It provides who may execute the warrant, what the warrant shall contain, and when it can be executed. Rule 5–211(B). It provides that

"a copy of the affidavit for search warrant, and the search warrant and a copy of the inventory of the property taken" shall be given to the person from whom or from whose premises property is taken. Rule 5–211(C). It provides that a return with an inventory of the property taken shall be made after execution. Rule 5–211(D). Finally, it provides for the manner in which probable cause for the warrant is to be determined. Rule 5–211(E). Here, there is no question that a portion of the affidavits for search warrants was redacted with the approval of the district judge, and it was the redacted affidavits that were presented to Defendant at the time of the execution of the warrants. We assume without deciding that by providing the redacted affidavits, the executing officers fell short of strict compliance with the language of Rule 5–211(C). The question is the remedy. Defendant argued, and the trial court agreed, that because this procedural requirement was not fully performed, it had to declare the warrant invalid, and therefore, the evidence must be suppressed.

{11} We disagree. We believe that the policy behind the rule calls for a less drastic remedy. The rule should be interpreted in light of the policies underlying the warrant requirement—to provide the property owner assurance and notice during the search. Because Rule 41 of the Federal Rules of Criminal Procedure is similar to Rule 5–211, we find the federal authorities persuasive. We agree that there are two kinds of violations of the search warrant rule: those that are fundamental and those that are merely technical. *United States v. Negrete-Gonzales,* 966 F.2d 1277, 1283 (9th Cir. 1992). Fundamental violations are those that render the search unconstitutional under traditional Fourth Amendment standards. *Id.* They require suppression. *Id.* Technical violations require suppression only if the defendant can show prejudice or if there was a deliberate disregard of the rule by the police. *Id.* Not all the procedures set forth in Rule 5–211 are of such constitutional import that suppression of the evidence necessarily follows in each and every case. Some procedures can reasonably be viewed as ministerial. *United States v. McKenzie,* 446 F.2d 949, 954 (6th Cir.1971).

{12} Following the general rule, our cases have held that ministerial acts concerned with the technical procedure for executing and returning a search warrant do not necessarily undercut the validity of the search warrant if the warrant otherwise conforms with the rule. *See State v. Elam,* 108 N.M. 268, 271–72, 771 P.2d 597, 600–01 (Ct.App. 1989); *State v. Wise,* 90 N.M. 659, 661, 567 P.2d 970, 972 (Ct.App.1977); *State v. Baca,* 87 N.M. 12, 14–15, 528 P.2d 656, 658–59 (Ct.App.1974); *State v. Perea,* 85 N.M. 505, 509–10, 513 P.2d 1287, 1291–92 (Ct.App. 1973). *See generally* 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment,* § 4.12 (3d ed. 1996 & Supp.2000). In each of these cases, obligatory procedures set forth in the rule were not followed. The procedures were found, however, to be ministerial acts that did not affect the validity of the search warrant. We stated in those cases that absent a showing of prejudice to the defendant from the failure to comply with the procedure, suppression was not required.

{13} Defendant points out that the language of the rule required that the person being searched *shall* be given a copy of the affidavit along with the search warrant and inventory, and Defendant emphasizes that use of the word "shall" indicates it is mandatory. *See State v. Lujan,* 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). While we recognize that mandatory language has been used in the rule, that does not convert noncompliance with the rule into a violation of the constitution. The rule also uses the word "shall" in regard to the return after execution: The return shall be made promptly after execution of the warrant." Rule 5–211(C). Yet, we have held that such matters are ministerial. *See Baca,* 87 N.M. at 14–15, 528 P.2d at 658–59; *Perea,* 85 N.M. at 509–10, 513 P.2d at 1291–92. Likewise, the rule uses the word "shall" in regards to who is to execute the warrant. In *Elam,* 108 N.M. at 271, 771 P.2d at 600, and *Wise,* 90 N.M. at 661, 567 P.2d at 972, we interpreted that requirement in such a manner as to allow the search warrant to be executed by those not listed in

the rule so long as authorized officers were present during the execution. Thus, use of the word "shall" by itself does not make lack of strict compliance with this requirement a constitutional violation requiring suppression.

{14} *State v. Montoya*, 86 N.M. 119, 520 P.2d 275 (Ct.App.1974), cited by Defendant, does not require a different result. First, *Montoya* is not a decision of this Court. *See Silva v. City of Albuquerque*, 94 N.M. 332, 333, 610 P.2d 219, 220 (Ct.App.1980) (holding opinion in which one judge of the Court of Appeals concurred in the result and another judge dissented has no precedential value). Second, Judge Sutin's opinion in *Montoya* appears to be based on the fact that the search warrant was void on its face because it did not include an instruction to the executing officers to return the search warrant and inventory. Thus, he believed that when there was a total failure to make any return and a total failure to make an inventory, the search was invalid. Judge Sutin was not concerned with minor defects in form, which would be considered ministerial. Instead, his concern was with the return and inventory, which he believed were necessary to make the warrant valid. Third, there were a number of defects in *Montoya*, including a complete failure to provide an inventory and return of the warrant. In the present case, the police provided Defendant with a copy of the affidavit for search warrant; the only alleged noncompliance with the rule concerns the redacted portions.

{15} We find Judge Hendley's partial dissent in *Montoya* persuasive. In it, he points out that the purpose for the return and inventory is to provide defense counsel access to the search warrant and to protect the target of the search from having his property stolen or misplaced by police. *Montoya*, 86 N.M. at 124, 520 P.2d at 280 (Hendley, J., dissenting in part and concurring in part). These are beneficial goals and should be met by the police. But that does not give those goals constitutional dimension. Judge Hendley determined that the defects in *Montoya* were simply ministerial, and thus, their violation did not make the search warrant invalid. We believe that the same can be said for the search warrant affidavit in this case.

{16} The purpose of an affidavit is to establish probable cause for the search and seizure. A showing of probable cause, as set forth in the rule is constitutionally mandated. However, there is nothing in the constitution requiring that all the supporting evidence appear with the warrant when the warrant is served. *See Commonwealth v. Gauthier*, 425 Mass. 37, 679 N.E.2d 211, 215 (1997). That requirement is a matter of procedural rule.

{17} Contrary to Defendant's argument at the suppression hearing, the person subject to the search has no right to resist the search warrant or question probable cause at the time the warrant is executed. *See State v. Hatton*, 116 Ariz. 142, 568 P.2d 1040, 1046 (1977) (in banc); *cf. Fugere v. State, Taxation & Revenue Dep't*, 120 N.M. 29, 36, 897 P.2d 216, 223 (Ct.App.1995). Thus, failure to provide the person searched, at the time of the search, with the statement supporting probable cause does not implicate a constitutional right to be free from unreasonable searches. Thus, providing the affidavit for search warrant at the time of execution of the warrant is a ministerial act. Even if the defendant does not have the affidavit, at that time, that alone would not prevent the defendant from challenging probable cause for the warrant at a later time. *Cf. State v. Doe*, 92 N.M. 100, 102–03, 583 P.2d 464, 466–67 (1978).

{18} Defendant argues that Rule 5–211(C) provides a notice requirement which is essential to the protection of the constitutional right. We agree that providing a copy of the search warrant gives the person to be searched notice of the officer's authority and what the officer is entitled to seize. *Gantt*, 194 F.3d at 990. However, Defendant was given a complete copy of the warrant and there is no question that he was sufficiently informed of the officer's authority and what he was entitled to seize. The affidavit in support of the search warrant was not necessary for this purpose. Thus, we do not believe that providing an unredacted affidavit for search warrant is constitutionally required to satisfy any notice requirement that there may be with regard to a search.

{19} We note that the search warrant form adopted by our Supreme Court refers to the affidavit for search warrant for description of the place or person to be searched and the things to be taken. Rule 9-214 NMRA 2001. Thus, in New Mexico, while the search warrant supplies the officers' authority, it is the affidavit that provides a description of what is to be taken and from where. That does not mean, however, that the complete affidavit is necessary at the time of execution. The notice requirement can be satisfied in appropriate circumstances, as it was here, by providing a partial affidavit addressing place, person and things to be taken.

{20} In the case before us, there is no question that Defendant was provided with the search warrants and, therefore, had notice of the officers' authority. He was also provided with redacted affidavits that showed what the officers were entitled to seize and from where. Under the facts of this case, the complete affidavits were not necessary to give Defendant notice of the officers' authority to search and seize property. *Cf. State v. Jones,* 1998-NMCA-076, ¶¶ 19-20, 125 N.M. 556, 964 P.2d 117 (stating the rule regarding substantial compliance with notice requirements).

{21} Because delivery of the affidavit for search warrant at the time of execution does not bear consequences of constitutional dimension, it follows that delivery of a redacted version does not automatically lead to the constitutional remedy of suppression. Incomplete performance will result in suppression only if Defendant can show he was prejudiced or that the State acted in bad faith. Although Defendant argues some vague notions of prejudice, he was not successful below and is likewise unsuccessful on appeal. The trial court found that Defendant was not prejudiced by the delivery of redacted affidavits. We agree with that determination. Mere assertion of prejudice is not a showing of prejudice. *See In re Ernesto M., Jr.,* 1996-NMCA-039, ¶ 10, 121 N.M. 562, 915 P.2d 318.

{22} Defendant also argues that when the State sealed the affidavit and failed to provide the affidavit at the time of execution, the State engaged in a deliberate and unnecessary—essentially bad faith—violation of the rule. Defendant argues that there were a number of ways that the affidavit could have been written so that it did not have to be sealed. While we agree that there were ways to write the affidavit to protect victims and witnesses and yet still provide probable cause, Defendant does not persuade us that the affidavit was written for the purpose of denying Defendant his right to be free from unreasonable searches and seizures. The affidavit contains substantial detail. The alleged victims and witnesses are identified by name, and thus it ultimately provides Defendant greater detail and credibility to the statement support of probable cause. *Cf. In re Shon Daniel K.,* 1998-NMCA-069, ¶ 9, 125 N.M. 219, 959 P.2d 553 (arguing that affidavits which disclose the identity of informants who proffer specific information are presumed reliable and credible). If the affidavits had been written as urged by Defendant to remove any identification of the alleged victims, this might have left the affidavit open to an attack for lack of probable cause. The level of detail in the affidavits acted to protect Defendant's constitutional right to be free from unreasonable searches and seizures rather than to infringe upon that right. We see no evidence of bad faith on the part of the police, and the trial court made no such finding.

{23} We hold that the requirement set forth in Rule 5-211(C) providing the person to be searched with a copy of the affidavit for search warrant is a ministerial act that does not affect the underlying validity of the search warrant unless the defendant can demonstrate prejudice or that it was a deliberate, unnecessary violation of the search warrant rule in bad faith. Because Defendant in the case at bar demonstrated neither prejudice nor bad faith, the district court abused its discretion in ordering the evidence suppressed. Accordingly, the order must be reversed.

CONCLUSION

{24} We reverse the order of the district court suppressing the evidence seized as a result of the execution of the search war-

rants. We remand this matter to the district court for further proceedings.

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

WE CONCUR: RICHARD C. BOSSON, Chief Judge and IRA ROBINSON, Judge.

2001-NMCA-091

34 P.3d 617

Rosalina AGUILERA, Petitioner/Claimant-Appellee,

v.

PALM HARBOR HOMES, INC., d/b/a Masterpiece Housing, Newco Homes, L.P., d/b/a Palm Harbor Village, Newco Homes, d/b/a C & S Magnahomes, Palm Harbor Homes, L.P., Masterpiece Housing, and Newco Homes, Respondents-Appellants.

Nos. 20,665, 21,155.

Court of Appeals of New Mexico.

Aug. 30, 2001.

Certiorari Granted, No. 27,144, Oct. 30, 2001.

J.C. Robinson, H.R. Quintero, Robinson, Quintero & Lopez, P.C., Silver City, NM, for Appellee.

Thomas L. Murphy, The Murphy Law Firm, LLC, Albuquerque, NM, for Appellants.

OPINION

ARMIJO, Judge.

{1} These consolidated appeals present us with the opportunity to examine the arbitration process in the context of the increasing demand for and dependence on methods of alternative dispute resolution. Specifically, we address the extent of an arbitrator's authority under the Arbitration Act, NMSA 1978, §§ 44-7-1 to -22 (1971).[1] Respondents, Palm Harbor Homes, Inc., et al., appeal from both the district court judgment confirming an arbitration award that awarded punitive damages to the claimant and the order awarding Petitioner, Rosalina Aguilera, additional attorney's fees. We affirm the district court's confirmation of the arbitration award and remand the order awarding additional attorney's fees to be vacated by the district court.

BACKGROUND AND FACTS

{2} Shortly after the death of her husband, Aguilera bought a mobile home from Palm Harbor Homes, Inc., et al. (Palm Harbor) in March 1997. As a condition of this purchase, Aguilera signed an arbitration provision, under which she agreed to settle any claims relating to the purchase "solely by means of final and binding arbitration before the American Arbitration Association (AAA) in accordance with the rules and procedures of the AAA." Following a protracted dispute over this purchase, the parties eventually stipulated to a court order requiring them to resolve their differences through arbitration, pursuant to the rules of the AAA. At the end of the arbitration, which was held on February 22-23, 1999, the Commercial Arbitration Tribunal (Tribunal) (composed of former District Judge Rebecca Sitterley, the neutral arbitrator, former Justice Dan Sosa, designated by Aguilera, and Matthew P. Holt, Esq., designated by Palm Harbor) announced its decision. The Tribunal found that Aguilera had revoked acceptance of the mobile home and was entitled to a refund of the purchase price of the home plus interest. The Tribunal also ruled that Palm Harbor was to remove the mobile home from Aguilera's property, or it would be deemed abandoned. Aguilera was awarded compensatory damages for emotional distress and for out-of-pocket expenses. The Tribunal also awarded punitive damages of $100,000 and found that Aguilera was entitled to her reasonable attorney's fees and costs under the Manufactured Housing Act, the precise amount of which would be decided after Aguilera's attorneys submitted a bill of costs and affidavits supporting a request for attorney's fees. The Tribunal determined that Aguilera's son had not proven a claim against Palm Harbor and was not entitled to damages. The award stated that the decision of

1. During the 2001 legislative session, our legislature repealed the version of the Arbitration Act applied by us today and substituted in its place a version that specifically authorizes an arbitrator to award punitive damages or other exemplary relief "if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim." H.B. 768 (effective July 1, 2001). While the amended statute is not controlling in this case, it provides guidance regarding our state's public policy.

the arbitrators was unanimous, "with the exception of the amount of punitive damages, to which Matthew P. Holt, Esq., dissents."

{3} Aguilera filed the arbitration award with the district court on March 16, 1999. Shortly afterwards, Aguilera and her son filed an application with the district court regarding the arbitration award. Palm Harbor then filed a motion with the district court for appellate review of the award. Aguilera's application sought additional compensatory damages for out-of-pocket expenses and emotional distress, additional punitive damages, and an award of damages for her son. Palm Harbor's motion sought to vacate the awards of emotional distress damages and punitive damages, arguing that there was no basis for emotional distress damages and that, under New Mexico law, arbitrators were not authorized to award punitive damages. The district court entered an order on March 24, 1999, in which it found the parties were in agreement regarding the contract damages and the award of attorney's fees and costs, although the amounts of fees and costs were still to be determined.

{4} The court held a hearing on April 30, 1999 on the remaining disputed issues. On May 27, 1999, the court entered a judgment and order in which it found that (1) there was no indication that either party objected to the Tribunal's consideration of punitive damages; and (2) the award of punitive damages would be treated as advisory and adopted by the court. The court confirmed the award of attorney's fees awarded by the Tribunal. Aguilera then moved for additional attorney's fees for proceedings before the district court, which the court awarded under the Unfair Practices Act (UPA). Palm Harbor filed two separate appeals, one challenging the authority of the Tribunal to award punitive damages and the other challenging the additional award of attorney's fees. We consolidated these appeals.

DISCUSSION

{5} Palm Harbor appeals the award of punitive damages and the award of additional attorney's fees. Palm Harbor raises four issues in connection with punitive damages: (1) the district court erred in confirming the award when the Tribunal had no authority to award punitive damages; (2) the district court's finding that the Tribunal made a recommendation of punitive damages rather than an award is not supported by substantial evidence; (3) the district court erred in failing to find that Aguilera was barred from recovering punitive damages because she had agreed to arbitrate all claims and punitive damages could not be awarded by arbitrators; and (4) the district court erred in awarding punitive damages because Aguilera failed to invoke the jurisdiction of the trial court to make an award. In connection with the additional award of attorney's fees under the UPA, Palm Harbor raises four issues: (1) the district court lacked jurisdiction to award additional attorney's fees after the entry of a judgment on attorney's fees; (2) the recovery of attorney's fees was substantive and within the jurisdiction of the Tribunal; (3) Aguilera is judicially estopped from claiming additional attorney's fees, having previously conceded that the district court lacked jurisdiction to make such an award; and (4) no statute, rule, or agreement permits recovery of attorney's fees in post-arbitration proceedings in the district court and the Arbitration Act does not empower the district court to make an award of attorney's fees. We first address the punitive damages issue and second address the award of attorney's fees.

I. *Punitive Damages*

{6} As this Court stated in *Casias v. Dairyland Ins. Co.*, 1999–NMCA–046, ¶ 7, 126 N.M. 772, 975 P.2d 385 (quoting *Fernandez v. Farmers Ins. Co.*, 115 N.M. 622, 625, 857 P.2d 22, 25 (1993)), "[o]ur Supreme Court has 'repeatedly reaffirmed the strong public policy in this state, expressed in the Arbitration Act [§§ 44–7–1 to –22], in favor of resolution of disputes through arbitration.' " Consistent with this policy, under Sections 44–7–12 and 44–7–13, "[i]n reviewing the confirmation of an arbitration award by the trial court, this Court is restricted to a determination of whether substantial evidence in the record supports the trial court's findings of fact and whether the trial court correctly applied the law to the facts when making its

conclusions of law." *Casias,* 1999–NMCA–046, ¶ 8, 126 N.M. 772, 975 P.2d 385 (citing *Town of Silver City v. Garcia,* 115 N.M. 628, 632, 857 P.2d 28, 32 (1993)).

{7} Because New Mexico encourages resolving disputes through arbitration, the district court's fact finding is limited to the issues raised in the application to vacate or modify the award and is not a de novo review of the evidence before the arbitrators. *Melton v. Lyon,* 108 N.M. 420, 421, 773 P.2d 732, 733 (1989). In *Casias,* this Court emphasized that "[t]he Arbitration Act controls the scope of the trial court's review of an arbitration award." *Casias,* 1999 NMCA 046, ¶ 7, 126 N.M. 772, 975 P.2d 385. Thus, under Sections 44–7–12 and 44–7–13, the authority of the district court to vacate, modify, or correct an award is "generally limited to allegations of fraud, partiality, misconduct, excess of powers, or technical problems in the execution of the award." *Id.*

{8} In this case, the trial court found that Palm Harbor had not alerted the Tribunal to the issue of its lack of authority to award punitive damages and that it would consider the award to be advisory and would adopt it. Palm Harbor argues, however, that the trial court's finding that the award was advisory was not supported by substantial evidence and that the district court should not have confirmed the award because the arbitrators exceeded their powers when they awarded Aguilera $100,000 in punitive damages.

{9} Palm Harbor relies on *Shaw v. Kuhnel & Assocs., Inc.,* 102 N.M. 607, 608–09, 698 P.2d 880, 881–82 (1985) to support its contention that arbitrators in New Mexico have no authority to award punitive damages. In *Shaw,* our Supreme Court held that the defendants in that case could not compel the plaintiffs to arbitrate their claims because the defendants were Texas corporations who were not authorized to do business, or to file suit, in New Mexico. *Id.* at 608, 698 P.2d at 882. The Court also stated that claims of fraud in the inducement and punitive damages were not "arbitrable under the language of the contract as written in this case." *Id.* The Court stated that because fraud in the inducement is a legal ground for revoking an arbitration agreement, such a claim cannot be resolved pursuant to that agreement. The Court then cited to *Garrity v. Lyle Stuart, Inc.,* 40 N.Y.2d 354, 386 N.Y.S.2d 831, 353 N.E.2d 793, 796–97 (1976) for the principle that the power to award punitive damages is reserved to the courts and should not be given to an arbitrator. *Shaw,* 102 N.M. at 609, 698 P.2d at 882.

{10} Aguilera responds that Palm Harbor's reliance on *Shaw* is not well founded. She argues that the statement in *Shaw* is not controlling and that our Supreme Court acknowledged as much in *Stewart v. State Farm Mut. Auto. Ins. Co.,* 104 N.M. 744, 747, 726 P.2d 1374, 1377 (1986). In *Stewart,* the Court upheld the arbitration panel's authority to make findings on the amount of punitive damages, but only within the amount permitted by the parties' contract. The Court observed that the arbitrators had not made an award of punitive damages "[u]ndoubtedly" because of the Court's statement in *Shaw,* but acknowledged that it was for the arbitrator and not the trial court to find the facts relevant to an award of punitive damages. *Stewart,* 104 N.M. at 747, 726 P.2d at 1377.

{11} We question whether the *Shaw* court's statement made in 1986, that the power to award punitive damages is reserved to the courts, reflects the state of our law today. This Court recognizes that "we are bound by our Supreme Court's precedents." *State ex rel. Martinez v. City of Las Vegas,* 118 N.M. 257, 259, 880 P.2d 868, 870 (Ct.App. 1994), *cert. granted,* 118 N.M. 430, 882 P.2d 21 (1994). However, when we determine that our Supreme Court would conclude that the precedent is no longer good law and would overrule it given the opportunity, we will decline to follow the precedent. *Id.*

{12} We have surveyed our case law since *Shaw,* and observe that it has been the practice for arbitrators to recommend an award of punitive damages and for the trial court to adopt the recommendation. It has not been our practice to require a separate trial on punitive damages. For example, in *Stinbrink v. Farmers Ins. Co.,* 111 N.M. 179, 182, 803 P.2d 664, 667 (1990), our Supreme Court reversed the confirmation of an arbitration award that required a sharing of costs and

found punitive damages were warranted, but precluded by the terms of the insurance policy and remanded the case to the district court. The Court did not specifically articulate whether this issue should be remanded to the arbitrators, but observed that the arbitrators had already found that punitive damages should be awarded. Furthermore, in *United Tech. & Res., Inc. v. Dar Al Islam,* 115 N.M. 1, 5, 846 P.2d 307, 311 (1993), the Court affirmed the trial court's adoption of the arbitrators' recommendation denying punitive damages, even though the plaintiffs demanded a jury trial on the issue. From these cases, we conclude that the trial court does not reserve to itself a fact-finding role in determining whether to award punitive damages.

{13} Our research further reveals that *Garrity* has not been followed by the majority of jurisdictions that have considered the issue. *See generally* Timothy E. Travers, *Arbitrator's Power to Award Punitive Damages,* 83 A.L.R.3d 1037 (1978 & Supp.2000). Following the *Garrity* decision, many employment and brokerage contracts, requiring that disputes be resolved through binding arbitration, began to include a New York choice-of-law clause. *See* Lorenzo Marinuzzi, *Punitive Damages in Arbitration: the Debate Continues,* 52 SUM Disp. Resol. J. 67, 70 (1997). And thus, in 1995, the United States Supreme Court took the opportunity to resolve a split in the circuits on whether arbitrators of Federal Arbitration Act claims could entertain and award punitive damages when such a choice-of-law provision existed. *See Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995). In that case, the Supreme Court held that a contract between a securities brokerage firm and its customers (arbitrated under the Federal Arbitration Act which authorizes punitive damages) allowed the arbitration panel to award punitive damages despite a choice-of-law provision, which the Court read as controlling only "New York's substantive rights and obligations, and not the State's allocation of power between alternative tribunals." *Id.* at 60, 115 S.Ct. 1212.

{14} Those jurisdictions which hold that arbitrators have no authority to award punitive damages have not based their rulings on exactly the same rationale as that set forth in *Garrity.* While New York reasoned that it was not appropriate for a private tribunal to punish, Indiana has held that arbitrators cannot award punitive damages because arbitration arises out of contract, and punitive damages are not available in contract actions. *See United States Fid. & Guar. Co. v. DeFluiter,* 456 N.E.2d 429, 432 (Ind.Ct.App. 1983). Based on similar reasoning, Arkansas has held that its law prohibits the arbitration of tort cases, for which punitive damages would be available, and thus punitive damages are not available for cases that can be arbitrated. *See McLeroy v. Waller,* 21 Ark. App. 292, 731 S.W.2d 789 (1987). Neither of these rationales further the policies of our state.

{15} First, in New Mexico, punitive damages are allowed in contract cases "on a showing of bad faith, or at least a showing that the breaching party acted with reckless disregard for the interests of the nonbreaching party." *Paiz v. State Farm Fire & Cas. Co.,* 118 N.M. 203, 210, 880 P.2d 300, 307 (1994). Additionally, since the 1986 *Shaw* decision, our society has become increasingly dependent on alternative methods of resolving its disputes and has increasingly demanded such methods. The increasing demands upon the courts have, in turn, encouraged the use of arbitration. *See United Tech.,* 115 N.M. at 3, 846 P.2d at 309 (explaining that the process of arbitration aids in relieving the judiciary's heavily burdened caseload).

{16} Our research also persuades us that "despite its roots in private contract, arbitration has been called upon to function as a wide-ranging surrogate for the courtroom. Indeed, it has increasingly moved from the role of commercial court to that of a civil court of general jurisdiction." Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration,* 92 N.W.U. L.Rev. 1, 8 (1997). Illustrating this trend to use arbitration to resolve disputes, the United States Supreme Court has recently extended the reach of the Federal Arbitration Act and ruled that employers can require the

arbitration of employment disputes, except for those involving transportation workers. *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 121 S.Ct. 1302, 1307, 149 L.Ed.2d 234 (2001).

{17} Moreover, *Garrity,* upon which our Supreme Court relied for the proposition that arbitrators had no authority to award punitive damages, was the product of a divided court and has been widely criticized. As one commentator has pointed out, "[t]he split in the *Garrity* court was essentially a battle of conflicting perspectives over the fundamental nature of arbitration." Stipanowich, *supra,* at 12. The majority view was that a private remedy for a private dispute should not, for public policy reasons, be permitted to punish to deter bad behavior, that is, act in a public role. *See Garrity,* 386 N.Y.S.2d 831, 353 N.E.2d at 795. The dissenting view, on the other hand, focused on the growing role and broadening scope of arbitration to resolve disputes. *Id.* 386 N.Y.S.2d 831, 353 N.E.2d at 798–801.

{18} Since *Garrity,* many other jurisdictions have allowed punitive damages to be awarded in arbitration. Some jurisdictions permit arbitrators to award punitive damages only when they are expressly authorized by the contract. *See Edward Elec. Co. v. Automation, Inc.,* 229 Ill.App.3d 89, 171 Ill.Dec. 13, 593 N.E.2d 833, 843 (1992) (determining arbitrators could award punitive damages, so long as there was an express provision in the agreement authorizing such relief). *Complete Interiors, Inc. v. Behan,* 558 So.2d 48 (Fla.Ct.App.1990) (holding arbitrators exceeded their power when they awarded punitive damages absent an express provision authorizing them).

{19} The federal courts, applying the Federal Arbitration Act, take the view that arbitration panels are empowered to award punitive damages unless the arbitration agreement states otherwise. *See Raytheon Co. v. Automated Bus. Sys., Inc.,* 882 F.2d 6, 10 (1st Cir.1989) (stating arbitrators should have the same authority as courts to award punitive damages for certain claims); *Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc.,* 598 F.Supp. 353, 361 (N.D.Ala.1984) (*aff'd,* 776 F.2d 269 (11th Cir. 1985) (determining that "there is no public policy bar which prevents arbitrators from considering claims for punitive damages" and quoting *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 567, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960)) for the proposition that "the arbitration process can be a viable method of dispute resolution only if 'it serves as a vehicle for handling any and all disputes that arise under the agreement' " and the arbitrators are given flexibility to fashion appropriate remedies). As the *Willoughby* court pointed out, the practical effect of precluding arbitrators from awarding punitive damages is either that a plaintiff who submits to arbitration waives his right to punitive damages and thus "the public policies and purposes served by punitive damage awards" would be totally frustrated or that, under the *Garrity* rule, the wasteful exercise of conducting a separate trial would be required. *Willoughby,* 598 F.Supp. at 363–64.

{20} Following the federal courts, some states have held that arbitration awards of punitive damages should be upheld when permitted by law and the arbitration agreement. In *Russell v. Kerley,* 159 Or.App. 647, 978 P.2d 446, 449 (1999), for example, the Oregon Court of Appeals upheld an arbitration award and held that "an arbitrator may award punitive damages if the arbitration agreement permits such an award and if such damages are otherwise recoverable on the underlying claim." The court noted that, even though Oregon's arbitration statutes are based on New York law, it was not bound by New York law, observing that the rule in *Garrity* had recently been limited by federal law. *Id.* Maryland has also held that punitive damages can be awarded unless the arbitration agreement specifically precludes such an award. *Regina Constr. Corp. v. Envirmech Contracting Corp.,* 80 Md.App. 662, 565 A.2d 693, 699 (1989).

{21} North Carolina has held that claims for punitive damages, which fall within the scope of a broadly written arbitration agreement, were not barred by any public policy. *Rodgers Builders, Inc. v. McQueen,* 76 N.C.App. 16, 331 S.E.2d 726, 734 (1985). Interpreting broad contract language encom-

passing an agreement to arbitrate "a dispute that arises among the parties," Texas has upheld an arbitration award of punitive damages, noting that no Texas court had ever set aside a punitive damages award of an arbitrator. *Kline v. O'Quinn,* 874 S.W.2d 776, 782–84 (Tx.Ct.App.1994). Recently, in affirming an arbitration award of treble statutory damages—awarded pursuant to a broadly written arbitration clause that agreed to settle any controversy or claim by arbitration—the Appeals Court of Massachusetts sided with those jurisdictions that permit arbitrators to award punitive damages and held that the "balance of policy considerations" weighed in favor of permitting arbitrators to award punitive damages, in the interests of "speedy and economic resolution of commercial disputes." *Drywall Sys., Inc. v. ZVI Constr. Co.,* 51 Mass.App.Ct. 353, 747 N.E.2d 168 (2001).

{22} Still other jurisdictions, recognizing that arbitration functions as a substitute for court proceedings, have simply ruled that when punitive damages may be asserted in a court of law, they may also be awarded in arbitration proceedings. In *Baker v. Sadick,* 162 Cal.App.3d 618, 208 Cal.Rptr. 676, 680–81 (1984), the California Court of Appeals stated that "[i]t strains legal imagination to conclude an agreement to substitute arbitration for litigation results ipso facto in forebearance of a claim which would support an award of punitive damages." *Id.* at 684. In *Faiyaz v. Dicus,* 245 Ga.App. 55, 537 S.E.2d 203, 206 (2000), the Georgia Court of Appeals ruled that an arbitration panel did not exceed its authority in awarding punitive damages when it found that an agreement had been fraudulently and intentionally breached.

{23} Times have changed, significantly, since *Shaw.* Given the increasing importance of methods of alternative dispute resolution in the functioning of an overburdened court system, and New Mexico's strong public policy favoring the resolution of disputes through arbitration and other alternative means, we hold that arbitrators are authorized to award punitive damages when such damages are permitted by law and supported by the facts. In so holding, we are mindful of Palm Harbor's concerns expressed at oral argument, that arbitrators could make unreasonably large awards that would be unreviewable by the district court. Palm Harbor correctly points out that, in general, "the district court does not have the authority to review arbitration awards for errors as to the law or the facts; if the award is fairly and honestly made and if it is within the scope of the submission." *Fernandez,* 115 N.M. at 625–26, 857 P.2d at 25–26.

{24} In *Fernandez,* however, our Supreme Court recognized that "under appropriate circumstances the district court may find an arbitration panel's mistake of fact or law so gross as to imply misconduct, fraud, or lack of fair and impartial judgment, each of which is a valid ground for vacating an award." *Id.* at 626, 857 P.2d at 26. NMSA 1978, § 44–7–12(A) provides as follows:

> A. Upon the application of a party, the court shall vacate an award where:
>
> (1) the award was procured by corruption, fraud or other undue means;
>
> (2) there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
>
> (3) the arbitrators exceeded their powers[.]

Accordingly, Section 44–7–12 provides for review of an award upon the motion of a party. *See Medina v. Found. Reserve Ins. Co.,* 1997–NMSC–027, ¶ 12, 123 N.M. 380, 940 P.2d 1175 (stating that "[i]n evaluating the propriety of an arbitration award, the reviewing court will conduct an evidentiary hearing and enter findings of fact and conclusions of law upon any issue presented in the motion to vacate the award.").

{25} Moreover, when punitive damages awards are "grossly excessive" in relation to the legitimate interests of the state in imposing punitive damages, such an award enters the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment. *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 568, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (*cited in Allsup's Convenience Stores, Inc. v. N. River Ins. Co.,* 1999–NMSC–006, ¶ 47, 127 N.M. 1, 976 P.2d 1). Under such circumstances, an arbitration

award would be reviewable under Section 44–7–12 as demonstrating a lack of fair and impartial judgment that implicates the Fourteenth Amendment. We doubt that unjustified awards will be common, however. *See* Stipanowich, *supra*, at 17–19 (discussing the relative conservatism of commercial arbitrators compared to juries when awarding punitive damages). We thus do not agree with Palm Harbor that our ruling today imposes upon a defendant the risk of an award of unchecked punitive damages.

{26} In the present case, the trial court reached the correct result even though it ruled that it would treat the Tribunal award of punitive damages as advisory and adopt it. *See State v. Torres*, 1999–NMSC–010, ¶ 22, 127 N.M. 20, 976 P.2d 20 (stating that appellate court "may affirm on grounds upon which the trial court did not rely unless those grounds depend on facts that [Appellant] did not have a fair opportunity to address in the proceedings below."). Accordingly, we need not address the remainder of Palm Harbor's arguments challenging an award of punitive damages by the district court. We therefore affirm the trial court's confirmation of the arbitration award in full.

II. *The Additional Award of Attorney's Fees*

{27} Palm Harbor also appeals the district court's January 5, 2000 award of additional fees under UPA, NMSA § 57–12–10(C) (1987), for the work done during the time the case was appealed to the district court. In her answer brief, Aguilera states that she "agrees Palm Harbor's second appeal is well taken and Appellee does not contend otherwise." Aguilera then states that she does not oppose Palm Harbor's appeal. This concession was also repeated at oral argument. Consequently, because Aguilera has informed us that she is giving up her claim for the attorney's fees awarded by the district court, we remand for the district court to vacate its order awarding attorney's fees. We make no ruling on the merits of this issue and our action should not be construed as such.

CONCLUSION

{28} Because we hold that it is within the authority of an arbitrator to award punitive damages when permitted by law and supported by the facts, we affirm the arbitration award in full. We also remand the order awarding additional attorney's fees to the district court with instructions to vacate that order.

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

WE CONCUR: A. JOSEPH ALARID, Judge, and IRA S. ROBINSON, Judge.

2001-NMCA-088

34 P.3d 624

STATE of New Mexico, Plaintiff–Appellant,

v.

ISAAC M., Child–Appellee.

No. 21,792.

Court of Appeals of New Mexico.

Sept. 7, 2001.

Certiorari Denied, No. 27,156, Oct. 18, 2001.

Patricia A. Madrid, Attorney General, Santa Fe, NM, Steve S. Suttle, Ass't Attorney General, Albuquerque, NM, for Appellant.

Phyllis H. Subin, Chief Public Defender, Samantha J. Fenrow, Ass't Appellate Defender, Santa Fe, NM, for Appellee.

OPINION

PICKARD, Judge.

{1} This appeal raises a single issue: whether the State may proceed by criminal information after a no-bill is returned by a grand jury. We conclude that NMSA 1978, § 31–6–11.1 (1979), which prohibits the State from resubmitting a case to the grand jury if a grand jury has previously returned a no-

bill, does not apply when a prosecutor seeks to proceed by information. We further conclude that the issue in this case continues to be controlled by *State v. Chavez,* 93 N.M. 270, 599 P.2d 1067 (Ct.App.1979), in which we interpreted the law of re-submission prior to the enactment of Section 31–6–11.1 and held that the State may proceed by information after the return of a no-bill. We reverse the order dismissing the information and remand for proceedings consistent with this opinion.

PROCEDURAL HISTORY

{2} In March 1999, the State filed a petition charging Isaac M. (Isaac) with criminal sexual penetration, kidnaping, tampering with evidence, aggravated assault, and unlawful possession of a handgun by a minor. A special master found probable cause to believe that Isaac had committed a criminal offense and ordered Isaac detained under NMSA 1978, § 32A–2–13 (1993). The State then filed a notice of intent to seek an adult sentence pursuant to NMSA 1978, § 32A–2–20(A) (1996) and presented the case to a grand jury, which returned a true bill against Isaac. The petition was disposed of by an administrative closing order once the indictment was filed. Based on this Court's decision in *State v. Ulibarri,* 1999–NMCA–142, ¶ 15, 128 N.M. 546, 994 P.2d 1164, *aff'd,* 2000–NMSC–007, ¶ 3, 128 N.M. 686, 997 P.2d 818, the State sought a new indictment against Isaac. In an attempt to spare the alleged victim another grand jury appearance, the State tailored its grand jury presentation around an investigating officer. However, the officer failed to respond to the subpoena, and the grand jury returned a no-bill. The State then filed a criminal information, containing the same allegations as were in the petition and the first indictment, and requested a preliminary hearing. Isaac moved to bar the preliminary hearing, arguing that the State was precluded from proceeding against Isaac by Section 31–6–11.1. After hearing arguments from both sides, the trial court dismissed the information by written order. The State appeals from that order.

{3} Although this case is currently under the jurisdiction of the children's court and therefore controlled by the children's code, NMSA 1978, §§ 32A–2–1 through 33 (1993, as amended through 1999), both parties assume that the statutes and concepts governing adult prosecutions control, and they argue their cases accordingly. We assume, without deciding, that the parties are correct. Because the issue was not raised by the parties, we leave for another day the question of the State's authority to proceed against a child if no probable cause is found in response to the prosecutor's notice of intent to seek an adult sentence. *See* § 32A–2–20(A).

STANDARD OF REVIEW AND RULES OF CONSTRUCTION

{4} Because this case requires us to interpret constitutional and statutory provisions, our standard of review is de novo. *See State v. Rowell,* 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995); *State v. Shaulis-Powell,* 1999–NMCA–090, ¶ 17, 127 N.M. 667, 986 P.2d 463.

{5} Our primary goal in interpreting the Constitution is to give effect to the intent and objectives of the framers. *See In re Generic Investigation Into Cable Television Servs.,* 103 N.M. 345, 348, 707 P.2d 1155, 1158 (1985). Similarly, we interpret statutes to give effect to the legislature's intent. *See State v. Martinez,* 1998 NMSC 023, ¶ 8, 126 N.M. 39, 966 P.2d 747. The normal rules of statutory construction apply equally to constitutional and statutory provisions. *See State ex rel. Wood v. King,* 93 N.M. 715, 718, 605 P.2d 223, 226 (1979); *Postal Fin. Co. v. Sisneros,* 84 N.M. 724, 725, 507 P.2d 785, 786 (1973). The primary rule of construction is that, when possible, we give effect to the clear and unambiguous language of a statute. *See State v. Jonathan M.,* 109 N.M. 789, 790, 791 P.2d 64, 65 (1990) ("When a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation."); *State v. Adam M.,* 2000–NMCA–049, ¶ 5, 129 N.M. 146, 2 P.3d 883 (same).

DISCUSSION

{6} The general rule is that, in the absence of an explicit constitutional or statutory provision to the contrary, "the acts of

the grand jury with respect to the finding of an indictment are not binding on the prosecuting attorney with respect to his filing of an information, and an information may be filed, although the grand jury has investigated the case and refused or failed to find an indictment." 42 C.J.S. *Indictments and Informations* § 43 (1991) (footnote omitted); *see also Chavez,* 93 N.M. at 273, 599 P.2d at 1070. In New Mexico, both the Constitution and statutory law define the scope and limits of the State's ability to initiate criminal proceedings against an accused. The issue raised by this appeal is whether these provisions are contrary to the general rule.

{7} Article II, Section 14 of the Constitution provides:

> No person shall be held to answer for a capital, felonious or infamous crime unless on a presentment or indictment of a grand jury or information filed by a district attorney or attorney general or their deputies, except in cases arising in the militia when in actual service in time of war or public danger. No person shall be so held on information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination.

N.M. Const. art. II, § 14.

{8} The State argues that Article II, Section 14 grants the State the right to proceed by either indictment or information and, by its silence on the issue, does not limit the State's right to proceed by the alternate method should the State's first choice prove unsuccessful. Isaac, on the other hand, asks this Court to interpret the word "or" separating the two methods as requiring that the State be limited to its first choice. In *Chavez,* we resolved this issue in favor of the State when we held that the Constitution does not expressly limit "the power of the district attorney either to resubmit a matter to a grand jury or to proceed by information after a grand jury has returned a no[-]bill." *Id.* at 273, 599 P.2d at 1070. We reaffirm that holding today. Had the drafters of the Constitution intended to prohibit the State from changing its method of prosecution when its initial choice is unavailable or unsuccessful, they would have included some language to that effect. *Cf.* Idaho Const. art. 1, § 8 ("[P]rovided further, that after a charge has been ignored by a grand jury, no person shall be held to answer, or for trial therefor, upon information of the public prosecutor."). As the Montana Supreme Court wrote when interpreting a constitutional provision similar to Article II, Section 14:

> The provision, in effect, declares that no citizen shall be held to answer, except upon a charge preferred by one of the methods of procedure indicated. There is nothing in it to indicate an intention that any citizen has a vested right to be charged by one method, to the exclusion of the other. Its provisions are in the alternative, without express limitations as to either, and we think it was the intention that either the indictment or information should be available, and that either might be resorted to in case the other should not be available, or for any cause break down during the progress of the prosecution.... But this does not mean that, after an indictment has been dismissed, he may not be charged with the same offense by any method the use of which is permitted by the Constitution, until his guilt or innocence has been ascertained by the verdict of a jury, or, in any event until he has once been in jeopardy.

State v. Vinn, 50 Mont. 27, 144 P. 773, 776 (1914). Unless a statutory provision expressly limits the State's authority as prosecutor, *Chavez* is controlling.

{9} Section 31–6–11.1 states, "After a grand jury acts on the merits of evidence presented to it and returns a no-bill, the same matter shall not be presented again to that jury or another grand jury on the same evidence." Recognizing that the statute does not explicitly refer to the filing of an information, Isaac argues that the legislature nonetheless intended that the return of a no-bill should end the criminal process absent new evidence. We reject Isaac's contention because his interpretation would require us to read language into the statute, which we will not do. *See State v. Gutierrez,* 102 N.M. 726, 730, 699 P.2d 1078, 1082 (Ct.App.1985) (stating that when statute makes sense as writ-

ten, this Court does not read words into the statute).

{10} In *Chavez,* we held that the former grand jury statute, NMSA 1953, § 41–5–27 (1854), did not apply to the filing of an information because the statute was enacted prior to the constitutional amendment that gave the State the authority to proceed by information. 93 N.M. at 272, 599 P.2d at 1069. This reasoning does not apply to Section 31–6–11.1 given that it was enacted in 1979, after the constitutional amendment. Nonetheless, we conclude that the legislature did not intend for Section 31–6–11.1 to apply to the filing of an information on the ground that the legislature is presumed to have been aware of the availability of this method of initiating a prosecution and yet chose not to address it. *See Benavidez v. Sierra Blanca Motors,* 120 N.M. 837, 843, 907 P.2d 1018, 1024 (Ct.App.1995) (discussing rule of expressio unius est exclusio alterius); *see also Chavez,* 93 N.M. at 274, 599 P.2d at 1071 (expressing doubt that Section 31–6–11.1 would apply to the filing of an information given that, by its terms, the statute applies only to grand jury proceedings). Further, we note that our conclusion that Section 31–6–11.1 does not apply to the filing of an information is consistent with the opinions of other courts that have addressed this issue. *See Orsini v. State,* 286 Ark. 283, 691 S.W.2d 175, 177 (1985); *Rea v. State,* 3 Okla.Crim. 269, 105 P. 381, 381–82 (1909), *overruled on other grounds by Cole v. State,* 18 Okla.Crim. 430, 195 P. 901, 903 (1921); 42 C.J.S., *supra,* § 43, at 365 ("A statute prohibiting a charge from being resubmitted to the grand jury upon return of a no true bill does not prevent an accusation by information after the grand jury has investigated the charge.").

{11} Notwithstanding the plain language of Section 31–6–11.1 and our holding in *Chavez,* Isaac argues that allowing the State to proceed after the return of a no-bill would undermine the protective role of the grand jury, violate analogous principles to double jeopardy, and allow the prosecutor unfettered power to harass potential defendants. In support of his argument regarding the sanctity of the grand jury's return of the no-bill, Isaac relies on *State ex rel. Swanigan v. Cline,* 177 W.Va. 107, 350 S.E.2d 734, 737 (1986), in which the court held that once a prosecutor has chosen to initiate criminal proceedings by submission to a grand jury, the prosecutor may not thereafter proceed by information.

{12} We are not persuaded by *Swanigan.* It is true that *Swanigan* contains language similar to that found in *Ulibarri* and other New Mexico cases emphasizing the importance of grand juries. We reaffirm our support for those cases and our adherence to the importance of grand juries. However, those cases have not overruled or cast doubt on *Chavez. Chavez* does not detract from the important role of grand juries in our judicial system. Adoption of the *Swanigan* rationale would be contrary to our cases on double jeopardy and well-recognized limits in New Mexico on the court's ability to override prosecutorial discretion. *See State v. Brule,* 1999–NMSC–026, 127 N.M. 368, 981 P.2d 782.

{13} Additionally, the circumstances under which the prosecutor sought to proceed by information after the return of the no-bill in *Swanigan* are distinguishable from the circumstances of the case at bar. In that case, the state filed its information after concluding that the grand jury's evaluation of the evidence was simply incorrect. *See Swanigan,* 350 S.E.2d at 737. In Isaac's case, however, the special master and the first grand jury, albeit with inadequate instruction, found probable cause to believe that Isaac had committed the crimes charged and the decision of the second grand jury appears to have been based in part on the investigating officer's failure to appear. Finally, and importantly, we note that the *Swanigan* opinion is contrary to the weight of authority which holds that a prosecutor is not prohibited from proceeding by information after the return of a no-bill. *See id.* at 735 n. 3 (rejecting contrary authority including *Chavez*).

{14} Isaac argues that the principles underlying the prohibition against double jeopardy apply with equal force to his situation insofar as the government, with all its resources, should not be allowed multiple attempts to show probable cause. The cases

on which Isaac relies are double jeopardy cases that address the government's attempt to secure a conviction at a trial on the merits. *See, e.g., Grady v. Corbin,* 495 U.S. 508, 515–24, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), *overruled on other grounds by United States v. Dixon,* 509 U.S. 688, 704, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). Isaac does not cite to any cases that apply the rule against double jeopardy to the pretrial stages of a prosecution. In fact, it is settled law that jeopardy does not attach pretrial, but instead attaches when the petit jury is impaneled and sworn at a jury trial or when the first evidence is presented at a bench trial. *See, e.g., State v. Nuñez,* 2000–NMSC–013, ¶ 28, 129 N.M. 63, 2 P.3d 264. We find no reason to depart from the settled law in this case.

{15} Finally, we agree with Isaac that a prosecutor's discretion should be limited by concerns of fundamental fairness and that it is the responsibility of the courts to scrutinize charging decisions in limited appropriate cases that seek to circumvent established criminal procedure or constitutional safeguards. However, Isaac does not argue that this is such a case, and we disagree that such principles require us to ignore the plain meaning of the Constitution or Section 31–6–11.1 by creating a bright line rule that would limit a prosecutor's power to proceed by either indictment or information, but not both. We believe that the prosecutor's discretion is limited by the prohibition against prosecutorial vindictiveness. *See Brule,* 1999–NMSC–026, ¶ 10, 127 N.M. 368, 981 P.2d 782 (discussing test for establishing claim of pre-trial prosecutorial vindictiveness); *State v. De La O,* 102 N.M. 638, 641, 698 P.2d 911, 914 (Ct.App.1985) (holding that application for injunctive relief provides adequate remedy to prevent prosecutorial vindictiveness or harassment through repeated filings against same person). In this case, the trial court did not find that the State filed the information out of vindictiveness, and we agree with the court's determination. As noted above, the record shows that the special master and the first grand jury found probable cause to believe that Isaac had committed the crimes charged and that the decision of the second grand jury may have been based in part on the investigating officer's failure to appear. While we can imagine a case in which the prosecutor's decision to file an information after a grand jury or a court has found no probable cause to proceed was made with the intent to harass an individual, this is not such a case.

{16} Our conclusion is consistent with the cases cited by Isaac in support of his argument that this Court should construe the law to limit prosecutorial discretion. The cases cited by Isaac do not impose strict or bright line rules prohibiting a prosecutor from particular actions, but give the trial court the discretion to evaluate a case under the particular circumstances to determine whether a prosecutor's actions are an abuse of the criminal process or are undertaken to circumvent a court procedure or a defendant's rights. *See State v. Lucero,* 108 N.M. 548, 550, 775 P.2d 750, 752 (Ct.App.1989) (holding that trial court may refuse to restart the six-month rule after the state has filed a nolle prosequi if the facts show that the state filed the nolle prosequi to circumvent the rule); *State v. Ericksen,* 94 N.M. 128, 130–31, 607 P.2d 666, 668–69 (Ct.App.1980) (holding that power to nolle prosequi cannot be used to circumvent rules restricting the disqualification of a judge). Similar to the rules applied in these cases, the prohibition against vindictive prosecution allows the trial court to evaluate each case under the totality of the circumstances and serves as an adequate check on the State's power as prosecutor. *See De La O,* 102 N.M. at 641, 698 P.2d at 914.

CONCLUSION

{17} In sum, we hold that neither the Constitution nor Section 31–6–11.1 limits the State's ability to proceed by information after a grand jury has returned a no-bill. We reaffirm the holding of *Chavez.* We also reject Defendant's policy arguments that allowing a prosecutor to file an information after a no-bill from the grand jury would eliminate the protective role of the grand jury, violate double jeopardy, and allow prosecutorial vindictiveness.

{18} For the foregoing reasons, we reverse the trial court's dismissal of the criminal

information and remand for further proceedings consistent with this opinion.

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

We concur: RICHARD C. BOSSON, Chief Judge, CELIA FOY CASTILLO, Judge.

2001-NMCA-097

34 P.3d 630

STATE of New Mexico, Plaintiff–Appellee,

v.

Justo (Torres) RUIZ, Defendant–Appellant.

No. 21,316.

Court of Appeals of New Mexico.

Sept. 27, 2001.

Certiorari denied, No. 27,191, Nov. 8, 2001.

Patricia A. Madrid, Attorney General, James O. Bell, Assistant Attorney General, Santa Fe, NM, for Appellee.

Phyllis H. Subin, Chief Public Defender, Laurel A. Knowles, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

BOSSON, Chief Judge.

{1} In a single trial, a jury convicted Defendant, Justo Ruiz, of criminal offenses committed separately against three minor girls. One girl testified to criminal sexual penetration and criminal sexual contact, another to indecent exposure, and a third to battery. On appeal, Defendant claims the trial court committed reversible error in four ways: (1) by not severing the counts against him so that the charges pertaining to one child, S.G., would be tried separately; (2) by allowing one girl to testify by videotape, thereby circumventing his constitutional right to confront witnesses; (3) by not allowing Defendant to rebut the prosecutor's innuendo that he had not taken a penile plethysmograph test when, in fact, he had; and (4) by not allowing the jury to visit his home to experience how compact the living conditions were and whether the events could have occurred as alleged. Applying established New Mexico law, we hold it was reversible error not to sever the charges, and therefore, we reverse Defendant's convictions and remand. Because the testimony of the girls, if believed by a jury, would support separate convictions, the State is entitled to retry Defendant on all charges in separate trials. We discuss the remaining issues that are likely to reoccur on retrial.

BACKGROUND

{2} Defendant and his wife, Cindy Ruiz, had three children. During the night of July 8, 1998, their oldest daughter, L.R., who was then twelve-years-old, awoke to find her father pushing her underwear aside and staring at her vagina with a flashlight. When she told her mother about the incident, the next day Cindy took the children and moved out. Cindy reported the incident to the New Mexico Children, Youth and Families Department which, in turn, reported the allegation to the police. The officer in charge of the police investigation arranged a safe-house interview with L.R. During that interview L.R. recalled the incident, and also reported that a year before she had seen Defendant doing a similar thing to her friend S.G.L.R. also recounted what she had been told by still another girl, L.J., that Defendant had exposed himself to L.J. approximately a year before.

{3} After being alerted to the possibility that Defendant may have accosted other girls, a police officer called the parents of the other girls to arrange for safe-house interviews. When the police officer spoke to the parents about the safe-house interviews, he admonished them "not to attempt in any way to assist the child in recalling memories," so as to avoid contaminating each child's testimony.

{4} A few days later S.G., also age 12, went to her safe-house interview. Contrary to the police officer's admonition, S.G.'s mother on several occasions had assisted her daughter "in recalling memories," raising the possibility of undue influence on S.G.'s testimony. At the interview, S.G. described a series of encounters with Defendant which began with Defendant pulling down her pants and fondling her, and ultimately engaging in sexual intercourse.

{5} L.J. also participated in a safe-house interview. L.J. disclosed to her interviewers that on two separate occasions she had glanced through a doorway in the Ruiz home and saw Defendant standing on the other side of the threshold, holding his penis in both hands and smiling. L.J. was six or seven years old at the time these acts occurred.

{6} Defendant denied all allegations. He contended that the charges were based on either outright fabrications or misperceptions

of benign behavior on his part. Defendant claimed that he was looking for the family cat on his daughter's bed with a flashlight, not staring at her vagina, and that being awakened from a deep sleep had distorted his daughter's perception of events. With regard to L.J., Defendant testified that she may have seen him putting on his coveralls in the garage, but that he had never exposed himself in the manner alleged. As for S.G., Defendant maintained that her story was a total fabrication and the result of her mother's suggestive influence.

{7} A grand jury indicted Defendant on ten counts arising from the three girls' allegations. After a jury trial on all ten charges, Defendant was convicted of eight of the ten counts against him; three counts of criminal sexual penetration of a minor, two counts of criminal sexual contact of a minor, two counts of indecent exposure, and one count of battery. Defendant was sentenced to 61½ years in prison.

DISCUSSION

Defendant's Motion to Severe

Preservation

{8} Before trial, Defendant twice moved to sever the charges pertaining to S.G. from the rest of the case. Both motions were denied. Although Defendant renews his severance argument before this Court, the State counters that the argument was not preserved for appellate review because Defendant failed to reassert his severance motion during the trial. The State relies on *State v. Jones,* 120 N.M. 185, 190, 899 P.2d 1139, 1144 (Ct.App.1995), for this proposition, but that reliance is misplaced.

{9} At times, as the State points out, we have faulted defendants for not renewing severance motions after the trial began. For example, we observed in *Jones* that a severance motion during trial was appropriate because, in that case, it was unclear before trial which defenses the accused would raise. *See id.* Therefore, before trial began, the court could only speculate about whether the prosecution would actually need the challenged evidence to rebut those defenses. *See id.* But neither *Jones,* nor any other opinion of this Court, has ever made renewal of a motion for severance either during or after trial a prerequisite to preserving an issue for appellate review. *See State v. Peters,* 1997-NMCA-084, ¶ 6, 123 N.M. 667, 944 P.2d 896 (addressing a severance issue preserved only by pretrial motion); *State v. McGill,* 89 N.M. 631, 632, 556 P.2d 39, 40 (Ct.App.1976) (same). *Jones* merely acknowledges that when a trial court is not alerted before trial to the defense's theory so that it can rule intelligently on a motion to sever, the court should have another opportunity to consider the motion after the facts become more clear. *Id.,* 120 N.M. at 190, 899 P.2d at 1144.

{10} Here, the State uses *Jones* to argue that Defendant had to renew his severance motion during trial so that the court could rule with "knowledge of the defenses asserted." However, when Defendant renewed his motion on the first morning of trial, all parties, including the court, were aware that the defense was a simple denial of the charges. Defendant took the position that the girls had either fabricated the allegations or misapprehended otherwise innocent behavior on his part. There was no need to provide the trial court with more information during trial; the court had all the information it needed before trial to assess the State's position in light of the defenses asserted. The State's preservation argument is without merit.

Rule 11-404(B) NMRA 2001

{11} We now address the merits of Defendant's severance argument. Separate charges against a defendant are ordinarily joined when the offenses "are of the same or similar character, even if not part of a single scheme or plan." Rule 5-203(A)(1) NMRA 2001. However, even when Rule 5-203(A) is satisfied, charges should be joined only if joinder does not unfairly prejudice either party. *See* Rule 5-203(C). A defendant is unfairly prejudiced when joinder allows the jury to consider evidence that would not otherwise be admissible under Rule 11-404(B) NMRA 2001, if the trials were severed. *State v. Gallegos,* 109 N.M. 55, 64, 781 P.2d 783, 792 (Ct.App.1989) ("[I]t is 'fundamental, however, that courts must not permit a defendant to be embarrassed in his defense by a multiplicity of charges to be tried before

one jury.' " (Quoting *State v. Paschall,* 74 N.M. 750, 752–53, 398 P.2d 439, 440 (1965).)). As this Court recently stated, "[t]he granting of a severance is discretionary, and one test for abuse of discretion is whether prejudicial testimony, inadmissible in a separate trial, is admitted in a joint trial." *Jones,* 120 N.M. at 186, 899 P.2d at 1140.

{12} Defendant claims to have suffered this very prejudice when the charges relating to all three girls were joined in one trial. He argues that joinder permitted the jury to consider evidence that would not have been cross-admissible under Rule 11–404(B), if the charges pertaining to each girl had been tried separately. We begin our analysis with Rule 11–404(B):

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

{13} Rule 11–404(B) is a specialized rule of relevancy that, like its federal counterpart, limits the admissibility of evidence that, although relevant, is unfairly prejudicial to the accused. *State v. Phillips,* 2000–NMCA–028, ¶ 21, 128 N.M. 777, 999 P.2d 421; *see also Old Chief v. United States,* 519 U.S. 172, 181, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) (stating that although evidence of other bad acts is " 'relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect' " (quoting *United States v. Moccia,* 681 F.2d 61, 63 (1st Cir. 1982))). The risk is that "character evidence when used circumstantially is likely to be given more probative value than it deserves and may lead the fact-finder to punish a bad person regardless of the evidence of what happened in the specific case." *State v. Lamure,* 115 N.M. 61, 69, 846 P.2d 1070, 1078 (Ct.App.1992) (Hartz, J., specially concurring). Thus, Rule 11–404(B) prohibits the use of evidence when its purpose is to show criminal propensity: "to prove the character of a person in order to show action in conformity therewith." The admonition of former Judge Hartz of this Court bears repeating: "One cannot ignore the long tradition of courts and commentators expressing fear that jurors are too likely to give undue weight to evidence of a defendant's prior misconduct and perhaps even to convict the defendant solely because of a belief that the defendant is a bad person." *Lamure,* 115 N.M. at 71, 846 P.2d at 1080.

{14} When reviewing a motion to sever through the lens of Rule 11–404(B), "a more detailed analysis needs to be done than simply comparing superficial similarity" of the crimes. *Jones,* 120 N.M. at 187, 899 P.2d at 1141. Because Rule 11–404(B) recognizes the grave risk of unfair prejudice when evidence of multiple bad acts is introduced in a single trial, courts must be careful to analyze the proffered evidence as if the charges were not joined together and the trials were separate. *See id.; see also State v. Lucero,* 114 N.M. 489, 494, 840 P.2d 1255, 1260 (Ct.App. 1992) (observing that prior-bad-acts evidence "is especially damaging" when the case "involves a particularly reprehensible crime against a child"); *State v. Aguayo,* 114 N.M. 124, 130–31, 835 P.2d 840, 846–47 (Ct.App. 1992) (same).

{15} Approaching the evidence in such a fashion, we follow a two-step test to determine if the evidence would have been cross-admissible in separate trials with respect to each girl. We first ask if there is "an articulation or identification of the consequential fact to which the proffered evidence of other acts is directed" that satisfies a valid exception to the general prohibition on propensity evidence. *Jones,* 120 N.M. at 187, 899 P.2d at 1141. If the evidence is probative of something other than propensity, then we balance the prejudicial effect of the evidence against its probative value to determine if "[the] probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury." Rule 11–403 NMRA 2001. In this appeal, we need concern ourselves only with the first question.

{16} We ask what is this "consequential fact" to which the evidence of other bad acts is directed, and is it valid under Rule 11–404(B)? At trial, the State asserted, rather indiscriminately, that the evidence supporting each of the ten counts would have been cross-admissible in separate trials to prove "defendant's motive, intent, knowledge, absence of mistake or accident under Rule 11–404(B)." On appeal, the State discards its scatter shot approach and concentrates on only one of the Rule 11–404(B) exceptions. It now asserts the evidence was admissible to demonstrate "absence of mistake."

{17} In refining its focus on "absence of mistake," the State argues that the evidence pertaining to each girl was necessary to rebut Defendant's position that the events never happened or were due to mistaken perceptions on the part of three young girls. By putting all the bad-acts evidence before the jury, the State hoped to create an aura of credibility; that it was less likely that any of the girls were "mistaken" in what they saw, because each girl testified to deviant conduct on the part of Defendant. However, the State misapprehends what "absence of mistake" permits under Rule 11–404(B).

{18} Analyzing the State's argument in context, we see no difference between what the State argues and the use of that same evidence to show propensity: that Defendant did bad things with one girl and it was therefore more likely that he did bad things with the others. But this is the same as "prov[ing] the character of [Defendant] in order to show action in conformity therewith," which is prohibited by Rule 11–404(B). Grouping the testimony of all of the girls together in the same trial may well have persuaded the jury that each girl's account of what transpired should be believed, and that there was no "absence of mistake" on their part. But it did so only demonstrating propensity: that Defendant had a tendency to abuse children sexually, and if he abused one girl, then he likely abused the others. This is exactly what Rule 11–404(B) does *not* allow. *See Aguayo,* 114 N.M. at 129, 835 P.2d at 845 ("Admission of character traits to prove that the defendant acted in accordance with those traits is, of course, exactly what Rule 11–404(B) is designed to prohibit.").

{19} What the State really wanted was an opportunity to bolster the testimony of these three girls. While we may sympathize with the State's desire to improve its position, and while "we recognize the potential difficulty in prosecuting such cases" involving sex crimes against children, it is equally true that "the appropriate solution is [not] to wink at the dictates of Rule [11–]404(B)." *Lucero,* 114 N.M. at 494, 840 P.2d at 1260. As we have previously stated, "the need to bolster the victim's credibility," and "the belief that sex crimes alone are more likely to follow a pattern based on the unique psychological profile of a likely perpetrator," are not recognized exceptions for admissibility under Rule 11–404(B), and they do not justify "manipulating the categories in the rule to accommodate prior bad acts evidence." *Lucero,* 114 N.M. at 494, 840 P.2d at 1260 (internal quotation marks and citation omitted); *see also Aguayo,* 114 N.M. at 131, 835 P.2d at 847 (rejecting the "siren song" of relaxing Rule 11–404(B) because of difficulty in proving child abuse cases).

{20} Defendant's mistake-of-fact rationale is also controlled by our prior analysis in *Jones,* 120 N.M. at 186, 899 P.2d at 1140, a case in which the accused was convicted of sexually assaulting two women, under similar circumstances, five days apart. Over objection, the charges pertaining to both women were tried jointly, and we reversed for failure to sever. *Id.* at 190, 899 P.2d at 1144. The accused denied each woman's version of events, arguing that his relationship with each woman was voluntary and consensual, and that their recollection of events was wrong. *Id.* at 186, 899 P.2d at 1140. The state argued, in part, that the testimony of each woman was permissible in a single trial to rebut the defendant's claim of consent. *Id.* at 189, 899 P.2d at 1143. This Court disagreed stating, "Defendant's defense here was simply that his version of the consensual nature of the entire evenings should have been believed over the testimony of [each victim];" what this Court called a "stark and substantial credibility issue." *Id.* We held that the state's use of the evidence to chal-

lenge the defendant's credibility was an attack on the defendant's character, observing that "the way the evidence accomplishes this is through the prohibited method of proving propensity." *Id.* Our holding in *Jones* applies with equal force to the case before us.

{21} We read *Jones* to limit the "absence of mistake" exception under Rule 11–404(B) to situations when a defendant claims to have made a mistake, such as when the accused admits to touching the victim but says it was accidental or by mistake. *See Jones,* 120 N.M. at 188–89, 899 P.2d at 1142–43; *cf. State v. Beachum,* 96 N.M. 566, 568, 632 P.2d 1204, 1206 (Ct.App.1981) (holding that the defendant did not put intent at issue when he claimed that he "did not commit the acts at all, not that he committed them without the requisite state of mind," and therefore bad-acts evidence under Rule 11–404(B) was precluded). The exception does not apply, however, to show "absence of mistake" on the part of a *witness* or the *victim,* who the accused claims is mistaken in his or her recollection of events. Traditionally, our courts have allowed evidence of a defendant's other acts to disprove accident or mistake after the defendant suggests that the crime came about through accident or mistake *on his or her part. See State v. Nguyen,* 1997–NMCA–037, ¶ 9, 123 N.M. 290, 939 P.2d 1098 (admitting evidence to prove that the defendant knowingly transferred a forged bingo card to rebut defense that transfer was innocent mistake).

{22} Focusing "absence of mistake" on the defendant is in line with other jurisdictions and commentators. *See, e.g., State v. Fitzgerald,* 39 Wash.App. 652, 694 P.2d 1117, 1123–24 (1985) (admitting evidence of earlier sexual abuse of a girl under Rule 11–404(B) when the defendant testified to accidently touching the girl's vagina in the case before the court); *see also United States v. Huels,* 31 F.3d 476, 479 (7th Cir.1994) (holding that rebuttal testimony of witness who grew marijuana in the same spot with the defendant was admissible under Rule 11–404(B) to rebut the defendant's testimony that he was in the marijuana garden by happenstance, hunting deer); *State v. Cirelli,* 115 Idaho 732, 769 P.2d 609, 611 (Idaho Ct.App.1989) (admitting evidence tending "to show a lack of mistake as to [the defendant's] knowledge of the stolen nature of the property"). *See generally* 1 John W. Strong et al., *McCormick on Evidence* § 190, at 664 (5th ed.1999) (allowing evidence of other bad acts "[t]o show, by similar acts or incidents, that the act in question was not performed inadvertently, accidentally, involuntarily, or without guilty knowledge" (footnotes omitted)); 1 Barbara E. Bergman & Nancy Hollander, *Wharton's Criminal Evidence,* § 4:35, at 418 (15th ed.1997) (stating that evidence is permissible under the rule "to show the absence of accident or mistake in committing the crime charged"); 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 112, at 658 (2d ed.1994) (acknowledging that the larger number of cases find evidence of other bad acts appropriate once the defendant asserts that his involvement in a crime was inadvertent or accidental). We are unaware of any authority that has admitted evidence of a defendant's other bad acts to prove that a witness was not mistaken, nor does the State direct us to any such authority. *Cf. Beachum,* 96 N.M. at 568, 632 P.2d at 1206.

{23} We hold that it was error not to sever the charges pertaining to S.G. as Defendant requested. We also note that Defendant suffered grave prejudice when he had to defend against charges pertaining to all three girls. *See Jones,* 120 N.M. at 190, 899 P.2d at 1144 (noting that a defendant's convictions alone suffices to demonstrate prejudice). We need only repeat the comments the trial judge rendered after the verdict as to what effect joinder had on the outcome:

> Yes, this was a close case. But I think it was not just Mr. Ruiz' word against the girl. We can't forget that Mr. Ruiz' own daughter testified to the incidents of abuse, as did another child, so it wasn't just one-on-one. It was three victims, [and] I never could determine why they would conspire together to get Mr. Ruiz. And I think the jury resolved it in that manner.

{24} The State has not persuaded us to depart from our reading of *Jones* and the test for admissibility of evidence of other bad

acts set out therein. If we were to allow evidence of bad acts every time an accused protests that a prosecution witness is mistaken, one small exception would swallow the entire rule. We conclude that the evidence pertaining to each girl would not have been cross-admissible in separate trials, and therefore the trial court abused its discretion in not severing the trials upon request.

S.G.'s Trial Testimony By Pre-recorded Videotape

{25} S.G. was allowed to testify by videotape instead of appearing in court. Defense counsel participated in the videotaped testimony under protest. Defendant argues the trial court failed to follow the applicable rules when it allowed S.G. to testify in this manner instead of appearing in court.

{26} The statutory law of New Mexico allows a trial court, upon a showing of good cause, to "order the taking of a videotaped deposition of any alleged victim under the age of sixteen years." NMSA 1978, § 30-9-17(A) (1978). The videotape "shall be viewed and heard at the trial and entered into the record in lieu of the direct testimony of the alleged victim." *Id.* Under our rules of criminal procedure, good cause is demonstrated when "the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm." Rule 5-504(A) NMRA 2001.

{27} Defendant offers two reasons why the trial court erred in allowing S.G. to testify by videotape. First, the trial court did not afford Defendant the discovery necessary to contest the prosecution's assertion that S.G. would suffer "unreasonable and unnecessary mental or emotional harm" by testifying at trial. Second, the trial court failed to make any findings of fact directed specifically at S.G.'s mental or emotional harm.

{28} We find each of Defendant's arguments persuasive. Defendant was denied two requests for discovery: (1) production of S.G.'s mental health records, and (2) an independent examination of S.G. by a court-appointed psychiatrist. The trial court entered a protective order preventing Defendant from discovering S.G.'s mental health records in the possession of both her therapist and the Santa Fe Family Center, and denied the request for an independent psychological evaluation. We analyze each request separately.

Medical Records

{29} The State contends that S.G.'s mental health records were subject to the psychotherapist-patient privilege. *See* Rule 11-504 NMRA 2001. Defendant argues that S.G. waived any such privilege when she allowed her therapist to discuss her mental condition with the prosecutor's office to show the State she needed to testify by videotape. Defendant cites to an exception to the privilege, Rule 11-504(D)(3), which states: "There is no privilege under this rule as to communications relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense. . . ."

{30} The State counters that the mental health records were not germane to the charges against Defendant regarding S.G., and therefore, S.G. did not rely upon her mental condition "as an element of [her] claim or defense" within the meaning of Rule 11-504(D)(3). Furthermore, even if S.G. did waive the privileged nature of her records, the State faults Defendant for failing to make a threshold showing that the records were material to his defense.

{31} The trial court conducted a hearing on whether to grant the prosecution's motion for videotaped deposition in lieu of live testimony. The hearing was a "proceeding" within the meaning of the Rule. Further, S.G.'s mental or emotional condition was the sole issue at that proceeding. To rule on the motion, the trial court had to determine whether S.G. "may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm." Rule 5-504(A). Thus, S.G. was relying upon the condition of her mental health "as an element" of her request for a videotaped deposition within the meaning of Rule 11-504(D)(3). In such proceedings, "[t]here is no privilege . . . as to communications relevant to an issue of

[S.G.'s] physical, mental or emotional condition." Rule 11–504(D)(3).

{32} Nevertheless, waiver of the psychotherapist-patient privilege as set forth in Rule 11–504(D)(3) does not automatically make all the records discoverable. Privacy concerns are still fundamental. To protect a child's privacy, we require that there "be a threshold showing by defendant that the records may reasonably be expected to provide information material to the defense." *State v. Gonzales,* 1996–NMCA–026, ¶ 21, 121 N.M. 421, 912 P.2d 297. As part of his threshold showing, Defendant argues he had a good faith belief that S.G. fabricated her allegations, and that her medical records would support this belief.

{33} Defendant's suspicion of fabrication is not without substance. The record supports an inference that S.G. initially denied that anything had happened with Defendant, and she only changed her recollection after repeated questioning and blandishments on the part of her mother. Despite the police officer's request not to assist S.G. in recalling the events, S.G.'s mother did exactly the opposite, including what could be called exerting suggestive influence on her daughter's memory.

{34} The possibility of undue influence on S.G.'s testimony is troubling in this case. Consistent with the police officer's admonition, "the importance of *proper* interview techniques as a predicate for eliciting accurate and consistent recollection" from children cannot be denied. *State v. Michaels,* 136 N.J. 299, 642 A.2d 1372, 1378 (1994) (citing Gail S. Goodman et al., *Optimizing Children's Testimony: Research and Social Policy Issues Concerning Allegations of Child Sexual Abuse in Child Abuse, Child Development, and Social Policy* (Dante Cicchetti & Sheree L. Toth, eds.1992)). Many of the techniques allegedly used in questioning S.G. are subject to criticism. *See* American Prosecutors Research Institute, National Center for Prosecution of Child Abuse, *Investigation and Prosecution of Child Abuse* 59–61, 67–75, 81 (2d ed.1993); *see also Michaels,* 642 A.2d at 1378. Although the problems of parental influence are arguably more pronounced in younger children, "[s]uggestibility is not simply a matter of age." 1 John E.B. Myers, *Evidence in Child Abuse and Neglect Cases* § 1.10, at 36 (3d ed.1997). The impact of suggestibility on an individual's recall "depends on a host of situational, developmental, and personality factors." *Id.* Given the problems associated with improper questioning of children, the circumstances surrounding S.G.'s allegations raise legitimate concerns about the reliability of her allegations. Defendant should have been allowed to pursue those concerns aided by appropriate discovery.

{35} S.G.'s therapist, who testified on behalf of the State, conceded that the depression, fear, and anxiety that S.G. felt about testifying in open court were consistent with those of a child being untruthful about her allegations. One purpose of confrontation is so "the moral suasion of facing the accused might influence the child to tell the truth." *State v. Tafoya,* 108 N.M. 1, 3, 765 P.2d 1183, 1185 (Ct.App.1988). Overall, the record supports Defendant's belief that S.G.'s mental health records may provide information material to his defense of fabrication. Thus, S.G.'s mental health records in the custody of her therapist and the Santa Fe Family Center were an appropriate avenue of discovery.

{36} However, Defendant was not necessarily entitled to all such records. The trial court still had an important role to play in balancing the best interests of the child with the fundamental rights of the defense. At trial, Defendant pressed for the release of all records in the possession of S.G.'s therapist and the Santa Fe Family Center, including as an alternative, a request that the trial judge inspect the records in camera. Appropriately, Defendant scales back his request on appeal. Defendant now asserts that the correct course of action is for the trial judge to perform an in camera review of the records to determine what is discoverable. We agree. *See Gonzales,* 1996–NMCA–026, ¶ 20, 121 N.M. 421, 912 P.2d 297. On retrial, the trial court should conduct an in camera inspection to determine what information supports or undercuts S.G.'s claim of "unreasonable and unnecessary mental or emotional harm" along with what information supports or undercuts Defendant's claim of fabrication

and undue influence. Information that the trial court deems relevant to the State's motion should be turned over to defense counsel subject to appropriate protective orders concerning the disclosure of the information and limits on its use.

Independent Psychological Evaluation

{37} The trial court also denied a request for an independent psychological evaluation, finding that Defendant had "failed to demonstrate any issue regarding the competency of [S.G.] to be a witness." However, S.G.'s competency to be a witness was never at issue. The issues presented to the trial court were whether S.G. would suffer unreasonable and unnecessary mental or emotional harm if she were to testify in open court, and whether the defense of fabrication warranted an independent evaluation. In cases such as this, deciding whether to grant an independent psychological exam does not turn on the general competency of a witness. *Cf. State v. Garcia*, 94 N.M. 583, 586–87, 613 P.2d 725, 728–29 (Ct.App.1980) (authorizing independent psychological exam on question of victim's mental anguish although no claim that the victim was mentally incapacitated).

{38} We have held that a trial court abuses its discretion by refusing a defendant's request for a psychological evaluation of the victim when the evaluation is necessary to rebut a claim of mental anguish that the State is required to prove. *Id.* The State attempts to limit *Garcia* by pointing out that the mental anguish of the victim in that case was an essential element of the crime, whereas here, S.G.'s mental anguish is only relevant to "whether she would testify in person at trial or by videotape." We are unpersuaded by the distinction. The State placed S.G.'s mental state at issue, and whether that occurs in a pretrial motion or the trial itself is of little consequence to our analysis. Under *Garcia*, reasonable discovery not precluded by law must be granted. *See id.*

{39} Parenthetically, we acknowledge an ambiguity in the law with respect to the standard a movant must meet to persuade the court to order a psychological examination. Under *Garcia*, the movant need not prove a "compelling reason" for the examination, "where there was a specific basis for the examination (to discover information concerning the mental anguish which the State was required to prove)." *Id.* That "specific basis" is present here. Yet the committee commentary to Rule 5–504 characterizes psychological evaluations as appropriate only "in the rare case" to show good cause for a videotaped deposition under the rule. The committee commentary properly points to the potential for emotional harm if psychological evaluations of juveniles are abused.

{40} We need not resolve the issue here because Defendant argues that he has, in fact, demonstrated a compelling need for the evaluation. *See Garcia*, 94 N.M. at 586, 613 P.2d at 728 (recognizing the compelling reason approach). Defendant also asserts that his compelling need for independent psychological evaluation extends to the preparation of his defense as well as rebutting the prosecution's motion for a videotaped deposition. In New Mexico, a compelling need is demonstrated when "the probative value of the evidence reasonably likely to be obtained from the examination outweighs the prejudicial effect of such evidence and the prosecutrix' right of privacy." *State v. Romero*, 94 N.M. 22, 27, 606 P.2d 1116, 1121 (Ct.App. 1980), *overruled on other grounds by State v. Johnson*, 1997–NMSC–036, ¶ 34, 123 N.M. 640, 944 P.2d 869. Given the manner in which S.G.'s allegations developed, and the therapist's admission that S.G.'s fear of testifying was consistent with a child that was not being truthful, Defendant may have demonstrated a compelling need. However, we leave that determination to the trial court in the sound exercise of its discretion and in light of all the relevant factors. We are confident that the court on remand can use its considerable powers to protect the child while ensuring that Defendant has the information he reasonably needs to oppose the State's motion for videotaped testimony.

An Order For Videotaped Trial Testimony Must Be Supported By Findings of Fact

{41} When a trial court concludes that the potential harm to a child outweighs a defendant's constitutional right

to confront that child at trial, the court must make individualized findings as to why the child needs special protection. *Tafoya*, 108 N.M. at 3, 765 P.2d at 1185 (citing *Coy v. Iowa*, 487 U.S. 1012, 1021, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988)). "Absent findings indicating the trial court was persuaded and why, the decision to deny a defendant his or her right of confrontation cannot be adequately reviewed on appeal." *State v. Benny E.*, 110 N.M. 237, 242, 794 P.2d 380, 385 (Ct.App.1990). Although the State concedes that no findings were made here, the State contends that the trial court's ruling was supported by substantial evidence. However, as an appellate court, it is not our function to make the findings necessary to support the trial court's ruling. *See id.* The failure to incorporate findings into the court's ruling was error.

Admissibility of Defendant's Penile Plethysmograph Test Results

{42} The defense included the testimony of Dr. Ned Siegel, who testified that Defendant's psychological profile was not consistent with that of a pedophile. On cross-examination, the prosecutor questioned whether Dr. Siegel had performed a penile plethysmograph test,[1] which the prosecutor described as a test "customarily used to identify pedophiles." Dr. Siegel responded, "No, I did not. I do not do that."

{43} Before redirect examination began, defense counsel requested a recess to allow Dr. Siegel to examine the report of Dr. Moss Aubrey. Dr. Aubrey had performed a penile plethysmograph test on Defendant, which Defendant passed. Defendant informed the trial court that he had decided not to call Dr. Aubrey to testify about the test because the results failed to meet the standards for reliability under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and therefore the test was not admissible. Defendant argued that the prosecution's questions left the jury with the impression that he had failed to take a legitimate test to determine pedophilia, and therefore, he should be allowed to rebut the prosecution's innuendo by introducing the test results.

{44} The trial court ruled that Dr. Siegel could not testify about the results of Dr. Aubrey's test, but the court would permit Defendant to testify that he had passed the penile plethysmograph test if he took the stand. In reliance on this ruling, Defendant questioned Dr. Siegel on redirect about the significance of the penile plethysmograph test and how to interpret the results of that test. However, before Defendant began his testimony, the State objected to any testimony about passing the test on the ground that the test results were never disclosed to the prosecution. Although the trial court noted that Defendant was not obligated to disclose material that it did not intend to use, the court nonetheless sustained the State's objection. Defendant then requested the trial court to instruct the jury to disregard all the testimony about the penile plethysmograph. The trial court denied the request.

{45} Defendant first argues that the prosecutor committed misconduct in questioning Dr. Siegel about the administration of a penile plethysmograph test. The misconduct is predicated on the assumption that the prosecutor knew, or should have known, that penile plethysmograph results are generally inadmissible. We assume, without deciding, that the results of the penile plethysmograph test are not reliable enough to be considered admissible. *See, e.g., Doe v. Glanzer*, 232 F.3d 1258, 1266 (9th Cir.2000) (holding that "courts are uniform in their assertion that the results of penile plethysmographs are inadmissible as evidence"). Nonetheless there is no evidence in the record that the prosecutor was privy to this knowledge, or should have known it. Defendant, who was aware of the admissibility problem, could have informed the prosecutor (and the trial court) of the fact with a timely objection, but he failed to do so. Although we do not approve of questioning a witness about inadmissible matters, we cannot find prosecutorial misconduct on this record.

1. The penile plethysmograph measures penile response to visual or auditory erotic stimuli. *See* 1 Meyers, *supra*, § 5.53, at 580–81.

{46} Defendant also asserts that the trial court erred by not allowing him to rebut the inference left with the jury that he had not taken a valid testing procedure, presumably out of fear that he would fail it. Although Defendant admits that the results of the penile plethysmograph are not admissible, Defendant asserts that he was entitled to present evidence that he had taken and passed the test, once the prosecution opened the door by questioning Dr. Siegel about it. We agree.

{47} Our precedents permit otherwise inadmissible evidence to be used to rebut the same under the doctrine of curative admissibility. *State v. Baca*, 120 N.M. 383, 390 n. 2, 902 P.2d 65, 72 n. 2 (1995) (recognizing that New Mexico adopted curative admissibility); *see also State Bank of Commerce v. W. Union Tel. Co.*, 19 N.M. 211, 227, 142 P. 156, 162 (1914) (permitting rebuttal evidence to counterbalance incompetent evidence entered into record without objection). In this regard, the trial court correctly decided to allow Defendant to testify to the result of his test in order to rebut the prosecutor's remarks. The trial court erred when it changed its mind.

{48} We recently reversed a criminal conviction after a defendant had relied on a trial court's evidentiary ruling, which the court later reversed to Defendant's detriment. *See State v. Glasgow*, 2000–NMCA–076, ¶ 1, 129 N.M. 480, 10 P.3d 159, *cert denied*, 129 N.M. 385, 9 P.3d 68. *Glasgow* acknowledged that "inconsistent application of the rules may have a prejudicial effect upon defense strategy." *Id.* ¶ 14. The lesson of Glasgow applies to the case at bar.

{49} We need not concern ourselves with the level of prejudice Defendant may have suffered because we are reversing the convictions on other grounds. At a minimum, however, the trial court's ruling prevented Defendant from rebutting the prosecutor's comment with evidence of the test results, which is the express purpose of the curative admissibility doctrine. *See* Strong, *supra*, § 57, at 252–53 & n. 2 (permitting rebuttal with inadmissible evidence once the opposing party has opened the door with inadmissible evidence, a doctrine described as "[f]ighting fire with fire").

Viewing the Scene

{50} Defendant's house was small, only 820 square feet. Part of S.G.'s testimony was that she was often molested inside the house with Cindy or the children in the adjoining rooms, in some cases with children in the same room but asleep in a bed two feet away. Defendant took the position that S.G.'s testimony was incredible given the cramped living conditions. To allow the jury to experience how close the living conditions were, and properly gauge the likelihood of S.G.'s allegations, Defendant moved the trial court to allow the jury to go to view the house. The trial court denied the motion.

{51} We consider four factors when reviewing whether a jury should be allowed to view a scene, reviewing them under an abuse of discretion standard. *State v. Maddox*, 99 N.M. 490, 491–92, 660 P.2d 132, 133–34 (Ct.App.1983). They are

> (1) the importance of the evidence to be obtained and the circumstances of the case on trial, (2) whether it is reasonably certain the view will substantially aid the jury in reaching a correct verdict, (3) whether the jury could visualize the scene or the object to be viewed from the testimony submitted, and (4) whether conditions of the scene since the time of the [event] are sufficiently the same at the time of the trial to make a jury view helpful.

Id. (citations omitted).

{52} Defendant does not address the factors individually. We note that at trial Defendant did illustrate how small the house was by marking out the dimensions of the house, to scale, *inside* the courtroom. Defendant also introduced an array of photographs designed to depict the close proximity within which the family lived. Coupled with the testimony of the witnesses, such evidence was sufficient for the jury to visualize the circumstances of Defendant's house. The trial court had the discretion to deny Defendant's motion and, under these circumstances, the court did not abuse its discretion.

CONCLUSION

{53} The trial court erred in denying Defendant's motion to sever the charges against him, and therefore we reverse his convictions. Because the testimony of the girls, if believed, provides sufficient evidence to convict, we remand for new trials consistent with this opinion.

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

WE CONCUR: A. JOSEPH ALARID, Judge, and CELIA FOY CASTILLO, Judge.

2001-NMCA-099

34 P.3d 643

STATE of New Mexico, Plaintiff–Appellee,

v.

Jake MARTINEZ, Defendant–Appellant.

No. 21,861.

Court of Appeals of New Mexico.

Oct. 16, 2001.

Patricia A. Madrid, Attorney General, M. Anne Kelly, Assistant Attorney General, Albuquerque, NM, for Appellee.

Phyllis H. Subin, Chief Public Defender, Nancy M. Hewitt, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

WECHSLER, Judge.

{1} Defendant Jake Martinez appeals his conviction of fraudulent use of a credit card in violation of NMSA 1978, § 30–16–33 (1971). There was evidence at trial that Defendant had used a stolen electronic benefits transfer (EBT) card issued to a public assistance recipient at a grocery store. Defendant contends that the EBT card is not a credit card as defined in NMSA 1978, § 30–16–25(B) (1999) and that, therefore, there was insufficient evidence to support his conviction. Alternatively, Defendant argues that his conviction should be reversed because he was charged under a general, rath-

er than a specific, statute concerning the criminal activity. We agree with Defendant that the EBT card is not a credit card under Section 30–16–33 and therefore reverse.

Definition of "Credit Card" in Section 30–16–25(B)

{2} Section 30–16–33(A)(4) prohibits the use of someone else's credit card without consent to obtain something of value with the intent to defraud. "Credit card" is defined in Section 30–16–25(B)(1) as

> any instrument or device, whether known as a credit card, credit plate, charge card or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining money, goods, services or anything else of value, either on credit or in consideration of an undertaking or guarantee by the issuer of the payment of a check drawn by the cardholder.

EBT Food Purchase System

{3} At trial, a vice president of Citicorp Financial Services Inc. (Citicorp) testified concerning the State of New Mexico's use of the EBT card system to enable cardholders who are clients of the State Income Support Division to purchase food at certified grocery stores. The Citicorp representative testified that the EBT card system is federally funded and state administered and replaced food stamps in New Mexico in the mid to late 1980s. Under the EBT system, the Income Support Division determines income eligibility and allocates a monthly amount available to a client for food purchases on an EBT card at certified stores. The client is given an EBT card and personal identification number for identification. When the client, as a cardholder, makes a purchase and presents the card and enters the personal identification number, the store contacts Citicorp which has a contract with the State of New Mexico to facilitate the operation of the program. Citicorp stores information received from the State concerning the identification and monthly purchase allocation for cardholders in its computer system. It verifies the information received by the store against the information in its computer system. If the information received from the store matches, Citicorp authorizes the purchase and reduces the balance of the available allocation on its record. At the conclusion of each business day, Citicorp settles all of the day's transactions. It pays the store by drawing on a letter of credit at the Federal Reserve Bank set up by the United States Treasury for Citicorp.

Applicability of Section 30–16–25(B)

{4} There is a layer of credit required to complete the transaction. The United States Treasury extends credit to Citicorp on behalf of the State of New Mexico for the payment of the merchants who sell food to Income Support Division clients. By that element of credit, the federal government funds the food purchases.

{5} The State contends that because the State of New Mexico is guaranteeing payment to the grocery store through the federal government's line of credit, the transaction was "on credit" so as to satisfy the definition of Section 30–16–25(B). Defendant would not have us read the statutory definition so broadly. As Defendant points out, the cardholder applies to the State for benefits, not for credit, and is never the guarantor of payment to the grocery store. According to Defendant, under the definition of "credit card" in Section 30–16–25(B), the cardholder did not have a credit relationship with anyone such that the purchase on the EBT card was "on credit."

{6} When we evaluate the meaning of a statute, we seek the legislative intent. *Draper v. Mountain States Mut. Cas. Co.*, 116 N.M. 775, 777, 867 P.2d 1157, 1159 (1994). We look to the plain meaning of the language used in the statute and the underlying legislative purpose. *See State v. Andrews*, 1997–NMCA–017, ¶ 5, 123 N.M. 95, 934 P.2d 289. We use the ordinary and plain meaning of statutory language unless the legislative intent indicates otherwise. *Draper*, 116 N.M. at 777, 867 P.2d at 1159. Statutory interpretation is a question of law that we review de novo. *State v. Rowell*, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995).

{7} Considering the language of Section 30–16–25(B) and the manner it is used, we

agree with Defendant that the State's interpretation is too broad because it construes "credit" in an overly broad manner and does not focus on the purpose of the statute. The statutory offense is fraudulent use of a "credit card," and Section 30–16–25(B) defines "credit card." Under the statutory definition contained in Section 30–16–25(D), an "issuer" issues a card to the cardholder so that the cardholder may use the card to obtain something of value on credit. We consider "on credit" to mean, in ordinary usage, the receipt of goods or money for payment in the future. *See* Webster's Third New International Dictionary 532 (unabridged, 1993) (defining "credit" in relevant part as "an amount or limit to the extent of which a person may receive goods or money for payment in the future").

{8} Thus, under usual circumstances, a cardholder, or one authorized by the cardholder, would use a credit card to make a purchase at a store and, by the nature of credit, be obligated to make payment in the future. Although the statutory definition of Section 30–16–25(B) does not specifically indicate that the credit relates to the cardholder, it also does not make any reference to any party other than the issuer and the cardholder. However, the nature of the definition, which describes a card issued to a cardholder for the cardholder's use, implies that it is the cardholder's credit that is involved.

{9} Moreover, rules of statutory construction require us to read statutes concerning the same subject matter together and to construe a statute in view of the harm it is designed to prevent. *State v. Ogden*, 118 N.M. 234, 243–44, 880 P.2d 845, 854–55 (1994). Although this statutory language could be read broadly as the State urges, we do not believe the legislature intended such a reading. Rather, when we read Section 30–16–25(B) with Section 30–16–33(A)(4), we believe that the legislature intended to protect against the injury to a cardholder when the cardholder's card is used without consent.

{10} Nor do we agree with the State's contention that its guarantee of payment to the grocery store fits within the Section 30–16–25(B) definition as a substitute for credit. Under Section 30–16–25(B), a credit card may be issued so that the cardholder can use the card to obtain something of value in consideration of the issuer's guarantee to pay a check of the cardholder. However, the facts of this case do not involve the payment of any check so as to implicate this guarantee provision of the statute.

{11} We do not lose sight of the fact that the legislature intended to define a "credit card" in Section 30–16–25(B). In its ordinary usage, the term "credit card" does not include a card requiring the payment of the United States Treasury or involving governmental assistance benefits. We believe that including an EBT card (used to access federally funded benefits) within the definition of a credit card would be a stretch of common usage which was neither intended nor contemplated by the legislature.

Amendment to Section 58–16–3(A)(9)

{12} If there was any doubt about the legislative intent as to whether an EBT card was a credit card under Section 30–16–25(B), the legislature put it to rest in 1999 when it enacted amendments to the Remote Financial Service Units Act, NMSA 1978, §§ 58–16–1 to –18 (1990, as amended through 1999). The Remote Financial Service Units Act prohibits the unauthorized use of the card of another. Section 58–16–16(B). In 1999, the legislature defined "card" as "a plastic card or other instrument . . . issued by a financial institution or by a state agency to a cardholder that enables the cardholder to have access to and that processes transactions against one or more accounts." Section 58–16–3(A)(9). The statutory definition specifically states that the term "card" "shall be used when referring . . . to . . . an EBT card issued to a recipient of public assistance benefits." *Id.* In defining "card," Section 58–16–3(A)(9) lists separately its reference to "a credit card identifying a cardholder who has established a pre-approved credit line with the issuer of the credit card." By this definition of "card," the legislature made it clear that an EBT card issued for public assistance benefits is not a credit card and that both an EBT and a credit card fall within a broader definition of "card" used in connection with

financial services. *See* § 58–16–2 (stating generally purposes of the Remote Financial Service Units Act to include enhanced use of financial services). Section 58–16–16(B) covers the conduct alleged in the indictment in this case.

Conclusion

{13} Because the EBT card issued to a client of the Income Support Division does not fall within the definition of "credit card" in Section 30–16–25(B), we reverse Defendant's conviction.

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

WE CONCUR: RICHARD C. BOSSON, Chief Judge, LYNN PICKARD, Judge.

2001-NMSC-033
34 P.3d 1134

STATE of New Mexico, Plaintiff–Respondent,

v.

Lathan BENALLY, Defendant–Petitioner.

No. 26,245.

Supreme Court of New Mexico.

Oct. 17, 2001.

Phyllis H. Subin, Chief Public Defender, Susan Roth, Assistant Appellant Defender, Santa Fe, NM, for Petitioner.

Patricia A. Madrid, Attorney General, William McEuen, Assistant Attorney General, Santa Fe, NM, for Respondent.

OPINION

FRANCHINI, Justice.

{1} Defendant was convicted of second-degree murder and tampering with evidence for his involvement in the death of Marco LaPlant following a fight at an outdoor party near Farmington, New Mexico. On appeal, Defendant argues that his conviction must be reversed because errors in the jury instructions prevented the jury from appreciating that the State had the burden of disproving self-defense. The Court of Appeals determined that a third, correct jury instruction cured the error in two instructions that had failed to explain the State's burden. We reverse the Court of Appeals and hold that, because of its distance from the erroneous elements instruction and the unlikelihood

that the jury would, sua sponte, graft language from a proper instruction onto improper instructions, the single proper instruction did not correct the improper self-defense instruction. The erroneous instruction therefore constituted fundamental error. We reverse Defendant's second-degree murder conviction and remand for a new trial.

I.

{2} At a late night outdoor party at "the levels," near Farmington, New Mexico, a fight broke out between Defendant and Orlando Delagrito. A friend of Defendant, Christopher Johnson, intervened and chased Mr. Delagrito to a green Chevrolet Nova. When Mr. Delagrito entered the Nova, Christopher Johnson and a third friend threw rocks at the car and challenged Mr. Delagrito to fight. The Nova drove off, but not before a rock shattered a rear window of the vehicle.

{3} The Nova belonged to the victim, Marco LaPlant, a friend of Mr. Delagrito. Mr. LaPlant had witnessed the vandalism of his vehicle and followed the Nova on foot as Mr. Delagrito drove it to safety. After approximately fifteen minutes, an angered Mr. LaPlant drove his Nova back to the levels, where Mr. Johnson had rejoined Defendant and some fourteen other people. The Nova kicked up a cloud of dust as Mr. LaPlant slammed on the brakes next to a truck where the group was gathered. Mr. LaPlant emerged from the vehicle brandishing a car jack that most witnesses believed was a gun. Someone yelled "gun" while everyone scrambled to hide. As Mr. LaPlant approached, Defendant, who had been hiding behind the truck, struck Mr. LaPlant on either the head or shoulder with an empty bottle of whiskey. Defendant and Mr. LaPlant then continued fighting.

{4} The parties dispute the events that followed. According to Mr. Johnson, a witness for the prosecution, when Mr. LaPlant gained position on top of Defendant, Mr. Johnson picked up a large, heavy rock and used it to strike Mr. LaPlant on the back. Mr. Johnson testified that he then helped Defendant to his feet and temporarily left the scene of the fight to go vandalize Mr. LaPlant's Nova. As he left, numerous people, including Defendant, were kicking and punching Mr. LaPlant. When he returned, Mr. Johnson found Mr. LaPlant covered in blood and breathing irregularly. Mr. Johnson testified that he and Defendant then got in a car, but before they could leave, Defendant exited the car and approached Mr. LaPlant. According to Mr. Johnson, Defendant kicked Mr. LaPlant in the side and then dropped a large rock onto the victim. Mr. Johnson did not see where the rock landed.

{5} The State also produced evidence regarding statements allegedly uttered by Defendant during the fray. Eyewitness Danielle Enos and her sister Dacia both testified that they heard Defendant tell Mr. LaPlant "croak, motherfucker, croak." Titus Jacquez testified that Defendant declared that he would have to kill Mr. LaPlant so he would not have to "worry," and then said "later" as he kicked Mr. LaPlant in the face. Mr. Johnson did not remember or could not hear what, if anything, Defendant said to Mr. LaPlant.

{6} Although many witnesses saw Mr. Johnson strike Mr. LaPlant with a rock, only Mr. Johnson, a co-defendant in the case, offered testimony that Defendant struck the victim with a rock. Defendant attacked Mr. Johnson's testimony by raising inconsistencies between his testimony and pre-trial statements. Defendant also attempted to discredit Mr. Johnson's testimony by suggesting that Mr. Johnson, who had pleaded guilty to first degree murder, received a lighter sentence (ten years maximum) and a postponement of that sentence in exchange for his testimony.

{7} According to Defendant, after Mr. LaPlant's Nova came speeding toward the group with whom he had gathered, he heard people yell "gun." Defendant admitted that he hit Mr. LaPlant with a whiskey bottle but claimed that he made contact with his shoulder rather than his head. He said that while Mr. LaPlant had him pinned to the ground he heard someone say "get back," then heard three cracks above him before someone removed Mr. LaPlant from on top of him. Defendant got up and started kicking Mr. LaPlant but could not recall if some of the blows landed on Mr. LaPlant's head. According to Defendant, he entered a friend's car, but exited the vehicle in order to smash the Nova's headlights and windshield. He

then returned to the car and left the levels. Defendant testified that he never revisited Mr. LaPlant's body after the initial fight, that he never hit Mr. LaPlant with a rock, and that he neither voiced nor entertained a desire to kill Mr. LaPlant.

{8} According to Dr. Patricia McFeeley, the State's pathologist/medical examiner, the victim died as a result of brain swelling caused by a combination of blows to the head. Dr. McFeeley testified that the fatal head injuries could have been dealt by a bottle, a rock, or a kick to the head regardless of the kind of footwear worn by the person kicking. Dr. Karen Griest, a forensic pathologist hired by Defendant, identified the cause of death as trauma from a "rigid, heavy object." Dr. Griest testified that it was unlikely that a kick leveled by someone wearing tennis shoes of the sort worn by Defendant on the night in question could have caused Mr. LaPlant's death. Dr. Griest also observed that there were no glass fragments in the victim's scalp or clothes.

{9} The jury acquitted Defendant of first-degree murder and convicted him of second-degree murder and tampering with evidence. Defendant received a sentence of fifteen years for the murder and eighteen months for tampering with evidence. On appeal, among other issues, Defendant asserted that the trial court committed fundamental error by giving jury instructions that did not adequately treat his self-defense claim. *State v. Benally,* No 19,897, at p. 1 (NMCA Feb. 21, 2000). A divided Court of Appeals held that the errors in the jury instructions did not amount to fundamental error and affirmed Defendant's conviction. *Id.* at pp. 3–10. In a dissenting opinion, Judge Bustamante argued that the erroneous jury instructions did amount to fundamental error. *Id.* at pp. 8–9. We granted certiorari to review the instructions.

II.

{10} The trial court determined that self-defense was at issue in this case and gave the jury a series of self-defense instructions. Defendant alleges that three errors resulting from those instructions require the reversal of his conviction. First, instruction 12, the elements instruction for second-degree murder, failed to include the element of unlawfulness.[1] Unlawfulness is an essential element of the offense in cases, like the present one, in which self-defense or defense of another is at issue. *State v. Parish,* 118 N.M. 39, 43, 878 P.2d 988, 992 (1994) ("[W]hen self-defense or the defense of others is at issue, the absence of such justification is an element of the offense.") (internal citations omitted). In order to prove unlawfulness, the State must disprove the defendant's self-defense claim beyond a reasonable doubt. *See id.* According to Defendant, the failure to include unlawfulness among the elements of second-degree murder prevented the jury from understanding the State's burden.

{11} In addition to the omission of unlawfulness from instruction 12, Defendant complains that instruction 15, which followed the instructions for homicide offenses, described self-defense in non-deadly force cases rather than in homicide cases.[2] Finally, Defendant

1. Instruction 12 read as follows:

For you to find the defendant guilty of second degree murder, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant killed Marco LaPlant[ ];
2. The defendant knew that his acts created a strong probability of death or great bodily harm to Marco LaPlant;
3. The defendant did not act as a result of sufficient provocation;
4. This happened in New Mexico on or about the 7th day of July, 1997.

Instructions 10 and 18, listing the elements for first degree murder and voluntary manslaughter, respectively, also erroneously omitted the element of unlawfulness. However, because Defendant was not convicted of either first degree murder or voluntary manslaughter, we do not address these errors.

2. Instruction 15 informed the jury that:

Evidence has been presented that the Defendant acted while defending himself.

The Defendant acted in self-defense if:

1. There was an appearance of immediate danger of death or great bodily harm to the Defendant as a result of being attacked with a deadly weapon by Marco LaPlant[ ]; and
2. The Defendant was in fact put in fear, by the apparent danger of immediate death or great bodily harm and struck Marco LaPlant[ ] because of that fear; and
3. The apparent danger would have caused a reasonable person in the same circumstances to act as the Defendant did.

observes that instruction 15 failed to explain that the State shouldered the burden of proving that Defendant did not act in self-defense. Because we determine that the omission of unlawfulness from instruction 12 constituted fundamental error, we do not review these claims independently.

{12} The standard of review we apply to jury instructions depends on whether the issue has been preserved. If the error has been preserved we review the instructions for reversible error. *See Parish* at 42, 878 P.2d at 991. If not, we review for fundamental error. *State v. Cunningham*, 2000–NMSC–009, ¶ 8, 128 N.M. 711, 998 P.2d 176. Under both standards we seek to determine " 'whether a reasonable juror would have been confused or misdirected' by the jury instruction." *Cunningham*, 2000–NMSC–009, ¶ 14, 128 N.M. 711, 998 P.2d 176 (quoting *Parish*, 118 N.M. at 42, 878 P.2d at 991). A juror may suffer from confusion or misdirection despite the fact that the juror considers the instruction straightforward and "perfectly comprehensible" on its face. *Parish*, 118 N.M. at 44, 878 P.2d at 993. Thus, juror 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.

{13} In *Parish*, a defendant standing trial for voluntary manslaughter presented evidence that raised a reasonable possibility that he acted in self-defense. *Parish*, 118 N.M. at 42, 878 P.2d at 991. Parish tendered an instruction that listed the absence of self-defense as an element of voluntary manslaughter, but the trial court rejected that instruction. *Id.* at 44, 878 P.2d at 993. Although not required by the Uniform Jury Instructions at the time, we held that reversible error nevertheless resulted from the trial court's failure to include the element of unlawfulness among the other elements of voluntary manslaughter. *Id.* at 43–44, 878 P.2d at 992–93. The erroneous voluntary manslaughter instruction could not be corrected by other instructions. *Id.* at 44, 878 P.2d at 993.

{14} In *State v. Armijo*, 1999–NMCA–087, ¶¶ 11–27, 127 N.M. 594, 985 P.2d 764, the Court of Appeals evaluated a set of jury instructions that were slightly different from those in *Parish*. As in *Parish*, the trial court had instructed the jury on self-defense but failed to include unlawfulness as an element in the instructions for the relevant offense. *Armijo*, 1999–NMCA–087, ¶ 11, 127 N.M. 594, 985 P.2d 764. The *Armijo* Court distinguished its case from *Parish*, however, because in *Parish*, apart from the error in the elements section, the general self-defense instruction had also failed to properly state the State's burden of disproving self-defense. *Armijo*, 1999–NMCA–087, ¶¶ 15–17, 127 N.M. 594, 985 P.2d 764 (citing *Parish* at 44, 878 P.2d at 993). In *Armijo*, on the other hand, the general self-defense instruction did state the proper burden of proof. *Id.* The *Armijo* Court held that in determining the sufficiency of jury instructions, "it is sufficient if [the State's burden to disprove self-defense] is in the defense instruction, even if not in the elements instruction, provided that no other instruction causes the defense instruction to be confusing or meaningless." *Id.* at ¶ 26. Because the self-defense instruction given to jury in *Armijo* accurately described this burden, the Court affirmed the defendant's aggravated battery conviction. *Id.* at ¶ 28.

{15} In *Cunningham*, we elaborated on the capacity of other instructions to cure an elements instruction that improperly omits unlawfulness. *Cunningham* involved a first-degree murder conviction based on an elements instruction that, like the instructions at issue in *Parish* and *Armijo*, failed to include unlawfulness. *Cunningham*, 2000–NMSC–009, ¶ 8, 128 N.M. 711, 998 P.2d 176. Unlike the defendant in *Parish*, Cunningham failed to object to the erroneous instruction. *Cunningham*, 2000–NMSC–009, ¶ 8, 128 N.M. 711, 998 P.2d 176. We therefore reviewed his claim for fundamental error, not reversible error. *Id.* Under the fundamental error analysis in *Cunningham*, we sought to determine whether the erroneous jury instruction was "corrected by subsequent prop-

In considering this defense, and after considering all the evidence in the case, if you have a reasonable doubt as to the Defendant's guilt, you must find him not guilty.

er instructions that adequately address[ ] the omitted element." *Id.* at ¶ 21. After examining the record as a whole, we affirmed Cunningham's conviction because a separate instruction correctly stated the element at issue, thereby erasing the possibility of juror confusion on the matter. *Id.* at ¶ 14.

{16} In New Mexico, then, unpreserved error in jury instructions is "fundamental" when it remains uncorrected, thereby allowing juror confusion to persist. Because both parties in the present case agree that instruction 12 was erroneous, and that Defendant failed to object to that error, we now employ *Cunningham* and review the case for fundamental error. Examining the whole record, we seek to determine whether the erroneous omission of the burden of proof from instruction 12 was corrected so as to eliminate juror confusion.

III.

{17} The incomplete elements instruction in the present case was followed by two self-defense instructions: instruction 15, which also omitted the State's burden, and instruction 25, which included the correct burden.[3] The State argues that, notwithstanding instruction 15, instruction 25 corrected all possible confusion stemming from instruction 12. We agree with the State, and with the Court of Appeals, that instruction 25 was proper: it represented a precise adaptation of UJI 15-5183, and, most importantly, explained to the jury that "[t]he burden is on the state to prove beyond a reasonable doubt that the defendant did not act in self defense." *Benally,* 19,897, at p. 3. It is therefore clear that the jury understood the State's burden with regard to the set of offenses to which instruction 25 pertained. We now address whether instruction 25 was capable of rescuing the jury from the confusion that stemmed from the omission in instruction 12.

{18} We begin our evaluation of the corrective capacity of instruction 25 with the common sense proposition that the jury understands the inclusion and omission of language in a jury instruction to reflect the intent of its author. Just as a jury expects an element included in an instruction to reflect the intent to include that element within the relevant law, the jury would naturally assume that the omission of an element reflects the intent to exclude that element from the law governing the issue. When posed with instruction 25 that included the State's burden of proof, and instructions 12 and 15, which omitted the burden, we believe that a juror would be inclined to believe that the author of instructions 12 and 15 intended the omission, and that the State's burden of proof was therefore not part of those instructions. Thus, in order to correct the error in instruction 12, instruction 25 must have convinced the jury that its correct statement of the burden of proof applied not only to the offenses it addressed, but also to the offense of second-degree murder, which instruction 12 addressed.

{19} Nothing on the face of the instructions, nor in their placement, suggested to the jury that the burden of proof from instruction 25 applied to second-degree murder. Instruction 25 addressed aggravated battery and voluntary manslaughter rather than second-degree murder, and a span of thirteen instructions separated it from instruction 12. The comparative nearness of erroneous instruction 15 to instruction 12 suggests that the jury would apply it, before the more remote instruction 25, to second-degree murder.

{20} The inapplicability of instruction 25 to second-degree murder would probably have

3. Instruction 25 provided:

Evidence has been presented that the defendant acted in self-defense. The defendant acted in self-defense if:

1. There was an appearance of immediate danger of death or great bodily harm to the defendant as a result of being attacked by Marco LaPlant[ ] with a deadly weapon;

2. The defendant was in fact put in fear of immediate death or great bodily harm and struck Marco LaPlant[ ];

3. The apparent danger would have caused a reasonable person in the same circumstances to act as the defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in self-defense. If you have a reasonable doubt as to whether the defendant acted in self-defense, you must find the defendant no[t] guilty. (Emphasis added).

been reinforced in the minds of the jury by other instructions. Instruction 9, which admonished the jury that "[e]ach crime charged should be considered separately," would have buttressed their logical inclination to consider the instructions accompanying the manslaughter and battery offenses separately from the instructions accompanying second-degree murder. UJI 14–6004 NMRA 2001. Instruction 1, which ordered the jury not to "pick out one instruction or parts of an instruction and disregard others," would have prevented the jury from interposing language from instruction 25 onto instructions 12 and 15. UJI 14–6001 NMRA 2001. We believe it is likely that at least some jurors would have perceived the two inconsistent instructions in a manner consistent with that theorized by Judge Bustamante in his dissent:

> I believe I would be very confused by the two self defense instructions, and that, in an effort to make sense of them, I would apply the erroneous self defense instruction to the first degree and second degree murder charges which it follows, and would apply the correct jury instruction to the voluntary manslaughter and aggravated battery instruction which it follows.

Benally, 19,897 at p. 10. Because we do not believe that a reasonable juror, following the given instructions, would graft the correct burden of proof from instruction 25 to the offense of second-degree murder, we hold that instruction 25 could not have corrected the omitted element from instruction 12.

IV.

{21} The State also argues that the prosecutor's remarks during her closing statement, in which she read instruction 25 and reminded the jury of the State's burden of proof, supports the conclusion that a reasonable juror would not have been confused or misled as to the appropriate burden of proof. We do not agree that attorney commentary is capable of correcting an erroneous jury instruction. We presume that the jury followed the instructions given by the trial court, not the arguments presented by counsel. *State v. Baca,* 1997–NMSC–045, ¶ 45, 124 N.M. 55, 946 P.2d 1066 ("[W]e are not willing to assume that the jury took the comment during closing and applied it as the law governing the case, ignoring the instructions given by the court."); *State v. Armendarez,* 113 N.M. 335, 338, 825 P.2d 1245, 1248 (1992) ("We presume that the jury followed the written instructions and did not rely for its verdict on one very brief part of the State's closing remarks."). For these reasons, the prosecutor's closing argument was incapable of correcting the fundamental error that resulted from the defective jury instructions. Neither have we found any other indication, either within the instructions or the record as a whole, that the jury overcame the error in instruction 12 and reached an accurate understanding of the State's burden of proof.

V.

{22} The juror confusion and misdirection resulting from instruction 12 remained uncorrected and resulted in fundamental error under the *Cunningham* standard. *Cunningham,* 2000–NMSC–009, ¶ 20, 128 N.M. 711, 998 P.2d 176. We therefore reverse Defendant's conviction and remand for a new trial.

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

PAMELA B. MINZNER and PETRA JIMENEZ MAES, JJ., concur.

JOSEPH F. BACA, J., and PATRICIO M. SERNA, C.J., dissented.

BACA, Justice, dissenting.

{24} I respectfully dissent. I find no fundamental error in this case and would affirm the Defendant's convictions for second degree murder and tampering with evidence. My disagreement with the Court's holding is predicated on the majority's finding of fundamental error based entirely upon a focused analysis of the jury instructions. The doctrine of fundamental error "is bottomed upon the innocence of the accused or a corruption of actual justice." *State v. Sanchez,* 58 N.M. 77, 84, 265 P.2d 684, 688 (1954). Hence, this Court's obligation does not rest on resolving the narrow issue of whether there exists error in the jury instructions. Rather, the court must focus on the broader issue of whether the Defendant's conviction for second degree murder " 'is so doubtful that it would shock the judicial conscience to allow

the conviction to stand.'" *Cunningham*, 2000–NMSC–009, ¶ 13, 128 N.M. 711, 998 P.2d 176 (quoting *State v. Baca*, 1997–NMSC–045, ¶ 41, 124 N.M. 55, 946 P.2d 1066). To properly resolve this issue, the Court is obliged to review the entire record, placing the jury instructions in the context of the individual facts and circumstances of the case, to determine whether the Defendant's conviction was the result of a plain miscarriage of justice. *See State v. Osborne*, 111 N.M. 654, 662, 808 P.2d 624, 632 (1991) (reaffirming that the doctrine of fundamental error applies only under exceptional circumstances in order to prevent a miscarriage of justice). Upon a complete and thorough review of the record before us, it is clear that the evidence presented to the jury in this case leaves little dispute that the Defendant killed the victim without any legal justification. Therefore, any deficiency that can be found in the self-defense instructions, when analyzed in the context of the facts of this case, does not constitute fundamental error. Accordingly, the Defendant's convictions should be affirmed.

I.

{25} There exist two distinct but interrelated aspects to a true fundamental error analysis. The first aspect, which could be characterized as the procedural prong of fundamental error, provides an exception to the preservation requirement. *See* Rule 12–216(B)(2) NMRA 2001 ("This [preservation] rule shall not preclude the appellate court from considering ... questions involving: ... fundamental error or fundamental rights of a party."). The second, or substantive aspect of fundamental error, provides the standard of review under which the issues claimed by the defendant are analyzed on appeal. In essence, it is the lens through which the Court reviews unpreserved error. *See, e.g., Cunningham*, 2000–NMSC–009, ¶ 21, 128 N.M. 711, 998 P.2d 176 ("Parties alleging fundamental error must demonstrate the existence of circumstances that 'shock the conscience' or implicate a fundamental unfairness within the system that would undermine judicial integrity if left unchecked."). To provide a foundation, I will discuss these two aspects of fundamental error analysis in turn so that I may better illuminate my disagreement with the majority's opinion.

A.

{26} The threshold question in any case on appeal is whether the claimed errors were properly preserved below. Rule 12–216, which defines the scope of appellate review, states: "To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked." With respect to jury instructions, a ruling or decision by the district court may be fairly invoked by either a formal objection to the instruction that is to be given to the jury by the court, or by tendering a correct instruction. *See, e.g., State v. Compton*, 57 N.M. 227, 236, 257 P.2d 915, 921 (1953) ("[W]here the court has not instructed on the subject it is sufficient to preserve the error if a correct instruction is tendered."). "The primary purpose of any objection to an instruction is, of course, to alert the mind of the judge to the claimed error contained in it, to the end that he may correct it." *Id.* Hence, "[t]imely objections to improper instructions must be made or error, if any, will be regarded as waived in every case." *State v. Garcia*, 46 N.M. 302, 307, 128 P.2d 459, 462 (1942).

{27} Although New Mexico courts generally adhere to the preservation requirement, Rule 12–216(B) provides exceptions that allow appellate review despite a party's failure to preserve error. Rule 12–216(B)(2) provides: "This rule shall not preclude the appellate court from considering ... questions involving: ... fundamental error or fundamental rights of a party." This doctrine of fundamental error is founded on every court's "inherent power to see that a man's fundamental rights are protected in every case." *State v. Garcia*, 19 N.M. 414, 421, 143 P. 1012, 1014 (1914).

> Where a man's fundamental rights have been violated, while he may be precluded by the terms of a statute or the rules of appellate procedure from insisting in this court upon relief from the same, this court has the power, in its discretion, to relieve him and to see that injustice is not done. The restrictions of the statute apply to the parties, not to this court.

Id. at 421, 143 P. at 1015. The Court, however, "will exercise this discretion very guardedly, and only where some fundamental right has been invaded, and never in aid of strictly legal, technical, or unsubstantial claims." *Id.* Accordingly, fundamental error will only apply in exceptional circumstances. *Cunningham,* 2000–NMSC–009, ¶ 13, 128 N.M. 711, 998 P.2d 176. Thus, the doctrine of fundamental error is more than a mere exception to the preservation requirement. It also provides the standard under which the issues claimed by the Defendant for the first time on appeal are reviewed. Therefore, review for fundamental error contains both procedural and substantive significance.

B.

{28} The fundamental flaw in the majority's analysis in this case is that it depicts fundamental error as merely an exception to the preservation requirement and utterly ignores the doctrine's substantive force. The majority, concluding that the Defendant did not properly preserve the claimed errors below, holds that "the omission of unlawfulness from instruction 12 constituted fundamental error." Majority Opinion at ¶ 11. Moreover, the majority finds that "because of its distance from the erroneous elements instruction and the unlikelihood that the jury would, sua sponte, graft language from a proper instruction onto improper instructions, the single proper instruction did not correct the improper self-defense instruction." Majority Opinion at ¶ 1. Hence, the majority reverses the Defendant's conviction for second degree murder by extricating the jury instructions from the context of the individual facts and circumstances of the case and reviews the instructions for facial errors. Such a technical and formalistic approach does not constitute review for fundamental error. *See Cunningham,* 2000–NMSC–009, ¶ 12, 128 N.M. 711, 998 P.2d 176 (recognizing that the doctrine of fundamental error is never used to aid "strictly legal, technical, or unsubstantial claims"). Instead, by limiting its analysis to an isolated review of the jury instructions, the majority in effect reviews this case for reversible error rather than for fundamental error.

{29} Fundamental error and reversible error are two distinct standards of review that have significantly different focuses and arise in different procedural circumstances. First, the procedural distinction between these two standards is apparent since review for reversible error arises when a Defendant preserves error below. This procedural distinction is significant because it shapes the Court's review on appeal and defines the scope of the Court's substantive analysis. For instance, where the defendant properly preserves an issue in the trial court, the appellate court is aware of where to focus its review on appeal. In contrast, where there is no specific preservation of error—in fact, where the defendant has waived all error—the court's focus on appeal is less articulate. As a result, the scope of the substantive review, when error is not preserved, is somewhat broader. I will illustrate these concepts below.

1.

{30} First, an example of review for reversible error is provided in *State v. Parish,* 118 N.M. 39, 878 P.2d 988 (1994). In *Parish,* the defendant, who was convicted of voluntary manslaughter, appealed his conviction on the basis of errors in the jury instructions. *Id.* at 41, 878 P.2d at 990. The defendant claimed that the trial court failed to "instruct the jury that they must decide whether the killing was unlawful when a claim of self-defense is raised" and that "the instructions failed to explicitly place the burden upon the State to prove that Defendant did not act in self-defense." *Id.* The Court reviewed the claimed errors under a reversible error standard of review since the defendant objected at trial to the jury instructions and offered other instructions that were refused. *See id.* at 42, 878 P.2d at 991; *see also Cunningham,* 2000–NMSC–009, ¶ 16, 128 N.M. 711, 998 P.2d 176 (recognizing that "*Parish* properly analyzed the jury instructions under a reversible error standard because the defendant in *Parish* not only objected to the proffered instructions, he also offered his own correct instructions"). Since the defendant alerted the court's attention to the errors in the jury instructions by objecting at trial, this Court focused its entire analysis on the claimed errors in the jury instructions.

{31} Therefore, under a reversible error standard, it is clear that the appellate court's substantive analysis is focused on the error preserved in the trial court—namely, the claimed error in the jury instructions. In determining whether the error claimed rises to the level of reversible error, the appellate court "will accept the slightest evidence of prejudice, and all doubt will be resolved in favor of the party claiming prejudice." *State v. Traxler,* 91 N.M. 266, 268, 572 P.2d 1274, 1276 (Ct.App.1977). To determine whether there is any evidence of prejudice, the appellate court will look to the jury instructions as a whole and assess whether "a reasonable juror would have been confused or misdirected" by the instructions. *Parish,* 118 N.M. at 42, 878 P.2d at 991. Accordingly, the focus in a reversible error analysis is placed entirely on the jury instructions.

2.

{32} The analysis under a fundamental error standard, however, is decidedly different than the analysis under a reversible error standard. *See Cunningham,* 2000–NMSC–009, ¶ 21, 128 N.M. 711, 998 P.2d 176.

> The main analytical distinction between a fundamental error analysis and a reversible error analysis is the level of scrutiny afforded to claims of error. Parties alleging fundamental error must demonstrate the existence of circumstances that "shock the conscience" or implicate a fundamental unfairness within the system that would undermine judicial integrity if left unchecked. Parties who have properly preserved an alleged error for appeal are afforded a much less onerous level of scrutiny under a reversible error standard as provided in *Parish.*

Id. (citations omitted). To claim that the analysis under fundamental error and reversible error is the same except that the Court invokes a fundamental error review when the error is not preserved "would eliminate the preservation of error requirement of our appellate jurisprudence" and "compromise the intent embodied in Rule 12–216." *Id.* at ¶ 18. Therefore, review under fundamental error is substantively different.

{33} In a fundamental error analysis, where the defendant has waived all error by failing to object, the Court's goal is to search for injustice. *See State v. Orosco,* 113 N.M. 780, 784, 833 P.2d 1146, 1150 (1992). "The rule of fundamental error applies only if there has been a miscarriage of justice, if the question of guilt is so doubtful that it would shock the conscience to permit the conviction to stand, or if substantial justice has not been done." *Id.* Thus, the doctrine provides this Court with the flexibility to review even unpreserved error to ensure that the interests of justice are served. The Court's focus in such a review, therefore, is not whether there is error in the jury instructions per se, but whether the defendant was wrongly convicted or suffered such an injustice that this court should not allow the conviction to stand. "To establish fundamental error, there must be a showing that error was of such magnitude that it affected the trial outcome." *State v. Jacobs,* 2000–NMSC–026, ¶ 58, 129 N.M. 448, 10 P.3d 127. Accordingly, we need to consider the individual facts and circumstances of the case to fulfill our role as the final arbiter of justice in the criminal justice system. This is not a limited inquiry as the majority's analysis suggests, but an exceedingly broad inquiry.

II.

{34} In the following section I analyze the present case pursuant to what I understand to be a true fundamental error analysis.

A.

{35} The primary question with respect to any case on appeal is whether the issues and errors presented were properly preserved. Upon review of the record, I find that the Defendant failed to properly preserve any of the claimed errors on which he seeks appellate review. First, at no time during trial did the Defendant object to the omission of unlawfulness from any of the essential elements instructions or alert the court's attention to the ambiguous statement regarding the State's burden of proof in Instruction 15. In fact, not only did the Defendant fail to object to these now claimed errors, but he also tendered essential elements instructions which omitted the element of unlawfulness as well as proposed several self-defense instructions which included the ambiguous burden

of proof statement of which the Defendant now complains. "Ordinarily a defendant may not base a claim of error on instructions he or she requested or to which he or she made no objection." *State v. Varela*, 1999-NMSC-045, ¶ 11, 128 N.M. 454, 993 P.2d 1280. "The defendant having failed to comply with the [preservation] Rule is not now in a position to complain that the court erred in the instruction[s] given." *State v. Sena*, 54 N.M. 213, 217, 219 P.2d 287, 289 (1950). Therefore, these errors were not properly preserved.

{36} Further, I also do not find that the Defendant's claimed error regarding the trial court's omission of UJI 14-5171 NMRA 2001 from the final jury instructions was properly preserved. Of course, I acknowledge that the Defendant tendered an instruction based on UJI 14-5171, which read:

> Evidence has been presented that the Defendant *killed* Marco LaPlante while defending himself.
>
> The *killing* is in self-defense if:
>
> 1. There was an appearance of immediate danger of death or great bodily harm to the defendant as a result of the victim coming his direction with a deadly weapon;
>
> 2. The Defendant was in fact put in fear by the apparent danger of immediate death or great bodily harm and *killed* Marco LaPlante because of that fear; and
>
> 3. A reasonable person in the same circumstances as the Defendant would have acted as the Defendant did.
>
> In considering this defense, and after considering all the evidence in the case, if you have a reasonable doubt as to Defendant's guilt, you must find him not guilty.

(Emphasis added.). The district court agreed to instruct the jury on justifiable homicide pursuant to the Defendant's tendered instruction and to place the instruction after the first and second degree murder instructions. For this reason, the Defendant argues that this Court should review this error pursuant to a reversible error standard of review. *See, e.g., Cunningham*, 2000-NMSC-009, ¶ 21, 128 N.M. 711, 998 P.2d 176 ("Parties who have properly preserved an alleged error for appeal are afforded a much less onerous level of scrutiny under a reversible error standard as provided in *Parish*."). Here, however, it is not that the district court failed to instruct on the subject of self-defense; rather the court, through inadvertence, gave the jury two self-defense instructions pursuant to UJI 14-5183 NMRA 2001. Thereby, the court mistakenly omitted UJI 14-5171.

{37} The court's mistake was apparent when the judge verbally instructed the jury at the close of the evidence. The judge read to the jury Instruction 15 as it appeared in the final jury instruction packet.

> Evidence has been presented that the Defendant acted while defending himself.
>
> The Defendant acted in self-defense if:
>
> 1. There was an appearance of immediate danger of death or great bodily harm to the Defendant as a result of being attacked with a deadly weapon by Marco LaPlante; and
>
> 2. The Defendant was in fact put in fear, by the apparent danger of immediate death or great bodily harm and *struck* Marco LaPlante because of that fear; and
>
> 3. The apparent danger would have caused a reasonable person in the same circumstances to act as the Defendant did.
>
> In considering this defense, and after considering all the evidence in the case, if you have a reasonable doubt as to the Defendant's guilt, you must find him not guilty.

(Emphasis added.). Despite the court's obvious oversight, the Defendant failed to alert the judge of this mistake:

> [W]here the court has instructed erroneously on the subject, although a correct instruction has been tendered on the point, if it leaves it doubtful whether the trial judge's mind was actually alerted thereby to the defect sought to be corrected by the requested instruction, the error is not preserved unless, in addition, the specific vice in the instruction given is pointed out to the trial court by proper objection.

State v. Henderson, 81 N.M. 270, 271, 466 P.2d 116, 117 (Ct.App.1970). Therefore, although the Defendant tendered UJI 14-5171, which the trial court accepted, he cannot "properly remain silent knowing that the court, in covering ... its instructions, has overlooked or inadvertently omitted an es-

sential element." *Id.* Under these circumstances, the court was not alerted to its inadvertence and therefore the claimed error was not properly preserved. Accordingly, because the Defendant failed to preserve the errors now claimed he "will be regarded as having waived the objection, and cannot [now] complain of the court's failure or refusal to give a proper instruction, or of an improper or inaccurate instruction which it has given." *Garcia,* 46 N.M. at 308, 128 P.2d at 462.

B.

{38} As discussed above, even if the Defendant fails to preserve, the Court may exercise its discretion to review for fundamental error. The initial question this Court must ask itself in a fundamental error analysis is whether the Defendant was wrongly convicted or suffered such injustice that this Court should not allow the conviction to stand. To determine whether the Defendant's conviction shocks the judicial conscience, the focus must preliminarily be directed at the conviction and the elements of the crime upon which the jury found the defendant guilty. "If there is substantial evidence ... to support the verdict of the jury, we will not resort to fundamental error." *State v. Rodriguez,* 81 N.M. 503, 505, 469 P.2d 148, 150 (1970); *see State v. Sisneros,* 79 N.M. 600, 606, 446 P.2d 875, 881 (1968) (holding that because there was ample evidence to support the conviction, whatever errors may have been committed failed to constitute a basis for finding fundamental error). Because I find substantial evidence in the record to show that the Defendant killed the victim without legal justification, and since the Defendant failed to demonstrate any circumstances that would "shock the conscience" or show a fundamental unfairness, I would hold that fundamental error did not occur in this case.

1.

{39} Here, the Defendant was convicted of second degree murder. Second degree murder is defined in NMSA 1978, § 30–2–1(B) (1994):

> Unless he is acting upon sufficient provocation, upon a sudden quarrel or in the heat of passion, a person who kills another human being without lawful justification or excuse commits murder in the second degree if in performing the acts which cause the death he knows that such acts create a strong probability of death or great bodily harm to that individual or another.

Accordingly, in the present case, the jury was given Instruction 12 that advised:

> For you to find the defendant guilty of second degree murder, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime.
>
> The defendant killed Marco La Plante;
>
> The defendant knew that his acts created a strong probability of death or great bodily harm to Marco La Plant;
>
> The defendant did not act as a result of sufficient provocation;
>
> This happened in New Mexico on or about 7th day of July, 1997.

See UJI 14–210 NMRA 2001. The Defendant's primary contention is that this instruction was erroneous because, as indicated in Section 30–2–1(B), unlawfulness is an essential element of second degree murder, yet it was omitted from Instruction 12.

{40} Of course, as defined in Section 30–2–1(B), unlawfulness is an element of second degree murder. However, "it is presumed that any killing of another is unlawful unless that killing is justified or excused." *Cunningham,* 2000–NMSC–009, ¶ 9, 128 N.M. 711, 998 P.2d 176; *State v. Noble,* 90 N.M. 360, 364, 563 P.2d 1153, 1157 (1977). It is the Defendant's burden to rebut this presumption of unlawfulness by producing some evidence, even slight evidence, to support the claim that the killing is justified. *State v. Duarte,* 1996–NMSC–038, ¶ 8, 121 N.M. 553, 915 P.2d 309.

{41} "It is well-settled that '[s]elf-defense [or defense of another] is a justification to all homicides and results in acquittal rather than mitigation.' " *State v. Gallegos,* 2001–NMCA–021, ¶ 9, 130 N.M. 221, 22 P.3d 689 (quoting *State v. Abeyta,* 120 N.M. 233, 239, 901 P.2d 164, 170 (1995), *abrogated on other grounds by State v. Campos,* 1996–NMSC–043, ¶ 32 n. 4, 122 N.M. 148, 921 P.2d 1266). To support an instruction on self-defense, the

Defendant must have presented some evidence that: " '[(1)] the defendant was put in fear by an apparent danger of immediate death or great bodily harm[;] [(2)] that the killing resulted from that fear[;] and [(3)] that the defendant acted as a reasonable person would act under those circumstances.' " *State v. Lopez*, 2000–NMSC–003, ¶ 23, 128 N.M. 410, 993 P.2d 727 (quoting *State v. Branchal*, 101 N.M. 498, 500, 684 P.2d 1163, 1165 (Ct.App.1984)). Therefore, an instruction on self-defense should be given if the Defendant produces evidence " 'sufficient to allow reasonable minds to differ as to *all* elements of the defense.' " *Id.* (emphasis added). Once the Defendant presents such evidence as to each element of self-defense, it is the court's duty " 'to instruct the jury fully and clearly on all phases of the law on [that] issue.' " *Id.* (quoting *State v. Heisler*, 58 N.M. 446, 455, 272 P.2d 660, 666 (1954)).

{42} In the present case, the Defendant failed to introduce sufficient evidence to allow reasonable minds to differ as to all the elements of self-defense. During trial the Defendant testified that he was placed in fear when the victim approached him with what appeared to be a gun. As a result of this fear, the Defendant struck the victim in the head or shoulder with a whiskey bottle, at which point the victim dropped the weapon and he and the Defendant fell to the ground and began fighting. While on the ground, the victim was on top of the Defendant and six to seven other individuals began kicking the victim in the head and back. Defendant stated that when he got up from the ground he stood above the victim, and along with five to seven other individuals, continued to kick him. On direct examination, the Defendant testified:

Q: Then what happened?

A: Then they pull him off me a few feet and that's when I get up.

Q: What were you feeling at that point? How were you feeling?

A: I was mad.

Q: Why were you mad?

A: I was just mad . . .

Q: So, Lathan, at that point were you able to get up?

A: Excuse me?

Q: Were you able to get up?

A: Um, yeah.

Q: Do you recall anyone helping you?

A: No, I don't.

Q: Ok. Now did you see what had happened to Marco LaPlante before you got up?

A: No.

Q: So, so what did you do then Lathan?

A: I kicked him.

Q: Ok, describe that . . . describe how you got up . . .

A: I got up using my hands and getting up and running, kicking him.

Q: Do you know where you kicked him?

A: No, I can't really say where I kicked him.

Q: Why?

A: I know I kicked him.

Q: Why can't you say where you kicked him, you can't remember or what . . .

A: I know I kicked him, but I can't, I don't know the actual, the actual points where I was planning to kick. I just was kicking him.

Q: Ok, was it because you were just real mad.

A: Yes.

Q: Ok, did you, could you have kicked him in the head?

A: I could have.

According to the Defendant, therefore, after the victim was no longer a threat, after the victim was on the ground being kicked by five to seven other individuals, the Defendant stood up and, as stated in the Defendant's Brief in Chief, "*angrily* started kicking LaPlant." (Emphasis added.).

{43} Even under the defense's theory of the case, the Defendant was not entitled to a self-defense instruction. The Defendant failed to present any evidence to show that the killing of the victim resulted from the Defendant's initial fear or that the Defendant acted as a reasonable person would act under the same circumstances. Instead, the Defendant's right to use force ended when the danger ceased and the victim was disabled and on the ground being repeatedly kicked by the Defendant. *See, e.g., State v. Garcia*, 83 N.M. 51, 54, 487 P.2d 1356, 1359 (Ct.App.

1971). Therefore, there was insufficient evidence to allow reasonable minds to differ on the second and third elements of self-defense. As such, although the Defendant may have been entitled to a self-defense instruction as a justification to the initial aggravated battery—when the Defendant struck the victim with the whiskey bottle—the Defendant failed to introduce any evidence that showed that the killing of the victim resulted from the Defendant's exercise of self-defense. Therefore, the evidence at trial was not sufficient to require submission of instructions to the jury on self-defense as to any of the homicide charges.

{44} Moreover, the extent of the victim's injuries is not indicative of the Defendant fearing for his life and acting out of self-defense. Patricia McFeely, a forensic pathologist for the Office of the Medical Investigator for the State of New Mexico, performed an autopsy on the victim's body. Dr. McFeely testified that the victim died four days after the incident from a combination of fatal head injuries. There was subdural bleeding on the left side of the brain and areas of bruising or contusions on the brain on both the right and left side. As a result, there was a lot of swelling to the victim's brain. The doctor testified that the areas of bruising on the brain were indicators of a substantial amount of force.

{45} In addition to the significant injuries to his brain, the victim also sustained smaller, less significant injuries on his arms, around his head, right eye, and right eyelid, extending down the right side of his face. Also, there were abrasions over his collarbone, right back and shoulder, on his left upper arm, back of his left lower arm, and on his knuckle. Internally, inside his stomach, there were areas of about four by three inches of soft tissue hemorrhage, which would indicate substantial blows to the abdomen. The injuries sustained by the victim were "extremely brutal and unnecessary blows by the defendant not consistent with self-defense." *State v. Martinez,* 95 N.M. 421, 423, 622 P.2d 1041, 1043 (1981); *see, e.g., Lopez,* 2000–NMSC–003, ¶¶ 25–26, 128 N.M. 410, 993 P.2d 727 (holding that although the victim was the initial aggressor, the defendant was not entitled to a self-defense instruction when the evidence showed that the defendant inflicted fifty-four stab wounds upon the victim and crushed his head with a rock).

{46} Consequently, "the facts in evidence did not warrant submitting the issue of self-defense." *State v. Heisler,* 58 N.M. 446, 452, 272 P.2d 660, 664 (1954). "Hence, in so far as the jury was instructed at all on that subject, the defendant got more than he was entitled to on the evidence and error, if any, in the instructions so given may not be made the basis of a reversal." *Id.; see also State v. Livernois,* 1997–NMSC–019, ¶ 15, 123 N.M. 128, 934 P.2d 1057 (holding that where there is sufficient evidence for the jury to conclude that the defendant killed the victim with the requisite intent, any deficiency in the jury instructions is inconsequential).

III.

{47} Despite the broad nature of fundamental error review, the majority reverses the Defendant's conviction for second degree murder by taking the jury instructions out of context and analyzing the claimed error in isolation. The notion that in a fundamental error analysis we should look solely to the jury instructions ignores the entire foundation upon which the doctrine of fundamental error is built and confuses a reversible error standard for a fundamental error standard. It is simply inconsistent to assert that under this broad doctrine, where we go in search of injustice, that we should be limited to looking only at the jury instructions. In deciding this case, as well as others like it, it is necessary to look far beyond the jury instructions at issue; we need to consider the individual facts and circumstances of the case and contemplate our role as the final arbiter in the criminal justice system. This is not a limited inquiry. To assert otherwise, as the majority opinion does, ignores the basic precepts of the doctrine of fundamental error. Upon my review of the individual facts and circumstances of this case, I find substantial evidence in the record to show that the Defendant killed the victim without any legal justification. Since the Defendant failed to demonstrate any circumstances that would shock the conscience or show a fundamental

unfairness, I find no fundamental error. For these reasons, I respectfully dissent.

SERNA, Chief Justice (dissenting).

{48} I respectfully dissent. I concur in Justice Baca's dissent and agree with his thorough review of the doctrine of fundamental error. I write separately to express one additional reason why I believe the instructional error in this case does not amount to fundamental error. I believe that the element of unlawfulness was necessarily established under the instructions given by the trial court. "Clearly, when a jury's finding that a defendant committed the alleged act, under the evidence in the case, necessarily includes or amounts to a finding on an element omitted from the jury's instructions, any doubt as to the reliability of the conviction is eliminated and the error cannot be said to be fundamental." *Orosco,* 113 N.M. at 784, 833 P.2d at 1150.

{49} "It is the element of unlawfulness that is negated by self-defense." *Parish,* 118 N.M. at 43, 878 P.2d at 992. To include the element of unlawfulness, the trial court should have instructed the jury that the State had to prove beyond a reasonable doubt that Defendant did not act in self-defense. This instruction could have been contained in the essential elements instruction or in the instruction defining self-defense. *See State v. Sosa,* 1997–NMSC–032, ¶ 31, 123 N.M. 564, 943 P.2d 1017; *State v. Armijo,* 1999–NMCA–087, ¶ 26, 127 N.M. 594, 985 P.2d 764; *see also State v. Puga,* 85 N.M. 204, 207, 510 P.2d 1075, 1078 (Ct.App. 1973) ("Instructions are to be considered as a whole; all elements of the offense need not be contained in one instruction.").

{50} The trial court did not instruct on the State's burden to disprove self-defense beyond a reasonable doubt in the instructions pertaining to second degree murder; however, the trial court did instruct the jury that, in order to prove second degree murder, the State had to prove beyond a reasonable doubt that "[t]he defendant did not act as a result of sufficient provocation." In New Mexico, as the jury was told, " '[s]ufficient provocation' can be any action, conduct or circumstances which arouse anger, rage, fear, sudden resentment, terror or other extreme emotions. The provocation must be such as would affect the ability to reason and to cause a temporary loss of self control in an ordinary person of average disposition." UJI 14–222 NMRA 2001. By contrast, self-defense has the objective component that the defendant act as a reasonable person would act under the circumstances. However, self-defense, like sufficient provocation, also contains a subjective component which requires that the defendant be put in fear of immediate death or great bodily harm. In fact, "New Mexico has long recognized that 'heat of passion' [, or sufficient provocation,] includes fear for one's own safety that may result in an unreasonable belief in the need to defend oneself." *State v. Abeyta,* 120 N.M. 233, 240, 901 P.2d 164, 171 (1995). "If the jury rejects the theory of self-defense, it may still find that the defendant acted under provocation of fear and may mitigate the charge of murder to the lesser charge of voluntary manslaughter." *Id.* "[T]he critical difference between self-defense and voluntary manslaughter lies not in provocation or the emotion of fear, but rather in the reasonableness of the defendant's conduct in killing." *Id.* (quoted authority and quotation marks omitted). "It is not unreasonable that the accused should be found guilty of voluntary manslaughter where the plea of self-defense fails." *Id.*

{51} In the present case, based on the essential elements instruction for second degree murder given to the jury, the jury found beyond a reasonable doubt that Defendant did not act with sufficient provocation. As a result, the jury found beyond a reasonable doubt that Defendant did not act out of fear for his own safety. Because the jury found beyond a reasonable doubt that Defendant did not kill the victim as a result of a subjective fear, the jury necessarily found beyond a reasonable doubt that one element of self-defense, the subjective element of fear for one's life, was not present under the facts in this case. The jury's rejection of voluntary manslaughter, and verdict of guilty on the charge of second degree murder, "necessarily includes or amounts to a finding on an element omitted from the jury's instructions." *Orosco,* 113 N.M. at 784, 833 P.2d at 1150.

{52} *Parish* supports this analysis. In *Parish*, the jury convicted the defendant of voluntary manslaughter, but "the jury was first asked to decide whether Parish committed second degree murder, which is distinguished from voluntary manslaughter by the element of provocation." *Parish*, 118 N.M. at 46, 878 P.2d at 995. We were concerned in *Parish* that the instruction on provocation contained language that was similar to the instruction on self-defense. *Id.* "[T]he jury could easily have found that [the facts of the case] fell within the definition of self-defense. However, upon considering the instruction on voluntary manslaughter, the jury may also have found in these same facts the element of provocation. Both instructions describe a situation which arouses fear in the Defendant...." *Id.* As a result, "[i]t is plausible that a reasonable juror might be confused by first finding sufficient provocation to reduce the charge from second degree murder to voluntary manslaughter, and to then discard the concept of provocation and use the same facts that evinced provocation to prove self-defense." *Id.* As this discussion demonstrates, the distinction between voluntary manslaughter and self-defense, and the defendant's conviction of voluntary manslaughter, was critical to our analysis of the jury instructions in *Parish*.

{53} Unlike *Parish*, the jury in the present case rejected voluntary manslaughter based on an elements instruction that contained the appropriate burden of proof; the jury rejected the first step described in *Parish* of finding sufficient provocation. Accordingly, the jury was not faced with the question of distinguishing between provocation from self-defense. In other words, the jury rejected "imperfect" self-defense and, in so doing, also implicitly rejected "perfect" self-defense. *See Abeyta*, 120 N.M. at 240, 901 P.2d at 171 ("Although the unreasonable belief in the need for self-defense may well be termed imperfect self-defense, this label is somewhat misleading. Such conduct is not a true defense and does not justify the killing. Rather, the claim of imperfect self-defense simply presents an issue of mitigating circumstances that may reduce murder to manslaughter."). By finding beyond a reasonable doubt that the mitigating circumstance of sufficient provocation was not present, the jury necessarily also determined that the killing was "without lawful justification or excuse." NMSA 1978, § 30-2-1(B) (1994).

{54} In *Orosco*, this Court cautioned:

> [U]nder the rule of fundamental error reversal is required only when the interests of justice so require. A rule of automatic reversal would mandate a new trial in every instance of a failure to instruct, even though it was not only undisputed but indisputable that the element was met. Such a result, in our view, would be a perversion of justice, a classic demonstration of profoundly inequitable results that follow when the judiciary worships form and ignores substance.

113 N.M. at 785, 833 P.2d at 1151 (quoted authority and quotation marks omitted). In this case, it is indisputable that the State demonstrated beyond a reasonable doubt that Defendant did not act in self-defense or with sufficient provocation. As a result, the majority's reversal of Defendant's second degree murder conviction elevates form above substance. For these reasons, and for the reasons expressed by Justice Baca, I respectfully dissent.

2001-NMSC-034

34 P.3d 1148

Michelle DELGADO, as personal representative of the estate of Reynaldo Delgado, individually, and as the parent of Danielle Delgado, a minor child, and Gabrielle Delgado, a minor child, Plaintiff-Petitioner,

v.

PHELPS DODGE CHINO, INC., a Delaware corporation, Charlie White, individually and in his corporate capacity, and Mike Burkett, individually and in his corporate capacity, Defendants-Respondents.

No. 26,360.

Supreme Court of New Mexico.

Oct. 29, 2001.

McGinn & Associates, P.A., Randi McGinn, Clay Campbell, Albuquerque, NM, for Petitioner.

Silva, Reider & Maestas, P.C., Paul Maestas, Christopher A. Riehl, Albuquerque, NM, for Respondents.

Carpenter & Chavez, William H. Carpenter, David Stout, Michael B. Browde, Albuquerque, NM, for Amicus Curiae New Mexico Trial Lawyers Association.

Sandenaw, Carrillo & Piazza, P.C., Leonard J. Piazza, Las Cruces, NM, for Amicus Curiae New Mexico Defense Lawyers Association.

OPINION

FRANCHINI, Justice.

{1} Reynaldo Delgado died following an explosion that occurred at a smelting plant in Deming, New Mexico, after a supervisor ordered him to perform a task that, according to Petitioner, was virtually certain to kill or cause him serious bodily injury. Respondents allegedly chose to subject Delgado to this risk despite their knowledge that he would suffer serious injury or death as a result. Delgado's widow brought a number of tort claims against Phelps Dodge and the individual supervisors who allegedly caused Delgado's death. The trial court dismissed the case on the grounds that the Workers' Compensation Act ("the Act") provides the exclusive remedy for Delgado's death, and that Respondents therefore enjoy immunity from tort liability. The Court of Appeals upheld that ruling in a memorandum opinion. *See Delgado v. Phelps Dodge Chino, Inc.*, NMCA 20,972, slip. op. (May 3, 2000). We granted certiorari to determine whether Respondents' behavior falls within the Act's exclusivity provisions. Our review of the Act reveals that it is effectively silent on the scope of employer exclusivity. Unequipped with legislative guidance on the matter, we apply NMSA 1978, § 52-5-1 (1990) and conclude that worker and employer rights under the Act must be subject to the same standard of conduct and equivalent consequences for misconduct. Accordingly, we reject the "actual intent test" and hold that when an employer willfully or intentionally injures a worker, that employer, like a worker who commits the same misconduct, loses the rights afforded by the Act. *See* NMSA 1978, § 52-1-11 (1989). For purposes of the Act, willfulness occurs when: (1) the worker or employer engages in an intentional act or omission, without just cause or excuse, that is reasonably expected to result in the injury suffered by the worker; (2) the worker or employer expects the injury to occur, or has utterly disregarded the consequences of the intentional act or omission; and (3) the intentional act or omission proximately causes the worker's injury. We reverse the Court of Appeals and remand to the trial court to apply the test we adopt today.

I.

{2} In reviewing a trial court's decision to grant a motion to dismiss under Rule 1-012(B)(6) NMRA 2001, we accept as true all facts properly pleaded. *See N.M. Life Ins. Guar. Ass'n v. Quinn & Co.*, 111 N.M. 750, 753, 809 P.2d 1278, 1281 (1991). For purposes of this appeal, we therefore accept as true the following facts, which were properly pleaded in Petitioner's complaint.[1]

{3} In the summer of 1998, thirty-three-year-old Reynaldo Delgado resided in Deming, New Mexico, with his wife, Petitioner Michelle Delgado, and two minor children. Mr. Delgado had been working at the Phelps

1. Respondents argue that we must limit our review to those facts alleged on the face of the complaint, while Petitioner suggests that we may consider facts submitted outside the complaint that were not considered by the trial court. Because we find the facts alleged in the complaint sufficient to resolve the case, we decline to rule on this issue.

Dodge smelting plant in Hurley, New Mexico, for two years. The smelting plant distills copper ore from unuseable rock, called "slag," by superheating unprocessed rock to a temperature in excess of 2,000 degrees Fahrenheit. During the process, the ore rises to the top, where it is harvested, while the slag sinks to the bottom of the furnace where it drains through a valve called a "skim hole." From there, the slag passes down a chute into a fifteen-foot-tall iron cauldron called a "ladle," located in a tunnel below the furnace. Ordinarily, when the ladle reaches three-quarters of its thirty-five-ton capacity, workers use a "mudgun" to plug the skim hole with clay, thus stopping the flow of molten slag and permitting a specially designed truck, called a "kress-haul," to enter the tunnel and lift and remove the ladle.

{4} On the night of June 30, Delgado's shorthanded work crew, under the supervision of Mike Burkett and Charlie White, was being pressured to work harder in order to compensate for the loss of production and revenue incurred after a recent ten day shut down. Suddenly, the crew experienced an especially dangerous emergency situation known as a "runaway." The ladle had reached three-quarters of its capacity but the flowing slag could not be stopped because the mudgun was inoperable and manual efforts to close the skim hole had failed. To compound the situation, the consistency of the slag caused it to flow at a faster rate than ever, thus resulting in the worst runaway condition that many of the workers on the site had ever experienced. Respondents could have shut down the furnace, thereby allowing the safe removal of the ladle of slag. However, in order to avoid economic loss, Respondents chose instead to order Delgado, who had never operated a kress-haul under runaway conditions, to attempt to remove the ladle alone, with the molten slag still pouring over its fifteen-foot brim. In doing so, Respondents knew or should have known that Delgado would die or suffer great bodily harm.

{5} When Delgado entered the tunnel, he saw that the ladle was overflowing and radioed White to inform him that he was neither qualified nor able to perform the removal. White insisted. In response to Delgado's renewed protest and request for help, White again insisted that Delgado proceed alone. Shortly after Delgado entered the tunnel, the lights shorted out and black smoke poured from the mouth of the tunnel. Delgado's co-workers watched as he emerged from the smoke-filled tunnel, fully engulfed in flames. He collapsed before co-workers could douse the flames with a water hose. "Why did they send me in there?" Delgado asked co-workers, "I told them I couldn't do it. They made me do it anyway. Charlie sent me in." Delgado had suffered third-degree burns over his entire body and died three weeks later in an Arizona hospital.

{6} The dilapidated kress-haul, recovered after the incident, exemplified the horror of the night's events. The vehicle's windows and tires had melted from the overspilled slag. The caps to the kress-haul's gas tanks were missing and the entire vehicle had burned. Delgado had managed to secure one of the ladle's hooks to the kress-haul before the flames consumed him.

{7} On December 1, 1998, Petitioner filed a complaint in district court against Respondents Phelps Dodge Chino, Inc., White, and Burkett. The complaint stated actions for wrongful death and loss of consortium, prima facie tort, and intentional infliction of emotional distress based on the theory that in ordering Delgado to remove the overflowing ladle, Respondents acted intentionally, with the knowledge that Delgado would be seriously injured and killed as a result of their actions. Respondents filed a motion to dismiss, pursuant to Rule 1–1012(B)(6) ("failure to state a claim upon which relief can be granted"). Judge Jeffreys granted the motion, finding that Petitioner's claims, even if proven true, established only that Respondents "did engage in a series of deliberate or intentional acts which they knew or should have known would almost certainly result in serious injury or death to Reynaldo Delgado, but the complaint falls short of alleging that [they] actually intended to harm Reynaldo Delgado."

{8} In a memorandum opinion, the Court of Appeals affirmed the trial court's decision to grant the motion to dismiss. *See Delgado,* NMCA 20,972, slip op. Citing *Johnson Controls World Services, Inc. v. Barnes,* 115 N.M. 116, 119, 847 P.2d 761, 764 (Ct.App. 1993), and 6 Arthur Larson & Lex K. Lar-

son, *Larson's Workers' Compensation Law* § 103.03 (2000), the Court of Appeals held that the Act provides an employer immunity from tort liability unless the worker's injury stems from the employer's "actual intent" to injure the worker. *See Delgado,* NMCA 20,-972, slip op. at 5. The Court affirmed the dismissal because it agreed with the trial court that Petitioner's complaint failed to allege facts that established actual intent. *See id.* at 6.

{9} Petitioner argues that the Court of Appeals erred in affirming the trial court because: (1) *Johnson Controls* misinterprets the term "accident"; (2) *Johnson Controls* contradicts rules of statutory construction by inserting the requirement of actual intent; (3) intentional acts for purposes of the Act should be defined in the same way as intentional acts in other contexts; (4) the actual intent test creates an absurd result; and (5) the actual intent test violates equal protection. Petitioner asks us to adopt a test that would lift the bar of exclusivity when the employer knows that its conduct is substantially certain to result in the worker's serious injury or death. In the alternative, Petitioner argues that Respondents' conduct satisfied the actual intent test.

{10} Respondents counter that Petitioner failed to preserve her argument that *Johnson Controls* was wrongly decided, and that, in any case, stare decisis binds this Court to application of the actual intent test. They argue that *Johnson Controls* was decided correctly, that the actual intent test is both well-established and well-reasoned, and that the substantial certainty test proposed by Petitioner must be rejected. Respondents also suggest that the New Mexico Legislature has implicitly approved the actual intent test in a memorial that encourages the judicial branch "to exercise careful judgment to maintain the balance between exclusive remedy and tort law." We decline to interpret this memorial as an endorsement of the actual intent test and therefore do not address it further.

{11} Respondents' argument that Petitioner failed to preserve her position that *Johnson Controls* was wrongly decided also lacks merit. We agree with Petitioner that a trial court is incapable of overruling an appellate court's ruling. Here, Respondent concedes that Petitioner preserved her argument that Respondents were not entitled to exclusivity. Her corollary argument that *Johnson Controls* should be overruled need not have been raised in the trial court, where no ruling on the issue could have been made. Petitioner's argument is properly raised for the first time on appeal. We therefore turn to the merits of that argument.

II.

{12} When a worker suffers an accidental injury and a number of other preconditions are satisfied, the Act provides a scheme of compensation that affords profound benefits to both workers and employers. The injured worker receives compensation quickly, without having to endure the rigors of litigation or prove fault on behalf of the employer. *See Sanchez v. M.M. Sundt Constr. Co.,* 103 N.M. 294, 296–97, 706 P.2d 158, 160–61 (Ct. App.1985) ("The Act, in effect, is designed to supplant the uncertainties of tort remedies and the burden of establishing an employer's negligence with a system of expeditious and scheduled payments of lost wages based on accidental injury or death in the course and scope of employment.") (citing *Gonzales v. Chino Copper Co.* 29 N.M. 228, 222 P. 903 (1924)). The employer, in exchange, is assured that a worker accidentally injured, even by the employer's own negligence, will be limited to compensation under the Act and may not pursue the unpredictable damages available outside its boundaries. *See* NMSA 1978, § 52–1–9 (1973).[2] The Act represents

2. Section 52–1–9 reads:

The right to the compensation provided for in this act, in lieu of any other liability whatsoever, to any and all persons whomsoever, for any personal injury accidentally sustained or death resulting therefrom, shall obtain in all cases where the following conditions occur:

A. at the time of the accident, the employer has complied with the provisions thereof regarding insurance;

B. at the time of the accident, the employee is performing service arising out of and in the course of his employment; and

C. the injury or death is proximately caused by accident arising out of and in the course of his employment and is not intentionally self-inflicted.

See also, NMSA 1978 §§ 52–1–6 (1990); 52–1–8 (1989).

the "result of a bargain struck between employers and employees. In return for the loss of a common law tort claim for accidents arising out of the scope of employment, [the Act] ensures that workers are provided some compensation." *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶ 22, 127 N.M. 47, 976 P.2d 999 (citation omitted); *see also Kent Nowlin Constr. Co. v. Gutierrez*, 99 N.M. 389, 390, 658 P.2d 1116, 1117 (1982) (describing exclusivity as striking "a balance between the worker's need for expeditious payment and the employer's need to limit liability."). This "bargain" is based on "a mutual renunciation of common law rights and defenses by employers and employees alike." NMSA 1978, § 52-5-1 (1989).

{13} The Act is subject to abuse from both sides of this *quid pro quo*. An unscrupulous worker, for example, might seek recovery from a self-induced injury, knowing that the Act generally awards compensation regardless of fault. An employer, on the other hand, may abuse the Act by subjecting a worker to injury after determining that the economic advantage of the injurious work outweighs the limited economic detriment that the Act will impose upon the employer after the injury occurs. In part to prevent against such bilateral abuse, the Act limits the availability of compensation only to those workers "injured *by accident* arising out of and in the course of his [or her] employment." NMSA 1978, § 52-1-2 (1987) (emphasis added).

{14} The Act does not define the term "accident," but our courts have come to define it according to its ordinary usage to mean "an unlooked-for mishap or some untoward event that is not expected or designed." *Cisneros v. Molycorp, Inc.*, 107 N.M. 788, 791, 765 P.2d 761, 764 (Ct.App.1988); *see also Aranbula v. Banner Mining Co.*, 49 N.M. 253, 258, 161 P.2d 867, 870 (1945). The Act refines this definition by exemplifying three categories of conduct that will render a worker's injury non-compensable. Under Section 52-1-11, "[n]o compensation shall become due or payable from any employer under the terms of [the Act] in event such injury was occasioned by the intoxication of such worker or willfully suffered by him [or her] or intentionally inflicted by himself [or herself]." The Legislature's refusal to compensate workers for injuries stemming from these three forms of misconduct indicates that the Legislature considered such injuries "non-accidental." This understanding of "accidental injury" finds support in common sense: injuries resulting from intoxication, willfulness, or intentional self-infliction cannot be described as an unexpected consequence of such misconduct.

{15} The Legislature clearly intended to extend employers' privilege of immunity from tort liability, like the worker's privilege of expedited compensation, only to injuries accidentally sustained. Under Section 52-1-9(C), exclusivity applies only when "the injury or death is proximately caused by accident arising out of and in the course of his [or her] employment. . . ." While Section 52-1-11 defines the sort of worker misconduct that will render a resulting injury non-accidental and therefore non-compensable, the Act contains no such provision with regard to employer misconduct.

{16} Rather than using other provisions in the Act to determine when employer misconduct should deprive the employer of exclusivity, our courts have, until now, uniformly deferred to Professor Larson's popular treatise. *See, e.g., Coleman v. Eddy Potash, Inc.*, 120 N.M. 645, 652-53, 905 P.2d 185, 192-93 (1995); *Flores v. Danfelser*, 1999-NMCA-091, ¶¶ 14-15, 127 N.M. 571, 985 P.2d 173; *Johnson Controls*, 115 N.M. at 119, 847 P.2d at 764; *Gallegos v. Chastain*, 95 N.M. 551, 553, 624 P.2d 60, 62 (Ct.App.1981); *Sanford v. Presto Mfg. Co.*, 92 N.M. 746, 748, 594 P.2d 1202, 1204 (Ct.App.1979). In each of these cases, without providing a critical analysis of its legal rationale or repercussions, New Mexico courts ratified Professor Larson's vigorous endorsement of the "actual intent" test for determining whether employer misconduct renders a worker's injury compensable outside the Act. Under this test, "in order to allege matters which will render an employer liable in tort outside the [Act], the plaintiff must allege matters indicating that the employer intended to injure the plaintiff." *Johnson Controls*, 115 N.M. at 119, 847 P.2d at 764. In order to satisfy this burden, in turn, the worker must prove that the employers intended a "deliberate inflic-

tion of harm" upon the employee. *Id.* (citation omitted.).

{17} Several factors have given us cause to re-evaluate the actual intent test. First, the Act declares that "the Workers' Compensation Act . . . [is] not to be given broad liberal construction in favor of the claimant or employee on the one hand, nor are the rights and interests of the employer to be favored over those of the employee on the other hand." NMSA 1978, § 52–5–1 (1990). This principle precludes us from interpreting the Act in any way that would favor either the worker or the employer. As demonstrated below, we believe that the actual intent test favors employers.

{18} Second, this case exposes the bizarre policy engendered by the actual intent test. The actual intent test provides immunity from tort liability for all injuries inflicted by the employer except those rare, practically unprovable instances in which it is the employer's purpose to injure the worker. Petitioner accurately observes that this standard provides employers virtually absolute immunity, and "an employer who knows his acts will cause certain harm or death to an employee may escape personal responsibility for an act by merely claiming that he/she hoped the employee would make it." Even more disturbingly, the actual intent test encourages an employer, motivated by economic gain, to knowingly subject a worker to injury in the name of profit-making. As long as the employer is motivated by greed, rather than intent to injure the worker, the employer may abuse workers in an unlimited variety of manners while still enjoying immunity from tort liability. Notwithstanding the fervor with which Professor Larson defends the actual intent test and the near unanimity with which it has been accepted nationwide, *see* 6 Larson & Larson, *supra*, § 103.03D, we are wary of the policy it promotes.

{19} Third and finally, an implicit rejection of the actual intent test in an opinion recently authored by this Court has created inconsistent case law on the matter. *See Coates*, 127 N.M. 47, 976 P.2d 999, 1999–NMSC–013, ¶¶ 29–31. In *Coates*, we held that the plaintiff's tort claims based on sexual harassment were not barred by the exclusivity provisions of the Act. Wal–Mart could be sued outside the Act because, among other significant factors, its supervisors acted intentionally. *See id.* ¶ 31. We attributed intent to Wal–Mart, despite the absence of any proof that Wal–Mart actually intended to injure the plaintiff, because Wal–Mart knew that one of its supervisors was sexually harassing the plaintiff but failed to take action to stop the harassment. *See id.* Spurred by Section 52–5–1, our uneasiness with the policy precipitated by the actual intent test, and by inconsistent case law on the matter, we now reevaluate the actual intent test.

III.

{20} As discussed above, the Act limits its scope to accidents, barring both compensation and exclusivity when the worker sustains a non-accidental injury. Because the basis for limiting exclusivity depends on the non-accidental character of the injury, Professor Larson argues:

> the common-law liability of the employer cannot, under the almost unanimous rule, be stretched to include accidental injuries caused by the gross, wanton, wilful, deliberate, intentional, reckless, culpable or malicious negligence, breach of statute, or other misconduct of the employer short of a conscious and deliberate intent directed to the purpose of inflicting an injury.

6 Larson & Larson, *supra*, § 103.03, at 103–5. This passage has been cited with approval by at least two of the cases adopting the actual intent test. *See Johnson Controls*, 115 N.M. at 119, 847 P.2d at 764; *Sanford*, 92 N.M. at 748, 594 P.2d at 1204.

{21} Under this test, employers who intentionally inflict injuries, like workers who do the same, are deprived of their respective benefits under the Act. Thus, the actual intent test treats a worker who suffers an intentionally self-inflicted injury the same as an employer who intentionally inflicts the injury. Assuming that there is no deliberate intent to inflict an injury, however, the actual intent test treats workers and employers differently. Under Section 52–1–11, a worker's willfulness will render a resulting injury non-accidental and non-compensable. Under Professor Larson's approach to exclusivity, however, an injury caused by the *employer's* willfulness is considered accidental, thereby

preserving the employer's immunity from tort liability. Thus, for the purposes of defining "accidental injury," which in turn determines a party's rights available under the Act, the actual intent test creates disparate standards for workers and employers, and biases the Act in favor of the latter. As Petitioners observe, an employer seeking to avoid payment of compensation must satisfy a considerably lower burden of proof (that the injury resulted from the worker's willfulness or intentional self-infliction) than a worker seeking to pursue damages outside the Act (who must prove that the employer possessed a "conscious and deliberate intent directed to the purpose of inflicting an injury").

{22} As if anticipating an attack on the actual intent test, Professor Larson explains:

> If these decisions [applying the actual intent test] seem rather strict, one must remind oneself that what is being tested here is not the degree of gravity or depravity of the employer's conduct, but rather the narrow issue of the intentional versus accidental quality of the precise event producing injury. The intentional removal of a safety device or toleration of a dangerous condition may or may not set the stage for an accidental injury later. But in any normal use of the words, it cannot be said, if such an injury does happen, that this was deliberate infliction of harm comparable to an intentional left jab to the chin.

6 Larson & Larson, *supra*, § 103.03, at 103–9. Rather than relieving our concerns regarding the unfairness of the actual intent test, this passage merely rephrases them. According to Professor Larson, in determining whether or not to deprive an employer of immunity we ignore the "degree of gravity or depravity of the employer's conduct" unless it was comparable to "a left jab to the chin," because only then will it be "non-accidental." When determining whether to deprive a worker of compensation, however, we do consider the depravity of the worker's conduct, and withhold compensation when that conduct reaches a far lower level of intent than that attending a "left jab to the chin."

{23} Under the actual intent test, a single standard of culpability, namely willfulness, will prevent a worker from benefitting from the Act while preserving the corresponding benefits for the employer. This bias violates the explicit mandate of Section 52–5–1, which demands the equal treatment of workers and employers. In keeping with Section 52–5–1, we hereby disabuse New Mexico courts of the notion that an employer will be deprived of tort immunity only when the employer actually intends to injure the worker. We expressly overrule all case law that has required allegation or proof of an employer's actual intent to injure a worker as a precondition to a worker's tort recovery.[3]

IV.

{24} Under Section 52–5–1, employers seeking exclusivity must be held to the same standard of conduct, and suffer equivalent consequences for a violation of that standard, as workers seeking compensation. *See also* NMSA 1978, § 52–1–10 (1989) (providing an increase in compensation of ten percent for a worker injured due to the employer's failure to provide a safety device required by law or reason and a decrease in compensation of ten percent when the worker's injury stems from his or her own failure to follow statutory safety guidelines or to use a safety device supplied by the employer). In keeping with Section 52–5–1, we hold that the same standard of conduct that our Legislature deemed non-accidental for purposes of depriving a worker of compensation must determine whether an employer's misconduct renders an injury non-accidental for purposes of exclusivity. We hold that when an employer intentionally inflicts or willfully causes a worker to suffer an injury that would otherwise be exclusively compensable under the Act, that employer may not enjoy

3. Our survey of New Mexico case law indicates that the cases affected by our holding include our own *Coleman* decision, 120 N.M. at 652–53, 905 P.2d at 192–93, as well as *Flores*, 1999–NMCA–091, ¶¶ 12–17, 127 N.M. 571, 985 P.2d 173, *Johnson Controls*, 115 N.M. at 119, 847 P.2d at 764, *Maestas v. El Paso Natural Gas Co.*, 110 N.M. 609, 611–12, 798 P.2d 210, 212–13 (Ct.App. 1990), *Gallegos*, 95 N.M. at 553, 624 P.2d at 62, and *Sanford*, 92 N.M. at 748, 594 P.2d at 1204 from the Court of Appeals.

the benefits of exclusivity, and the injured worker may sue in tort.

{25} Our courts have promulgated two methods for defining willfulness for purposes of Section 52–1–11. According to *Tallman v. ABF (Arkansas Best Freight),* 108 N.M. 124, 133, 767 P.2d 363, 372 (Ct.App.1988) (citing *Christensen v. Dysart,* 42 N.M. 107, 76 P.2d 1 (1938)), willfulness "requires that the worker have knowledge of the peril and the ability to foresee the injury for which willful misconduct is to blame." Under the test employed in *Gough v. Famariss Oil & Ref. Co.,* 83 N.M. 710, 714, 496 P.2d 1106, 1110 (Ct.App. 1972) (citation omitted), willful misconduct means "the intentioned doing of a harmful act without just cause or excuse or an intentional act done in utter disregard for the consequences."

{26} Combining these tests, and keeping in mind our definition of "accident," we hold that willfulness renders a worker's injury non-accidental, and therefore outside the scope of the Act, when: (1) the worker or employer engages in an intentional act or omission, without just cause or excuse, that is reasonably expected to result in the injury suffered by the worker; (2) the worker or employer expects the intentional act or omission to result in the injury, or has utterly disregarded the consequences; and (3) the intentional act or omission proximately causes the injury.

{27} The first prong presents an objective threshold question. Under this prong, which is informed both by the *Tallman* requirement of foreseeability, *see Tallman,* 108 N.M. at 133, 767 P.2d at 372, and our longstanding definition of "accident," *see Cisneros,* 107 N.M. at 791, 765 P.2d at 764, we determine whether a reasonable person would expect the injury suffered by the worker to flow from the intentional act or omission. We recognize that certain workers, such as firefighters and police, may incur injuries that are reasonably expected, but which nevertheless fail this prong because the intentional act or omission was done with "just cause or excuse."

{28} The second prong requires an examination of the subjective state of mind of the worker or employer. If the worker or employer decided to engage in the act or omission without ever considering its consequences, this prong is satisfied. If, on the other hand, the worker or employer did consider the consequences of the act or omission, this prong will be satisfied only when the worker or employer expected the injury to occur. It will not be enough, for example, to prove that the worker or employer considered the consequences and negligently failed to expect the worker's injury to be among them.

{29} The third prong echoes Section 52–1–11's requirement that in order to render a worker's injury non-compensable willfulness must "cause" the injury. We interpret this causation requirement to refer to proximate cause. *See Estate of Mitchum v.Triple S Trucking,* 113 N.M. 85, 89, 823 P.2d 327, 331 (Ct.App.1991) ("Scrutiny of Section 52–1–11 indicates that our legislature, in enacting legislation establishing the affirmative defense of intoxication, followed the approach taken by a majority of states requiring proof that the worker's intoxication constituted a proximate cause of his or her injury.") (citations omitted).

{30} Respondents warn this Court that any deviation from the actual intent test will "visit an undo hardship upon employers in this State and wreak havoc with New Mexico's workers' compensation system." Even after the scope of exclusivity has been narrowed, the Act continues to provide immunity for negligence. Employer liability for intentional torts will still depend on the worker's ability to prove each element. Because we do not believe that the Act was ever intended to immunize employers from liability for intentional torts, we fail to see the hardship that our holding visits upon employers. *See Turner v. PCR, Inc.,* 754 So.2d 683, 689 (Fla.2000) ("[S]ince the workers' compensation scheme is not intended to insulate employers from liability for intentional torts, and is not to be construed in favor of either the employer or the employee, workers compensation should not affect the pleading or proof of an intentional tort.").

{31} To the extent that this case reflects an adverse development for employers, we remind Respondents that workers, whose

families may depend for livelihood on the compensation received under the Act, have consistently been, and will continue to be, deprived compensation under the same standard we now apply to employers. We also note that under the test presently adopted, employers may avert tort liability by simply refraining from intentionally or willfully injuring workers. Finally, we seriously doubt that employers are willfully injuring their workers with such frequency that the consequence of our decision to expose such employers to tort liability will be to "wreak havoc" with the workers' compensation system. The greater the impact this opinion has on the workers' compensation system, the more profound will have been its need.

V.

{32} We reverse the Court of Appeals, and remand to the trial court to apply the test announced herein.

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

WE CONCUR: PATRICIO M. SERNA, Chief Justice, JOSEPH F. BACA, Justice, PAMELA B. MINZNER, Justice and PETRA JIMENEZ MAES, Justice.

2001-NMCA-086

34 P.3d 1157

STATE of New Mexico, Plaintiff–Appellee,

v.

Robert Licon BARRAGAN, Defendant–Appellant.

No. 21,846.

Court of Appeals of New Mexico.

Sept. 17, 2001.

Patricia A. Madrid, Attorney General, Katherine Zinn, Ass't Attorney General, Santa Fe, NM, for Appellee.

Phyllis H. Subin, Chief Public Defender, Laurel A. Knowles, Ass't Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

PICKARD, Judge.

{1} Defendant appeals from the judgment entered after a jury found him guilty of aggravated burglary, possession of burglary tools, larceny over $100, and concealing identity. Defendant asserts five grounds for reversal: (1) the trial court erred in denying Defendant's motion to suppress evidence

seized pursuant to a protective search; (2) the jury instructions directed the jury to find that the market value of the items taken by Defendant was greater than $100; (3) the trial court erred in denying Defendant's motion for a directed verdict on the charge of possession of burglary tools and the aggravated portion of the charge of aggravated burglary; (4) the trial court abused its discretion in denying Defendant's motion for a mistrial; and (5) the trial court abused its discretion in allowing the State to reopen its case to introduce an in-court identification of Defendant. We hold that the officer who searched Defendant exceeded the scope of a protective search when he emptied Defendant's pockets after ascertaining that the item causing the bulge in Defendant's pants was not a weapon. For this reason, we reverse three of Defendant's convictions and remand for a new trial. We affirm Defendant's conviction for concealing his identity. Because we reverse Defendant's conviction for larceny based on the erroneous admission of evidence, it is unnecessary for us to reach Defendant's challenge to the jury instructions.

FACTS

{2} At approximately 2:20 a.m. on February 3, 1999, police officers responded to a report of a possible burglary at a commercial building in Las Cruces. The building houses two businesses separated by an eight-foot "dummy wall" that leaves a small gap between the top of the wall and the ceiling of the building. An automobile repair shop occupies the south side of the building, and an automobile parts store is located on the north side. The repair shop portion of the building also includes a separately secured, free-standing interior office. The burglar entered through an air conditioning vent above the office.

{3} When the police arrived at the business, they found a bay door to the repair shop partially open. The officers searched the repair shop and the parts store, but found no one inside. They did, however, find a stack of tools in a pile just inside the bay door as well as a small flashlight, which had been left on.

{4} After the officers had secured the interiors of the two businesses, the officers moved their search outside. Officer Syling, a K–9 officer, began a "wind scent" search with his dog, wherein the officer and dog position themselves downwind from an area such that the dog may detect the scent of persons upwind. After leaving the bay door, the dog alerted almost immediately. The dog lost the trail, but soon picked up a scent and alerted more strongly. Shortly after the dog alerted the second time, Officer Syling saw Defendant walk around the corner of a nearby building and notified other officers to stop and question Defendant.

{5} Officer Monget responded to Officer Syling's request. As he approached Defendant in his patrol car, Officer Monget saw that another officer had already stopped beside Defendant. As he got out of his car, Officer Monget heard the other officer ordering Defendant to stop, and Officer Monget began issuing verbal orders to stop. Officer Monget drew his gun, pointed it at Defendant, and ordered Defendant to get down on the ground. Defendant complied with Officer Monget's orders, and Officer Monget handcuffed Defendant.

{6} Officer Monget then stood Defendant up and began a protective search to ascertain whether Defendant was armed. Officer Monget testified that he felt hard objects in Defendant's pockets. The officer pulled out a hard plastic device four-to-five inches long, which one of the victims later identified as a dog training tool. At trial, Officer Monget testified that after feeling the device, he was unsure whether it was a weapon. After removing the dog training device, Officer Monget emptied Defendant's pockets, recovering two watches, some loose change, several video game tokens, a bandana, and a comb. The change, tokens, and watches were later identified as belonging to one of the victims.

{7} After the search, Officer Monget took Defendant back to the scene of the burglary to compare the soles of Defendant's shoes to footprints found near the air conditioning vent through which the burglar had entered the building. The prints appeared to match. The officers showed the items seized from Defendant to one of the business owners, who identified the objects as having been in the locked office within the repair shop. The owner later testified that the office door had

been pried open during the burglary, and that, after entering the office, the burglar appeared to have used a pry bar to open a locked cabinet.

{8} While taking pictures of the scene, the officers discovered a jacket in the air conditioning vent. After the jacket had been photographed, the officers removed it from the vent. They found a knife underneath the jacket. Neither the knife nor the jacket belonged to the owners of the two businesses.

{9} Prior to trial, Defendant moved to suppress the items seized during the pat-down search. The trial court denied Defendant's motion, and the case was heard by a jury. The jury found Defendant guilty of aggravated burglary, possession of burglary tools, larceny over $100, and concealing identity. This appeal followed.

DISCUSSION

I. Motion to Suppress

{10} Typically, in reviewing a trial court's denial of a motion to suppress, we determine whether the law was correctly applied to the facts, giving due deference to the factual findings of the lower court. *State v. Duquette,* 2000-NMCA-006, ¶ 7, 128 N.M. 530, 994 P.2d 776. We review de novo the trial court's application of the law to the facts. *State v. Paul T.,* 1999-NMSC-037, ¶ 8, 128 N.M. 360, 993 P.2d 74.

{11} Defendant challenges the trial court's denial of his motion to suppress on three grounds: (1) the officers lacked reasonable suspicion to stop Defendant; (2) by drawing their weapons, ordering Defendant to lie down on the ground, and then placing Defendant in handcuffs, the officers used excessive force to detain Defendant; and (3) the full search of Defendant's pockets exceeded the permissible bounds of an investigative detention. The State argues that the search was proper in all respects, but offers the inevitable discovery doctrine as an alternative justification for admitting the evidence should we decide that the search was improper. We conclude that the officers had reasonable suspicion to stop Defendant, but that the search of Defendant's pockets exceeded the scope of a pat-down search for weapons. We hold that the record is insufficient for us to evaluate the State's claim that the evidence is admissible under the inevitable discovery doctrine.

{12} "In appropriate circumstances and in an appropriate manner a police officer may approach a person for purposes of investigating possible criminal behavior, even though there is no probable cause to make an arrest." *State v. Watley,* 109 N.M. 619, 624, 788 P.2d 375, 380 (Ct.App.1989) (citing *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). An investigatory stop must be supported by a particularized suspicion, based on the totality of the circumstances known to the officer, that the particular individual being stopped is engaged in wrongdoing or was involved in a completed felony. *Id.* at 624, 788 P.2d at 380. In this case, Defendant was walking in the vicinity of a recent burglary at a late hour in a deserted neighborhood. The police dog alerted to a smell immediately upon leaving the garage, and, although the dog lost the scent for a brief period of time, he quickly regained it and led Officer Syling to where Defendant was walking. It appeared to the officer that Defendant emerged suddenly, as if he had previously been hiding. Officer Syling and other officers noted that although it was cold outside, Defendant was wearing a tank top and blue jeans. Under these circumstances, we conclude that the officers had reasonable suspicion to believe that Defendant may have been involved in the recent burglary. *See id.* (holding that officers had reasonable suspicion to stop suspect seen driving late at night only a short distance from the area in which a crime had been committed).

{13} Upon approaching Defendant, the officers ordered him to stop. Defendant did not respond immediately. Officer Monget then drew his gun, ordered Defendant to lie down on the ground, and, when Defendant complied, handcuffed Defendant before standing him up to conduct a protective search. Defendant argues that the force used by Officer Monget was excessive under the circumstances. We disagree. "Where there is reason for the officers to fear for their safety, they may unholster their guns and use reasonable force in effectuating the stop without such action automatically constituting an arrest." *State v. Lovato,* 112 N.M.

517, 522, 817 P.2d 251, 256 (Ct.App.1991). Officer Monget was investigating a burglary, an inherently dangerous crime for which officers may assume that a suspect is likely to be armed. *See State v. Cobbs,* 103 N.M. 623, 630, 711 P.2d 900, 907 (Ct.App.1985) (holding that the police have an automatic right to conduct a protective search of a burglary suspect because burglary is a crime for which an offender would likely be armed). Although there were several officers on the scene at the time that Officer Monget stopped Defendant, Defendant's hesitance in complying with the officers' earlier orders, his furtive behavior, and the inherently dangerous nature of the crime for which he was suspected justified Officer Monget in drawing his weapon and securing Defendant's hands until the officer could determine whether Defendant was in fact armed. *See, e.g., State v. Jimmy R.,* 1997–NMCA–107, ¶ 4, 124 N.M. 45, 946 P.2d 648. We reject Defendant's contention that police officers may not draw weapons during an investigatory stop unless the officers know in advance that the crimes for which they suspect an individual involved the use of a firearm or the officers are outnumbered by the suspects. Such a rule is not only untenable, but is unsupported by the cases cited by Defendant and will not be considered by this Court. *See State v. Chandler,* 119 N.M. 727, 733, 895 P.2d 249, 255 (Ct.App.1995) (stating that appellate court will not consider argument unsupported by precedent).

{14} Having concluded that Officer Syling was justified in conducting a protective search of Defendant, we now turn to the question of whether, in emptying Defendant's pockets, Officer Syling exceeded the scope of a protective search. During an investigatory stop, a protective search must be limited to that which is necessary to discover weapons that may be used to harm the officers or others nearby. *See Paul T.,* 1999–NMSC–037, ¶ 17, 128 N.M. 360, 993 P.2d 74. An officer may not only pat the outer clothing of a suspect, but may also remove a hard object if by touch the officer remains uncertain as to whether the object might be a weapon. *See id.* ¶ 18, 993 P.2d 74.

{15} Officer Monget testified that he felt several hard objects during his pat down of Defendant. The officer further testified that, after feeling a hard object approximately four to five inches long, he remained uncertain whether the object was a weapon. After removing the object, the officer ascertained that it was an ultrasonic pet training device. The officer then emptied Defendant's pockets, recovering loose change, tokens, two watches, a comb, and a bandana. No evidence was introduced at either the suppression hearing or at trial to indicate that Officer Monget suspected that any of these objects might be weapons. Without such testimony, we conclude that although Officer Monget was justified in removing the pet training device, he exceeded the scope of a protective search when he removed the remaining items. *See id.* ¶ 23, 993 P.2d 74 (quoting *People v. Collins,* 1 Cal.3d 658, 83 Cal.Rptr. 179, 463 P.2d 403, 406 (1970)) (" '[A]n officer who exceeds a pat-down without first discovering an object which feels reasonably like a knife, gun, or club must be able to point to specific and articulable facts which would reasonably support a suspicion that the particular suspect is armed with an atypical weapon which would feel like the object felt during the pat-down.' "). The rule allowing an officer to remove an object suspected to be a weapon does not give the officer carte blanche to empty a suspect's pockets. Under the circumstances of this case, where the officer did not state any reasons for believing the coins or watches might be weapons, and the officer removed a bandana, which was clearly not a weapon, we conclude that Officer Monget's actions exceeded the scope of the permissible search.

{16} The State argues that even if we hold that removing the coins, tokens, and watches exceeded the scope of the protective search, we should nonetheless uphold the trial court's denial of the motion to suppress on the ground that the evidence would have inevitably been discovered during an inventory search following Defendant's arrest. The State concedes that this argument was not made below, but argues that we should apply the "right for any reason" rule to uphold the trial court's denial of Defendant's motion to suppress.

{17} Although we may affirm a trial court's ruling on a ground not relied upon by the court or argued by the parties, we will not do so if reliance on the new ground would be unfair to the appellant, in this case Defendant. *See State v. Franks,* 119 N.M. 174, 177, 889 P.2d 209, 212 (Ct.App.1994). "In particular, it would be unfair to an appellant to affirm on a fact-dependent ground not raised below." *Id.* Because application of the inevitable discovery doctrine requires a trial court to make factual determinations, we will not uphold the trial court's ruling on that ground.

{18} The inevitable discovery doctrine is an exception to the exclusionary rule that permits the admission of unlawfully seized evidence if that evidence would have been seized independently and lawfully in due course. *State v. Johnson,* 1996–NMCA–117, ¶ 19, 122 N.M. 713, 930 P.2d 1165; *State v. Corneau,* 109 N.M. 81, 90, 781 P.2d 1159, 1168 (Ct.App.1989). In order for the inevitable discovery doctrine to apply, the lawful means by which the evidence could have been attained must be wholly independent of the illegal search. *See State v. Wagoner,* 2001–NMCA–014, ¶ 13, 130 N.M. 274, 24 P.3d 306. The State argues that the officers had probable cause to arrest Defendant, and therefore the evidence would inevitably have been seized during an inventory search following the arrest. In order for a trial court to find in favor of the State, the court would be required to make at least three factual findings: (1) whether, without the illegally seized evidence, the officers had probable cause to arrest Defendant; (2) whether the officers would in fact have made the arrest under such circumstances; and (3) whether an inventory that would have revealed the items was standard procedure. *See, e.g., State v. Romero,* 2001–NMCA–046, ¶¶ 11–17, 130 N.M. 579, 28 P.3d 1120 [No. 21,078 (N.M.Ct.App. May 30, 2001)] (upholding trial court's findings that officers would have arrested the defendant even if the officers had not discovered cocaine during an illegal search, that the officers had probable cause to do so, and that an inventory search would have occurred). Even if we were able to determine whether the officers in this case had probable cause to arrest Defendant without consideration of the illegally seized evidence, there is no evidence that the officers would have arrested Defendant under these circumstances and no evidence regarding a standard inventory procedure. For this reason, we will not consider the inevitable discovery doctrine as an alternative ground for upholding the trial court's decision. *See Franks,* 119 N.M. at 177, 889 P.2d at 212 (refusing to uphold trial court's decision on fact-dependent ground not raised below).

{19} Finally, the State argues that the admission of the coins, tokens, and watches, even if erroneous, was harmless insofar as the evidence was cumulative. We disagree. For error to be considered harmless, there must be: (1) substantial evidence to support the conviction without reference to the improperly admitted evidence, (2) such 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. *Sanchez v. State,* 103 N.M. 25, 27, 702 P.2d 345, 347 (1985). In this case, we agree with the State that substantial evidence supported Defendant's conviction without reference to the improperly admitted evidence. The evidence showed that Defendant was the only person found near the scene of the burglary. Despite the fact that it was early in the morning and cold outside, Defendant was wearing only a tank top and jeans. A jacket was found inside the air conditioning vent through which the burglar gained access to the building. The burglarized repair shop was dirty and oily, and the police noted that Defendant's clothing and hands were covered in dirt and oil. In addition, Defendant was found in possession of a pet training device which was identical to a device missing from the office of the repair shop. The soles of Defendant's shoes appeared to match the footprints found inside the building. Finally, when asked for identification, Defendant initially gave a false name, indicating consciousness of guilt.

{20} Nonetheless, we conclude that the volume of permissible evidence was not so disproportionate to the amount of improper evidence that the erroneously admitted evi-

dence could not have contributed to the conviction. *See, e.g., Clark v. State,* 112 N.M. 485, 487, 816 P.2d 1107, 1109 (1991) ("Error in the admission of evidence in a criminal trial must be declared prejudicial and not harmless if there is a reasonable possibility that the evidence complained of might have contributed to the conviction."). When asked what he was doing walking late at night, Defendant told the police that he was headed home from a friend's house, nearly six miles away. The fact that Defendant warmed himself up walking so far could have explained why Defendant was not wearing a jacket. A jury member asked whether the oil on Defendant's hands could have come from the parking lot in which Defendant was ordered to lie down by police. In addition, although the soles of Defendant's shoes appeared to match the footprints left at the scene of the burglary, there was no evidence that Defendant's shoes were unique or that the match was perfect. Finally, the owner of the repair shop testified that he had recently purchased the pet training device and that the device had no distinguishing marks or characteristics by which the owner could definitively identify the device as belonging to him. The erroneously admitted evidence substantially corroborates the State's theory that the device did in fact belong to the business and substantially confirms that Defendant was inside the building. In addition, we think it significant that the prosecutor in closing argument made several references to the watches and coins as important evidence for conviction, inferring that this evidence might tip the scale of doubt and even describing the evidence as additional pieces of a puzzle which when taken together showed a picture that demonstrated guilt beyond a reasonable doubt. For these reasons, we reject the State's argument that the error was harmless.

{21} In conclusion, we hold that Officer Monget exceeded the scope of a permissible protective search when he continued to remove items from Defendant's pockets after ascertaining that the pet training device was not a weapon and in the absence of any particularized suspicion that the remaining items were themselves weapons. Because Defendant's convictions for aggravated burglary, possession of burglary tools, and larceny were based in part on the admission of this evidence, we reverse these convictions and remand for a new trial.

II. Sufficiency of the Evidence

{22} Defendant claims that the trial court erred by denying his motion for a directed verdict with respect to the charge of possession of burglary tools, contrary to NMSA 1978, § 30–16–5 (1963), and the aggravated portion of the charge of aggravated burglary, contrary to NMSA 1978, § 30–16–4(A) (1963). We review the trial court's denial of a motion for a directed verdict to determine whether substantial evidence supports the charge. *State v. Dominguez,* 115 N.M. 445, 455, 853 P.2d 147, 157 (Ct.App.1993). Although we reverse Defendant's convictions and remand for a new trial based on the erroneously admitted evidence, we review Defendant's sufficiency of the evidence claims because the principles of double jeopardy would bar retrial if Defendant's convictions are not supported by substantial evidence. *See State v. Sanchez,* 2000–NMSC–021, ¶ 30, 129 N.M. 284, 6 P.3d 486; *State v. Post,* 109 N.M. 177, 181, 783 P.2d 487, 491 (Ct.App.1989).

A. Possession of Burglary Tools

{23} Defendant challenges the sufficiency of the evidence underlying his conviction for possession of burglary tools on the grounds that there was no evidence that he used any tools to enter the building through the air conditioning vent, the evidence showed that at least one of the tools (a flashlight) belonged to the owner of the repair shop, and, by the time that the evidence shows that Defendant used the tools, the crime of burglary was complete. The State counters that evidence that Defendant pried open the door to an office inside the repair shop is sufficient to sustain the conviction because (1) for the purposes of the possession statute, burglary is a continuing offense or (2) the entry into the office was itself a burglary. It is unnecessary for us to consider whether burglary is an ongoing offense because the evidence in this case shows that Defendant possessed a burglary tool for the purpose of committing a burglary.

{24} Although framed as a challenge to the sufficiency of evidence, Defendant's argument requires us to engage in statutory interpretation to determine whether the facts of this case, when viewed in the light most favorable to the verdict, are legally sufficient to sustain a conviction for possession of burglary tools. Issues of statutory construction and interpretation are questions of law and are reviewed de novo. *See State v. Herbstman,* 1999-NMCA-014, ¶ 16, 126 N.M. 683, 974 P.2d 177; *State v. Adam M.,* 1998-NMCA-014, ¶ 15, 124 N.M. 505, 953 P.2d 40.

{25} As a preliminary note, Defendant urges us not to consider the State's argument that Defendant's use of a tool to gain entry into the office constituted a burglary because this argument was not made below. The State was not required to present every possible scenario under which Defendant might be found guilty of possession. *Cf. State v. Crews,* 110 N.M. 723, 736, 799 P.2d 592, 605 (Ct.App.1989) (holding that variation between an indictment and proof to a jury is not material where the allegations and proof substantially correspond). In this case, Defendant was charged with, and the jury was properly instructed as to, the elements of possession of burglary tools in general terms, and it was up to the jury in the first instance to determine whether the evidence presented was sufficient to find Defendant's guilt beyond a reasonable doubt. *See State v. Orgain,* 115 N.M. 123, 126, 847 P.2d 1377, 1380 (Ct.App.1993) (noting that appellate review of sufficiency of the evidence involves two-step process: (1) deference to fact-finder's resolution of factual conflicts and inferences derived therefrom and (2) a legal determination of whether evidence viewed in this manner could support verdict). Furthermore, given the particular facts of this case, we believe that Defendant was on notice of the State's argument insofar as the State's contention that burglary is a continuing offense put Defendant on notice of the need to defend against the evidence of Defendant's forced entry into the office. *Cf. Crews,* 110 N.M. at 736, 799 P.2d at 605; *State v. Mills,* 94 N.M. 17, 20, 606 P.2d 1111, 1114 (Ct.App.1980) (rejecting argument that discrepancy between opening remarks by prosecutor as to what evidence would show and the evidence actually introduced was prejudicial to the defendant).

{26} The offense of possession of burglary tools consists of "having in the person's possession a device or instrumentality designed or commonly used for the commission of burglary and under circumstances evincing an intent to use the same in the commission of burglary." Section 30-16-5. Burglary is defined as "the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, with the intent to commit any felony or theft therein." NMSA 1978, § 30-16-3 (1971).

{27} In New Mexico, "a separately secured area of a building otherwise open to the public is a 'structure' within the meaning of the burglary statute." *State v. Gregory,* 117 N.M. 104, 104-05, 869 P.2d 292, 292-93 (Ct.App.1993); *see also State v. Sanchez,* 105 N.M. 619, 621-22, 735 P.2d 536, 538-39 (Ct.App.1987); *State v. Harris,* 101 N.M. 12, 19, 677 P.2d 625, 632 (Ct.App.1984); *State v. Ortega,* 86 N.M. 350, 351, 524 P.2d 522, 523 (Ct.App.1974). Although it is true that, at the time of the burglary, the repair shop was not open to the public, it is also true that the possession of burglary tools statute does not require that a defendant be convicted of burglary to be held liable for possession. *See State v. Everitt,* 80 N.M. 41, 47, 450 P.2d 927, 933 (Ct.App.1969) (holding that possession of burglary tools is an offense separate from burglary). Instead, the evidence must only show that a defendant have "an intent to use the instrumentality or device in committing burglary." *State v. Najera,* 89 N.M. 522, 523, 554 P.2d 983, 984 (Ct.App.1976); *see also* UJI 14-1633 NMRA 2001 (listing as an element of the offense that the defendant possessed a tool or device with the intent that the tool or device "be used for the purpose of committing a burglary"). As such, the critical question is not whether Defendant could be charged with two counts of burglary for the initial entry through the air conditioning vent and the entry into the locked office, but whether the use of a pry device to gain entry into the office evinces an intent to use the pry device in the commission of a burglary. *See* § 30-16-5. The evidence shows that Defendant pried open

the office door, and, once inside, committed a larceny. This is sufficient to support a finding that Defendant intended to use the pry device to make an unauthorized entry of a structure with the intent to commit a felony therein. *See* § 30–16–3 (defining crime of burglary). We do not discuss the flashlight because possession of the pry device was sufficient to sustain the conviction, and we are remanding the entire charge for a new trial. On remand it will be up to the trial court to determine what theories should be submitted to the jury based on the evidence presented.

B. Aggravated Burglary

{28} Defendant challenges his conviction for aggravated burglary on the ground that the jury's finding that the knife found under Defendant's jacket in the air conditioner shaft required the jury to make an impermissible inference. We disagree.

{29} In analyzing a claim of insufficient evidence, we ask whether there is substantial evidence of either a direct or circumstantial nature to support a verdict of guilty beyond a reasonable doubt with respect to each essential element of the crime charged. *State v. Apodaca,* 118 N.M. 762, 765–66, 887 P.2d 756, 759–60 (1994). We view the evidence in the light most favorable to the State, resolving all conflicts and indulging all permissible inferences in favor of allowing the charge to be determined by the jury. *See Dominguez,* 115 N.M. at 455, 853 P.2d at 157. An inference is permissible "if the evidence necessary to invoke the inference (the evidence as a whole, including the basic fact or facts) is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt." *State v. Matamoros,* 89 N.M. 125, 128, 547 P.2d 1167, 1170 (Ct.App. 1976).

{30} Viewed in the light most favorable to the verdict, the evidence shows that the burglar entered the building through the air conditioning duct. A jacket was discovered at the bottom of the duct, and the knife was lying directly under the jacket. The owner of the repair shop testified that he had no idea how or why a jacket and a knife would be in the duct. From this evidence, a jury could properly infer that the jacket and the knife belonged to the burglar.

{31} The evidence shows that there was dirt and oil on the floor of the repair shop and that the bay door had been opened slightly to allow the burglar to remove the items stacked near the door. When the police questioned Defendant near the scene of the burglary, they noticed that his clothes and hands were oily and dirty. Property taken from the repair shop was recovered from Defendant's person, and the soles of Defendant's shoes matched the shoe prints found near the air conditioning duct through which the burglar entered the building. In addition, Defendant was dressed only in a tank top and jeans despite the fact that it was cold outside. Based on this evidence, a jury could properly infer that Defendant was the person who burglarized the building, and that the jacket and knife found in the vent therefore belonged to Defendant. *See id.* at 128, 547 P.2d at 1170.

III. Concealing Identity

{32} Because the erroneous admission of the evidence seized during the illegal search of Defendant could not have contributed to Defendant's conviction for concealing his identity, we must consider Defendant's remaining two challenges in light of this conviction.

A. Motion for Mistrial

{33} We review the denial of a motion for a mistrial under an abuse of discretion standard. *State v. Gonzales,* 2000–NMSC–028, ¶ 35, 129 N.M. 556, 11 P.3d 131. A trial court abuses its discretion when its ruling is clearly against the logic and effect of the facts and circumstances of a case. *State v. Woodward,* 121 N.M. 1, 4, 908 P.2d 231, 234 (1995). We cannot say the trial court abused its discretion unless its ruling is clearly untenable or not justified by reason. *Id.*

{34} Defendant complains that the trial court abused its discretion by denying his motion for a mistrial after a witness unexpectedly testified that Defendant had decided to reveal his true identity after having concealed it from the police because "once he went to the detention center, that the correctional officers there would recognize him and they would know his identity[.]"

The record indicates, and Defendant concedes, that this testimony was unsolicited by the State insofar as the testimony was significantly different from the witness's original statement in a police report, in which the witness wrote that Defendant said, "I'm going to tell you who I am because you're gonna find out anyway." After sustaining Defendant's objection but denying his motion for a mistrial, the trial court instructed the jury to disregard the testimony.

{35} Our cases distinguish between inadvertent remarks made by a witness and similar testimony intentionally solicited by the prosecution. *Gonzales,* 2000–NMSC–028, ¶ 39, 129 N.M. 556, 11 P.3d 131. When a witness offers unsolicited testimony not previously disclosed, the general rule is that the prompt sustaining of an objection and a curative instruction to the jury to disregard the testimony cures any prejudicial effect of inadmissible testimony. *See id.* ¶ 37, 11 P.3d 131; *State v. Simonson,* 100 N.M. 297, 301, 669 P.2d 1092, 1096 (1983) ("The overwhelming New Mexico case law states that the prompt sustaining of the objection and an admonition to disregard the answer cures any prejudicial effect of inadmissible testimony."). Applying this rule to the case at bar, we conclude that the trial court did not abuse its discretion in denying Defendant's motion for a mistrial.

B. Motion to Reopen Case

{36} At the close of the State's case in chief, Defendant moved for a directed verdict on the ground that the State had failed to provide an in-court identification of Defendant. The State conceded its error and requested that it be permitted to reopen its case for the sole purpose of securing the identification. Over Defendant's objection, the court granted the State's request. Defendant argues that the court abused its discretion. We disagree.

{37} We review the trial court's ruling on a motion to reopen a case after the close of evidence for an abuse of discretion. *State v. Harrison,* 2000–NMSC–022, ¶ 56, 129 N.M. 328, 7 P.3d 478. We consider the trial court's ruling in light of the extent to which the State used due diligence to obtain the testimony and the probable value of the testimony. *Id.* In the case at bar, the trial court noted that various witnesses had already referred to Defendant as the person who the police stopped and subsequently arrested as the suspect on the night of the burglary. The State used due diligence to secure the attendance of these witnesses, but neglected to solicit the testimony it thought was necessary. By allowing the State to reopen for the limited purpose of securing an in-court identification of Defendant, the court did nothing more than insist that all facts be presented that would insure a fair trial. *See State v. Crump,* 97 N.M. 177, 179, 637 P.2d 1232, 1234 (1981). Under these circumstances, we cannot say that the trial court abused its discretion.

CONCLUSION

{38} For the foregoing reasons, we reverse Defendant's convictions for aggravated burglary, larceny, and possession of burglary tools and remand for a new trial. We affirm Defendant's conviction for concealing his identity.

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

WE CONCUR: A. JOSEPH ALARID, Judge and JONATHAN B. SUTIN, Judge.

2001-NMCA-106

35 P.3d 298

BRADBURY & STAMM CONSTRUCTION, a New Mexico corporation; Jaynes Corporation, a New Mexico corporation; Gerald Martin General Contractor, a New Mexico corporation; Brycon Corporation, a New Mexico corporation; Jack B. Henderson Construction Co., a New Mexico corporation, Petitioners–Appellees,

v.

BOARD OF COUNTY COMMISSIONERS OF BERNALILLO COUNTY, Respondent–Appellant,

and

Joe E. Woods, Inc., Intervenor.

No. 21,052.

Court of Appeals of New Mexico.

July 10, 2001.

Mickey Beisman, Albuquerque, NM, for Appellees.

William J. Darling, Margaret P. Armijo, Leslie K. Coyne, William J. Darling & Associates, P.A., Albuquerque, NM, for Appellant.

OPINION

BOSSON, Chief Judge.

{1} Bernalillo County (the County) appeals the district court's decision that it must grant a preference to New Mexico contractors (the "resident preference") in selecting the low bidder for the County's new jail project. *See* NMSA 1978, § 13–4–2(E) (1997). The County argues that the New Mexico legislature granted the County sole discretion to determine when it is "practicable" to apply the resident preference, and in this case, the County decided that it was not. *See* NMSA 1978, § 13–4–1 (1984). The County also contends that the district court should not have addressed the resident preference issue because the resident contractor waived its right to appeal by failing to comply with administrative procedures regarding bid protests. We disagree with the County and hold that the resident preference formula set forth in Section 13–4–2(E) applies to all bids for public works contracts. Because Plaintiff Bradbury & Stamm substantially complied with administrative procedures, we affirm the decision of the district court.

BACKGROUND

{2} Faced with a federal court order to reduce inmate overcrowding at the Bernalillo County Detention Center, the County decided to build a new jail. To save money, the County decided not to grant a resident preference to New Mexico contractors who bid on the project. According to statute, that preference would have given New Mexico contractors a bidding advantage by multiplying their bids by a factor of .95 before comparing them to the bids from out-of-state contractors. Section 13–4–2(E). Thus, a New Mexico contractor could have won the contract over an out-of-state contractor with the low bid, if the resident contractor's bid was within 5 percent of the low bid.

{3} The County's reasons for bypassing the resident preference were twofold. First, the resident preference would cost too much. The County felt it was in "grave danger" of exceeding the appropriated budget for the project, which was over $31 million. Second, the County estimated that the 5 percent resident preference would cost taxpayers over $1.5 million in extra expense if applied to a contract of that size. The County also reasoned that the resident preference would decrease the number of out-of-state contractors bidding on the project which, in turn, would decrease the incentive to bid competitively.

{4} When the bids were opened on October 4, 1999, the County determined that an Arizona company had entered the low bid. The Arizona company bid $25,032,000, and Bradbury & Stamm, a resident contractor, bid $25,232,134. Both bids were over $5 million below what the County had appropriated for the project. Because the percentage

difference between the bids was much less than 5 percent, Bradbury & Stamm would have won the contract if the resident preference had been applied.

{5} After a protest, the district court decided that the resident preference was mandatory for public works contracts and that the County did not have discretionary authority to waive the rule. The district court remanded the case to the County with instructions to apply the resident preference to the bids before awarding the contract.

{6} Instead of applying the resident preference to the bids, the County investigated and ruled on a second, unrelated protest against the Arizona contractor. The County determined that the second protest was meritorious, and disqualified the Arizona contractor which meant that the bid went to Bradbury & Stamm. The County then appealed the district court's decision, which we treated as a petition for writ of certiorari and granted. *Cf. Hyden v. N.M. Human Servs. Dep't*, 2000–NMCA–002, ¶¶ 11–13, 128 N.M. 423, 993 P.2d 740.

DISCUSSION

{7} Resolution of this appeal requires deciding questions of mootness, statutory construction, and administrative procedure. We begin our discussion by addressing an outstanding appellate motion filed by Bradbury & Stamm, requesting that we dismiss the appeal on the ground of mootness.

Mootness

{8} Although Bradbury & Stamm successfully litigated the resident preference issue in the district court, the County ignored the court order and awarded the contract to Bradbury & Stamm on the basis of the second protest. Thus, the resident preference was ultimately not an actual factor in awarding the contract, and we agree that there no longer appears to be an actual controversy between the parties regarding the resident preference statute. *See Snodgrass v. Tularosa Bd. of Educ.*, 74 N.M. 93, 95, 391 P.2d 323, 324 (1964) (declining to accept jurisdiction when deciding the case "would be academic and would determine no issues between the parties").

{9} The County admits that no specific controversy now exists regarding the jail contract, but argues that the outstanding order of the district court, entered while an actual controversy did exist, could have a preclusive effect on the County when faced with similar situations arising in future public works contracts. *See State ex rel. Blanchard v. City Comm'rs*, 106 N.M. 769, 770, 750 P.2d 469, 470 (Ct.App.1988); *see also Atchison, Topeka & Santa Fe Ry. Co. v. State Corp. Comm'n*, 79 N.M. 793, 794, 450 P.2d 431, 432 (1969) (observing if an "order appealed from has any vitality and may be given implementation, even temporarily, the case is not moot and is entitled to consideration"). The County also suggests that we vacate the district court's outstanding order to avoid any future effect upon the County. We decline the County's invitation to do so. As the above cases demonstrate, New Mexico courts are inclined to resolve viable, outstanding orders on their merits, rather than dismiss a case as moot and vacate a lower court order.

{10} The County also asserts that the issues before us are of substantial public importance and, as such, should be excepted from the doctrine of mootness. *See City of Las Cruces v. El Paso Elec. Co.*, 1998–NMSC–006, ¶ 18, 124 N.M. 640, 954 P.2d 72 (observing that the Court will make an exception to the mootness rule if "an issue of substantial public interest is presented"); *Riesenecker v. Arkansas Best Freight Sys.*, 110 N.M. 451, 453, 796 P.2d 1147, 1149 (Ct. App.1990) ("[E]ven when events have mooted the dispute between the parties, New Mexico courts possess discretion whether to proceed to decide appellate issues that are matters of substantial public interest.").

{11} We note that this dispute is not unique to the County. It involves all governmental entities and their competing legal obligations to resident New Mexico contractors and to the public at large. Thus, this dispute potentially has a far-ranging impact on public finance and public administration. *See Mourer v. Rusk*, 95 N.M. 48, 51, 618 P.2d 886, 889 (1980) (listing criteria to consider in determining " 'he requisite degree of public interest' " (quoting *People v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769, 772 (1952))).

{12} For these reasons, we find the County's argument persuasive. The issue on appeal is of substantial importance to the public. If the County is correct that it has discretionary authority to protect its taxpayers from unnecessary expenditure, then the County and other governmental entities similarly situated could effectively eliminate the resident preference whenever it might be economically desirable to do so. Because this issue may well reoccur, it invites " 'authoritative determination for the future guidance of public officers.' " *Id.* (quoting *Labrenz*, 104 N.E.2d at 772). As our precedent guides us to "continue a cause" when these conditions are fulfilled, *Mowrer*, 95 N.M. at 51, 618 P.2d at 889, we deny all motions to dismiss and proceed to decide the appeal.

The Relationship Between Section 13-4-1 and Section 13-4-2

{13} At the heart of this appeal lies a dispute about the interplay between Section 13-4-1 and Section 13-4-2, two statutes detailing how governmental entities are to award public works contracts. As stated in Section 13-4-1, "[i]t is the duty of every office, department, institution, board, commission or other governing body or officer thereof of this state or of any political subdivision thereof to award all contracts for the construction of public works . . . to a resident contractor *whenever practicable.*" (Emphasis added.) Juxtaposed with that law is Section 13-4-2, which first defines a resident contractor and then in subsection (E) states:

> When bids are received only from nonresident contractors and resident contractors and the lowest responsible bid is from a nonresident contractor, *the contract shall be awarded to the resident contractor* whose bid is nearest to the bid price of the otherwise low nonresident contractor *if the bid price of the resident contractor is made lower than the bid price of the nonresident contractor when multiplied by a factor of .95.*

(Emphasis added.)

{14} The County contends that the language "whenever practicable" in Section 13-4-1 grants the County discretionary authority to determine practicability regardless of the formula in Section 13-4-2. *See* N.M. Att'y Gen. Op. 65-05 (1965). According to the County, Section 13-4-2(E) comes into play only if it first determines that the resident preference is practicable. Without such a reading of the statutes, the County argues that the "whenever practicable" language of Section 13-4-1 would be rendered meaningless. *See Regents of Univ. of N.M. v. Fed'n of Teachers*, 1998-NMSC-020, ¶ 28, 125 N.M. 401, 962 P.2d 1236 (" 'Statutes must be construed so that no part of the statute is rendered surplusage or superfluous.' " (quoting *In re Rehab. of W. Investors Life Ins. Co.*, 100 N.M. 370, 373, 671 P.2d 31, 34 (1983))). The County also asserts that the statutes "are *in pari materia* and, if possible by reasonable construction, must be construed so that effect is given to both." *Abbott v. Armijo*, 100 N.M. 190, 191, 668 P.2d 306, 307 (1983).

{15} Bradbury & Stamm responds that the language of Section 13-4-2(E) is unequivocal, and the legislative directive must be heeded that "the contract *shall* be awarded to the resident contractor" (emphasis added) if its bid is within 5 percent of the out-of-state bid. The contractor marshals its own rule of statutory construction to support that view, asserting that if the wording of the statute is unambiguous, the word "shall" imposes a mandatory duty. *See N.M. Dep't of Health v. Compton*, 2000-NMCA-078, ¶ 11, 129 N.M. 474, 10 P.3d 153, *cert. granted*, 129 N.M. 385, 9 P.3d 68 (2000).

{16} In discerning what the legislature intended, we follow "[t]he first rule of statutory construction," which is " '[t]he plain language of a statute is the primary indicator of legislative intent.' " *Mem'l Med. Ctr., Inc. v. Tatsch Constr., Inc.*, 2000-NMSC-030, ¶ 27, 129 N.M. 677, 12 P.3d 431 (quoting *Gen. Motors Acceptance Corp. v. Anaya*, 103 N.M. 72, 76, 703 P.2d 169, 173 (1985)). According to Section 13-4-2(E), "the contract shall be awarded to the resident contractor . . . if the bid price of the resident contractor is made lower than the bid price of the nonresident contractor when multiplied by a factor of .95." We find nothing in the statutes to indicate that this language is not mandatory. Before 1984, when Section 13-4-2(E) was

enacted, counties had substantial discretion to determine practicability. *See* N.M. Att'y Gen. Op. 65–05. That changed with the enactment of Section 13–4–2. *See Doyal v. Waldrop,* 37 N.M. 48, 52, 17 P.2d 939, 941 (1932) (noting that executive discretion to award contracts may be "limited in various degrees by statutory provisions"). Although Section 13–4–2(E) does not expressly address practicability, we construe the formula in that section to be the legislature's effort at a working definition of practicability that, by its nature, substantially divests the governmental entity of discretion to decide the matter on its own.

{17} Understood in this manner, the two statutes can be read harmoniously. The "whenever practicable" language of Section 13–4–1 is measured by the formula set out in Section 13–4–2(E). No longer is it necessary for a governmental entity to make "a written finding setting forth in particularity why such an award [to the resident contractor] is not 'practicable' under the circumstances," as prevailing authority before 1984 demanded. N.M. Att'y Gen. Op. 65–05. If a resident contractor does not bid within 5 percent of a nonresident contractor's low bid, the legislature has decided as a matter of law that the taxpayer will not be burdened with the additional expenditure of a local preference, and the governmental entity need not justify its decision to go out of state. On the other hand, when the bids are within 5 percent of each other, then the legislature has determined that the added cost is "practicable" for the taxpayer to bear in terms of balancing cost against benefit. In the interests of consistency and fairness across the state, the legislature has removed the burden of that decision from the governmental entity.

{18} As with any government procurement, the policy of offering a resident preference is to support "those persons and companies who contribute to the economy of the State of New Mexico by maintaining plants and other facilities within the state and giving employment to residents of the state." N.M. Att'y Gen. Op. 69–42 (1969). We acknowledge, as argued by the County, that such a policy taxes the citizens of this state, especially as the cost of any particular contract grows.

{19} In this regard, we observe that in 1989 our legislature eliminated the resident preference for general procurement contracts when bids exceeded $5 million. However, the legislature did not eliminate that same resident preference for public works contracts, nor did it set a cap on the value of the contract, even though resident preferences for both kinds of contracts were addressed in the same piece of legislation. *See* 1989 N.M. Laws, ch. 310, §§ 1, 2. We infer from this history that the legislature acted purposefully when it retained the resident preference formula for public works contracts notwithstanding the additional cost. The legislature is uniquely situated to make balanced judgments of this kind. In requiring the County to respect the statutory resident preference, we are simply enforcing the will of the legislature.

Administrative Procedure

{20} The County argues that the district court should never have reached the merits of the case, nor should we, because the contractor failed to follow the appropriate administrative procedure before bringing its appeal to district court. The County contends that Bradbury & Stamm did not protest bidding irregularities to the County's purchasing agent, nor did its protest address with particularity any irregularity in the bidding process for the County to correct. Therefore, the County contends that we should uphold its decision to dismiss the protest for procedural irregularities. We disagree.

{21} The County announced its decision at a pre-bid meeting on August 31, 1999. When resident contractors pressed for an explanation of the decision, County officials required a written request. Bradbury & Stamm faxed a written request to Ms. Baggenstos, addressing her as the Bernalillo County Purchasing Agent. When the County did not respond, Bradbury & Stamm forwarded another written request, similarly addressed, a week later. The second request stated that the contractor needed the County's rationale for denying the resident preference so that it

could protest the decision if necessary. Two days later, September 9, 1999, still not having received a response from the County, Bradbury & Stamm formally protested the County's denial of the preference. The written protest again requested the County's rationale for the decision not to apply the preference, and reserved the right to amend the protest upon receipt of the rationale. The protest, sent by fax, was again addressed to Ms. Baggenstos as the County Purchasing Agent.

{22} Responding to this third request, the County faxed the contractor a document, titled "***DETERMINATION,***" explaining why the resident preference would not be applied to this contract. An accompanying letter from the county attorney dated September 8, 1999, referred to the document as "the determination made by the County of Bernalillo with regard to the jail construction."

{23} Having received the County's determination, Bradbury & Stamm filed an appeal in district court. *See* NMSA 1978, § 13–1–183 (1999) (authorizing judicial review of determinations). However, the County informed Bradbury & Stamm that the faxed document was only a response to its request for a rationale, not an appealable resolution of the contractor's protest as contemplated by the Procurement Code. *See* NMSA 1978, § 13–1–175 (1984). Although the parties disagreed on the legal import of the document faxed to the contractor on September 9, 1999, they stipulated to stay the proceedings in district court until the County ruled on the protest, which it promised to do by October 31, 1999. Once the County ruled on the protest, it would open the bids to determine whether the resident preference would affect the bid for the contract. If application of the resident preference would affect the award of the contract, the parties agreed to proceed with the appeal.

{24} We note that Bradbury & Stamm repeatedly requested the County's rationale for denying the resident preference from Ms. Baggenstos, addressing her as the County Purchasing Agent. When no correspondence was forthcoming, the contractor lodged its protest with her as well. Although the County insists that the bidding instructions require a protest to be filed with the county purchasing agent, a person it asserts is someone other than Ms. Baggenstos, Bradbury & Stamm was not informed of that fact until the County issued its dispositive decision on the protest, long after the protest was filed. By statute, "[a]ny bidder . . . who is aggrieved in connection with a[n] . . . award of a contract may protest to the state purchasing agent or a central purchasing office." NMSA 1978, § 13–1–172 (1987). A central purchasing office is statutorily defined as "that office or officer within a state agency or a local public body responsible for the control of procurement of . . . construction." NMSA 1978, § 13–1–37 (1984). There is no dispute that Ms. Baggenstos was the senior buyer for the County, and the County's bidding instructions directed that all questions be addressed to her regarding the purchasing procedures. We conclude that lodging a protest with Ms. Baggenstos satisfied the statutory protest requirements because she was within an "office . . . responsible for the control of procurement of . . . construction." *Id.*

{25} Moreover, the County was well aware of the contractor's complaints. In response to Bradbury & Stamm's request for a rationale for denying the resident preference, the County issued a "determination." Once that "determination" was received from the County, Bradbury & Stamm filed its appeal as the statutes requires. The filing of the appeal, which included a verified petition for stay of enforcement and application for declaratory and injunctive relief, put the County on notice of all of the contractor's arguments. The stipulated stay for the appeal allowed the County to consider these arguments before issuing a formal response to the protest, and thus, the County was not prejudiced in any manner.

{26} Under the circumstances presented here, we hold that Bradbury & Stamm substantially complied with the statutory administrative process which allowed full consideration of the contractor's claim. *See Bogan v. Sandoval County Planning & Zoning Comm'n,* 119 N.M. 334, 344, 890 P.2d 395, 405 (Ct.App.1994) (observing that exhaustion of administrative remedies can be

"satisfied by an effort made in good faith"). From a practical perspective, the administrative process had run its course, and therefore the doctrine of exhaustion does not bar Bradbury & Stamm's appeal. *See id.* However, the remaining contractors did not attempt either to protest the bid or exhaust the administrative process, and therefore those other contractors have no standing to assert appellate claims. For this reason, they are dismissed from this appeal.

CONCLUSION

{27} We hold that Section 13–4–2(E) provides the statutory formula for determining the practicability of applying the resident preference outlined in Section 13–4–1, and must be followed. We affirm the decision of the district court to that effect.

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

WE CONCUR: A. JOSEPH ALARID, Judge, JAMES J. WECHSLER, Judge.

2001-NMCA-098

35 P.3d 304

STATE of New Mexico, Plaintiff–Appellee,

v.

Donisio SOTO, Defendant–Appellant.

No. 20,986.

Court of Appeals of New Mexico.

Aug. 17, 2001.

Certiorari Denied, No. 27,116, Sept. 26, 2001.

Patricia A. Madrid, Attorney General, Ann M. Harvey, Assistant Attorney General, Santa Fe, NM, for Appellee.

Phyllis H. Subin, Chief Public Defender, Vicki W. Zelle, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

FRY, Judge.

{1} Defendant appeals his convictions of two counts of burglary and one count each of larceny and disposing of stolen property. Defendant argues that the district court should have granted his motion to suppress evidence seized during an illegal search. Defendant also argues that the district court should have directed a verdict of not guilty as to one of the two burglary counts because only one burglary occurred. We reverse the district court's determination that Defendant lacked standing to challenge the search of the car used jointly by Defendant and his girlfriend and remand for rehearing on the motion to suppress. We affirm the district court's denial of Defendant's motion for directed verdict.

BACKGROUND

{2} This case arose from a commercial burglary of the "Bug Way," a Volkswagen repair business in Carlsbad, New Mexico, owned by Don Mathis. The business premises comprised two buildings: a shop, which had an office and three automobile bays, and an adjacent, unattached, storage building where the business stored the parts used to repair automobiles. Mathis also permitted his stepfather to use the storage building to pursue a hobby. The burglar entered the shop through the office window and entered the storage building by prying apart the siding. The stolen property consisted of auto mechanic tools belonging to Mathis, his chief mechanic, and his stepfather, valued at approximately $4,000.

{3} Several witnesses reported seeing a four-door, brown/tan/gold automobile parked in the vicinity of the Bug Way around the

time the burglary occurred. One witness reported that there was something red in the car's opened trunk. Officers located a car in Carlsbad matching the various witnesses' descriptions. The car was a gold 1980 Oldsmobile registered to Vera Rodriguez, who resides in Artesia with Defendant and her son. Rodriguez testified at trial that she and Defendant both use the car, and he could have been using the car on the evening the witnesses saw it parked near the Bug Way.

{4} After locating the car, two officers went to Rodriguez's place of employment and asked her for consent to search the car. Rodriguez testified that she consented to a warrantless search, during which the officers found a small red toolbox in the car's trunk. Rodriguez claimed the box belonged to her. The officers seized the box and told Rodriguez they had concluded the search and that she could return to work. There is conflicting testimony as to what occurred next. Rodriguez testified that, a few minutes after the officers had finished the search, she looked out the door and saw that they were again looking in the trunk of her car. She walked back out and saw that the officers had a silver tool that had not been discovered during the previous search. Contrary to Rodriguez's testimony, however, the officers testified that they performed only one search of the trunk. The officers later took the red box and the silver tool to Mathis to be identified. Mathis believed the items were his because the toolbox and tool were generally similar to items missing from the Bug Way.

{5} Prior to trial, Defendant alleged that there had been irregularities in the search of the car. Specifically, Defendant objected to the second search of the car that he claims occurred after the officers had completed the initial search performed with Rodriguez's consent. Defendant claimed that Rodriguez did not consent to the second search, and that the evidence seized as a result of the second search should be suppressed. The district court denied Defendant's motion on the ground that he lacked standing, stating that Defendant failed to demonstrate "that he had an actual, subjective expectation of privacy in this automobile that was owned by his girlfriend. The car was titled to the girlfriend. [Defendant] was not present at the time of the search." The court expressly refused to find that Defendant was a permissive user of the car.

DISCUSSION

Motion to Suppress

{6} In reviewing a district court's denial of a motion to suppress, we determine whether the law was correctly applied to the facts, giving due deference to the factual findings of the lower court. *State v. Duquette,* 2000–NMCA–006, ¶ 7, 128 N.M. 530, 994 P.2d 776. A denial of a motion to suppress "will not be disturbed if it is supported by substantial evidence unless it also appears that the ruling was incorrectly applied to the facts." *State v. Cline,* 1998–NMCA–154, ¶ 6, 126 N.M. 77, 966 P.2d 785. The trial court must resolve conflicts in the evidence, but "[w]hether that evidence complies with constitutional requirements is . . . a legal question reviewed by the appellate court on a *de novo* basis." *Id.* (quoting *State v. Vargas,* 120 N.M. 416, 418, 902 P.2d 571, 573 (Ct.App. 1995) (internal quotation marks omitted)).

{7} "In ascertaining the standing of an individual to challenge the propriety of a search, the focus is on the person's legitimate expectations of privacy." *State v. Villanueva,* 110 N.M. 359, 365, 796 P.2d 252, 258 (Ct.App.1990). In making this determination, we ask first whether Defendant has exhibited a subjective expectation of privacy, and second, whether Defendant's expectation is one society will recognize as reasonable. *State v. Esguerra,* 113 N.M. 310, 313, 825 P.2d 243, 246 (Ct.App.1991).

{8} At the hearing on the motion to suppress, the parties did not dispute that Defendant and Rodriguez lived together, that his property was mingled with hers, that the Oldsmobile was their only car and was used by both of them on a day-to-day basis, and that Defendant routinely used the car. Defendant argued that these facts gave rise to a reasonable expectation of privacy in the car giving Defendant the right to challenge the propriety of the second search of the car's trunk. The State contended that Defendant could have no expectation of privacy in the car because he did not own it and he was not

in physical control of the car at the time of the search. We agree with Defendant that, as a regular, permissive user of the car, through his ongoing relationship with Rodriguez, he exerted control over the car and its contents. Thus, Defendant had a subjective expectation of privacy in the car. *See State v. Leyba*, 1997–NMCA–023, ¶ 14, 123 N.M. 159, 935 P.2d 1171. The trial court in effect found that Defendant was not a permissive user of the car but that finding is not supported by substantial evidence. At the suppression hearing, the State did not dispute that Defendant was a permissive user, and at trial Rodriguez testified that he was. *Cf. State v. Martinez*, 94 N.M. 436, 439–40, 612 P.2d 228, 231–32 (1980) (holding that appellate court is not limited to the record made at the suppression hearing). There was no evidence controverting this testimony.

{9} We next determine whether Defendant's expectation of privacy is one recognized by society as reasonable. We find *Leyba* to be dispositive. In *Leyba*, the defendant neither owned nor occupied the car in question at the time of the search, but she was a permissive user and demonstrated some interest in the contents of the car's trunk. *Id.* ¶ 4. We concluded that the defendant had standing to challenge the search of the car because she was a permissive user who had an ongoing relationship with the owner through which she exerted control over both the car and its contents. *Id.* ¶ 18. Here, the circumstances are similar, and we conclude that society is prepared to recognize as reasonable Defendant's expectation of privacy in a car he shared with his live-in companion.

{10} The State contends that, even if Defendant had standing to challenge the search, nevertheless we should affirm the trial court's denial of Defendant's motion to suppress based on the evidence adduced at trial. We do not agree that we are in a position to affirm on this record. At the suppression hearing the parties did not introduce any evidence regarding the particulars of the car search, and at trial the evidence was conflicting. Vera Rodriguez testified that the officers performed two distinct searches of her car's trunk-one to which she consented and one conducted without consent. The officers testified that they performed only one consented-to search of the trunk. Because the trial court did not have the opportunity to evaluate this evidence in the context of Defendant's suppression motion, and given the necessity for assessment of credibility, remand is appropriate. Defendant had standing to challenge the search of the car, and the district court must reconsider his motion to suppress.

Multiple Charges of Burglary

{11} At the conclusion of the State's case-in-chief, Defendant moved for a directed verdict as to the two burglary counts, arguing that the two should be merged. The district court denied the motion ruling that the two buildings burglarized supported separate counts. Because this issue will likely arise if there is a new trial on remand, we address it now in the interest of judicial efficiency.

{12} The State argues that Defendant failed to preserve his challenge to multiple charges because he did not argue at trial that he exhibited a single intent supporting only a single crime. The State contends that the question of intent is a factual question that must be preserved through argument and through tender of an appropriate jury instruction. We disagree with the State's underlying premise that this issue involves a fact question. The propriety of charging multiple violations of the same statute is analyzed under the Double Jeopardy Clause. *See State v. Barr*, 1999–NMCA–081, ¶ 13, 127 N.M. 504, 984 P.2d 185. Double jeopardy claims may be raised for the first time on appeal. *State v. Sanchez*, 1996–NMCA–089, ¶ 12, 122 N.M. 280, 923 P.2d 1165.

{13} We set out the analysis for single-statute unit of prosecution cases in *Barr*, 1999–NMCA–081, ¶ 11, 127 N.M. 504, 984 P.2d 185. Where a defendant is charged with multiple violations of a single statute and raises a double jeopardy challenge, we determine whether the legislature intended to permit multiple charges and punishments under the circumstances of the particular case. *Id.* ¶¶ 11–13. If the statute does not clearly define the unit of prosecution, we

consider whether the different offenses are "separated by sufficient indicia of distinctness[.]" *Id.* ¶ 15 (quoting *Swafford v. State,* 112 N.M. 3, 13, 810 P.2d 1223, 1233 (1991)). Such indicia include: "(1) temporal proximity of the acts; (2) location of the victim(s) during each act; (3) existence of an intervening event; (4) sequencing of acts; (5) defendant's intent as evidenced by his conduct and utterances; and (6) the number of victims." *Barr,* 1999-NMCA-081, ¶ 16, 127 N.M. 504, 984 P.2d 185. "[M]ultiple victims will likely give rise to multiple offenses." *Id.* (quoting *Herron v. State,* 111 N.M. 357, 361, 805 P.2d 624, 628 (1991)). Because this analysis is rooted in statutory construction, we review the issue de novo.

{14} The burglary statute proscribes "the unauthorized entry of any ... dwelling or other structure ... with the intent to commit any felony or theft therein." NMSA 1978, § 30-16-3 (1963). In this case, the burglar entered two separate buildings using two different methods of entry. The perpetrator entered the shop through a window and entered the adjacent storage building by prying apart siding. Although the acts occurred at one business and one address at roughly the same time, the burglar's acts affected two victims-the Bug Way owner and his stepfather, Mr. Williamson. While Williamson did not own the storage building from which the burglar took Williamson's tools, he did have an interest in the security of the space in which he kept his tools. "The general purpose of burglary statutes is to protect possessory rights with respect to structures and conveyances, ... and to define 'prohibited space.'" *State v. Rodriguez,* 101 N.M. 192, 194, 679 P.2d 1290, 1292 (Ct. App.1984). Consequently, burglary is "an offense against the security of the property which is entered." *State v. Ortiz,* 92 N.M. 166, 168, 584 P.2d 1306, 1308 (Ct.App.1978). Here, the burglar breached the security of two separate buildings and the interest of two victims in maintaining that security.

{15} Our holding is further supported by *State v. Ortega,* 86 N.M. 350, 351, 524 P.2d 522, 523 (Ct.App.1974) and *State v. Harris,* 101 N.M. 12, 19, 677 P.2d 625, 632 (Ct.App.1984). In *Ortega,* the burglar entered a building and then entered two offices leased by the building owner to two separate entities. *Id.* at 350-51, 524 P.2d at 522-23. In *Harris,* the burglar entered offices of two separate government agencies located in the same building. *Id.* at 19, 677 P.2d at 632. In each case we held that two charges of burglary were appropriate. Thus, even where only one building is burglarized, multiple burglary charges are proper when the security interests of multiple victims are involved. In the present case, the perpetrator breached the security of two buildings as well as the security interests of two victims.

{16} We reject Defendant's reliance on the single-larceny doctrine for dismissal of one count of burglary. As noted in *State v. Morro,* 1999 NMCA 118, ¶¶ 21-25, 127 N.M. 763, 987 P.2d 420, the single-larceny doctrine has several distinguishing features that support its "departure from the general rule that multiple charges are appropriate when there are multiple victims." *Id.* ¶ 22. There is a long history of treating larceny as a single charge regardless of the number of victims, and this treatment is warranted by the particular features of larceny-its definition, which "does not require proof of ownership in a particular person," and its penalty, which "depends on the value of the goods taken." *Id.* ¶¶ 24, 25. Burglary has no such history or distinguishing features.

{17} Under the circumstances of this case, we cannot say that the legislature intended that Defendant be charged with or punished for only one count of burglary. Therefore, if the case proceeds to trial on remand, Defendant may be tried as before on two counts of burglary.

CONCLUSION

{18} We hold that Defendant had standing to challenge the search of Rodriguez's car and remand for rehearing of his motion to suppress.

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

WE CONCUR: MICHAEL D. BUSTAMANTE, Judge, and IRA ROBINSON, Judge.

2001-NMCA-101

35 P.3d 309

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Petitioner–Appellee,

v.

PROGRESSIVE SPECIALTY INSURANCE COMPANY,
Respondent–Appellant,

and

Kimberly A. Ward, Defendant,

and

Starla Whitaker Johnson, Real Party In Interest.

No. 21,978.

Court of Appeals of New Mexico.

Oct. 9, 2001.

Terry R. Guebert, Don Bruckner, Guebert, Bruckner & Bootes, P.C., Albuquerque, NM, for Appellee.

Daniel J. O'Brien, Lawrence M. Glenn, Daniel J. O'Brien & Associates, P.C., Albuquerque, NM, for Appellant.

Michael R. Huffaker, Booth & Huffaker, Farmington, NM, for Real Party In Interest.

OPINION

BOSSON, Chief Judge.

{1} This appeal addresses a question left unanswered by prior appellate decisions as to whether New Mexico's mandatory liability insurance law requires coverage for punitive damages. We hold that New Mexico law does not require such coverage and that an insurer may contractually exclude punitive damages from its liability policy. The district court having ruled to the contrary, we reverse.

BACKGROUND

{2} Starla Johnson and Kimberly Ward were involved in an automobile accident. Johnson made a demand upon Ward and her liability insurer, Progressive Insurance Company (Progressive), to settle for policy limits ($25,000), which included her claim for punitive damages. Progressive advised Johnson that Ward's liability policy had an exclusion for punitive damages, and therefore, Progressive would not include punitive damages in its settlement evaluation. Ultimately, the parties agreed to settle the compensatory damage portion of Johnson's claim for $18,500, and Progressive continued to refuse any payment for punitive damages. Johnson then advised her own uninsured/underinsured motorist (UM) carrier, State Farm Mutual Automobile Insurance Company (State Farm), of her intent to file a UM claim for the punitive damages that had been omitted from her settlement with Progressive. State Farm agreed to settle Johnson's UM claim and paid Johnson $18,500 in compensatory damages and $7,500 in punitive damages for a total of $26,000.

{3} Following payment to Johnson, State Farm filed a declaratory judgment action against Progressive, in which State Farm asked the district court to (1) void Progressive's punitive damage exclusion in Ward's liability policy because it was contrary to state statute, and (2) order Progressive to pay its policy limits to State Farm. The district court agreed with State Farm that Progressive's punitive damage exclusion vio-

lated state law and entered summary judgment against Progressive for $25,000. In this appeal, Progressive contends that it is only liable for the compensatory damage portion of the settlement, $18,500, and that its punitive damage exclusion should be enforced under New Mexico law.

DISCUSSION

{4} In its effort to void Progressive's punitive damage exclusion, State Farm relies primarily on the case of *Stinbrink v. Farmers Ins. Co.*, 111 N.M. 179, 803 P.2d 664 (1990). In that opinion, our Supreme Court held that the Uninsured Motorists' Insurance Act (UM Act), NMSA 1978, § 66–5–301 (1983), required New Mexico UM insurers to include coverage for punitive damages within their UM policies. *Stinbrink*, 111 N.M. at 180–81, 803 P.2d at 665–66. The Court's holding invalidated punitive damage exclusions in UM coverage. *See id.* at 181, 803 P.2d at 666; *cf. Stewart v. State Farm Mut. Auto. Ins. Co.*, 104 N.M. 744, 747, 726 P.2d 1374, 1377 (1986) (dicta suggesting that UM coverage for punitive damages could be excluded by express language in UM policy; subsequently "disavowed" in *Stinbrink*, 111 N.M. at 180, 803 P.2d at 665). The rationale for the *Stinbrink* decision was that specific words in the UM Act, requiring coverage "for the protection of persons insured thereunder who are legally entitled to recover damages," were meant to include punitive damages to the extent a victim is legally entitled to recover them. *Id.* at 180, 803 P.2d at 665. This rationale fit within the purpose of the UM Act to empower potential victims to protect against serious or catastrophic financial hardship. *Stinbrink* did not address punitive damage exclusions in liability policies.

{5} The holding in *Stinbrink* requires State Farm in this instance to include punitive damages in Johnson's UM coverage. Because Ward's liability policy with Progressive excluded punitive damages, Ward became "uninsured" or "underinsured" to that extent, causing State Farm to indemnify Johnson for her punitive damage claim. State Farm can recoup its UM payment for punitive damages if it can void Progressive's exclusion.

{6} The parties do not claim that Progressive's punitive damage exclusion was somehow ambiguous or unclear. Thus, this appeal presents a clear question of law: whether the rationale of *Stinbrink* should be extended as a matter of statutory law to require punitive damage coverage in liability policies, regardless of whether the parties have contractually agreed to exclude liability for those very damages.

{7} While acknowledging the holding in *Stinbrink*, Progressive points to differences between UM insurance and liability insurance. Progressive places particular emphasis on the separate statutes that control these two kinds of insurance. Whereas UM insurance is governed by the UM Act, which the Court construed in *Stinbrink*, liability insurance is controlled by the New Mexico Mandatory Financial Responsibility Act (MFRA), NMSA 1978, §§ 66–5–201 to –239 (as amended through 1999), which was not at issue or even discussed in *Stinbrink*. Progressive emphasizes that no New Mexico appellate court has ever construed the MFRA to require punitive damage coverage in liability insurance policies. We explore the differences between the two statutes to determine whether the rationale of *Stinbrink* should be extended to liability insurance.

{8} The MFRA attempts to protect the motoring public by requiring drivers to demonstrate a minimal amount of financial responsibility as a condition for driving an automobile in this state. *See Allstate Ins. Co. v. Perea*, 2000–NMCA–070, ¶¶ 6–16, 129 N.M. 364, 8 P.3d 166. A driver demonstrates financial responsibility under the MFRA by one of three methods: a liability insurance policy, a surety bond, or a cash deposit with the State Treasurer. Section 66–5–208. The liability insurance policy must provide at least $25,000 coverage for bodily injury of one person in any one accident, at least $50,000 for two or more persons in any one accident, and at least $10,000 for property damage in any one accident. *Id.* As an alternative to liability insurance, a driver may elect to post a surety bond or a cash deposit in the amount of $60,000 to cover these same contingencies. Sections 66–5–218, –225, –226. All three alternatives are designed to

ameliorate the "catastrophic financial hardship," § 66–5–201.1, that can befall the "innocent victims of automobile accidents," *Perea*, 129 N.M. 364, 8 P.3d 166, 2000–NMCA–070, ¶ 10.

{9} On the surface, the UM Act shares much of the same general purpose. Recognizing the plethora of uninsured drivers in New Mexico, the UM Act requires insurers to offer UM coverage to all New Mexico drivers. *See* § 66–5–301; *Perea*, 129 N.M. 364, 8 P.3d 166, 2000–NMCA–070, ¶ 10. By empowering the potential victim to purchase UM insurance, the UM Act offers protection to the motoring public from the same financial consequences of automobile accidents. In one sense, then, these statutes are like two sides of the same coin: one focuses on the tortfeasor, the other on the victim.

{10} Beyond similar goals, however, the statutes appear to differ markedly in their approaches. The UM Act aims high but does not mandate prudence. A prudent driver who wants UM coverage, and can afford it, need not suffer serious financial consequences from a culpable, uninsured motorist. The more liability insurance a driver purchases, the more the UM Act requires insurers to make available in UM coverage. Section 66–5–301. The only limiting factor would appear to be how much the driver wants to pay. *See Britt v. Phoenix Indem. Ins. Co.*, 120 N.M. 813, 816, 907 P.2d 994, 997 (1995) (UM insurance includes coverage for damages caused by intentional acts of an uninsured motorist). The UM Act places the responsibility for obtaining adequate UM insurance upon the citizen seeking protection.

{11} In contrast with the UM Act, the MFRA is a mandatory, but minimal act, modest in its aim and reach. It applies to all drivers without exception or waiver but requires only a minimal amount of coverage, in an attempt to avoid "catastrophic financial hardship." Section 66–5–201.1.

{12} Cost appears to be a factor. The legislature makes no pretense of mandating comprehensive liability coverage; the cost to both citizen and insurer would likely be prohibitive. Instead, the legislature appears to have settled upon a compromise. In the interest of achieving the broadest possible coverage, the statute limits mandatory insurance to an amount and scope likely to be affordable.

{13} Even the stated aim of the MFRA, avoiding "catastrophic financial hardship," demonstrates a minimalist approach. *See* § 66–5–201.1. Contrary to the UM Act, the aim of the MFRA is not to offer the opportunity to insure fully against a victim's loss by putting the victim in the same position as if the culpable motorist had adequate liability insurance. The MFRA only mitigates the financial hardship by not leaving the victim penniless. It is self-evident that "financial hardship" occurs when compensatory damages, such as medical bills and lost wages, are left unsatisfied. "Financial hardship," whether catastrophic or otherwise, is far less evident from unrequited punitive damages. *See Weidler v. Big J Enters., Inc.*, 1998–NMCA–021, ¶ 53, 124 N.M. 591, 953 P.2d 1089 (describing punitive damages as "a windfall conferred upon an otherwise fully compensated plaintiff").

{14} The difference between the two statutes is also reflected in certain language of the UM Act, relied upon by our Supreme Court in *Stinbrink*, but not found in the MFRA. The UM Act requires that an insurance policy contain UM coverage "for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury." Section 66–5–301(A). As interpreted by our Supreme Court, "[t]hose damages that a victim of an uninsured tort-feasor might be legally entitled to recover undoubtedly include punitives." *Stinbrink*, 111 N.M. at 180, 803 P.2d at 665. In a state like New Mexico, where a driver may contract for liability insurance to include punitive damages, the theory behind the UM Act puts the victim in the same position as if the culpable motorist had actually purchased coverage for "punitives." *Baker v. Armstrong*, 106 N.M. 395, 398–99, 744 P.2d 170, 173–74 (1987) (holding that New Mexico's public policy does not preclude insuring against punitive damages). However, the MFRA contains no such language requiring liability coverage to the extent the victim may be "legally entitled to recover."

{15} In light of the differences between these two statutes and the compromise seemingly struck by our legislature in requiring a minimum amount of financial responsibility of all drivers, we are reluctant to expand the reach of the MFRA beyond its apparent scope. Almost fourteen years ago, our Supreme Court debated whether public policy would even *permit* liability insurance to cover punitive damages. *Id.* at 397, 744 P.2d at 172. It was assumed at the time that liability insurers could not be *obligated* to insure against punitive damages, and that a liability policy could exclude punitive damages if done so in a clear and unambiguous manner. *See id.* at 396, 744 P.2d at 171 (noting in dictum that "[w]hile [the liability insurer] could have contracted to exclude punitive damages, it did not do so by the language it chose to use"); *Rummel v. St. Paul Surplus Lines Ins. Co.*, 1997–NMSC–042, ¶ 16, 123 N.M. 767, 945 P.2d 985 (analyzing whether under *Baker* the liability insurer "unambiguously adopts a punitive damages exclusion" in a non-automobile liability policy).

{16} Justice Montgomery's dissent in *Stinbrink* reemphasized the point that New Mexico law has never compelled liability insurers to include punitive damages. 111 N.M. at 183 n. 1, 803 P.2d at 668 n. 1 (Montgomery, J., concurring in part, dissenting in part) ("No decision of which I am aware holds that an insurer cannot exclude liability for punitive damages under a liability insurance policy."). That understanding about New Mexico law is consistent with appellate decisions in comparable jurisdictions. *See, e.g., Ross Neely Sys., Inc. v. Occidental Fire & Cas. Co.*, 196 F.3d 1347, 1351 (11th Cir.1999) (punitive damage exclusion in automobile liability policy did not violate Alabama law or public policy); *Cassel v. Schacht*, 140 Ariz. 495, 683 P.2d 294, 295 (1984) (en banc) (holding that an Arizona statute similar to the MFRA did not compel liability coverage for punitive damages in the face of a contractual exclusion); *Taylor v. Lumar*, 612 So.2d 798, 800 (La.Ct.App.1992) (holding that Louisiana compulsory liability insurance law did not compel coverage for punitive damages if excluded in policy). State Farm has not referred us to any contrary appellate decision that would support its interpretation of the MFRA, and we have no reason to believe that any such decision exists.

{17} The MFRA has remained largely intact since *Baker* and *Stinbrink*, as has the UM Act. *See generally* 1998 N.M. Laws, ch. 34 (changing provisions of the MFRA not relevant to this issue). In the intervening years, the legislature has not amended the MFRA to require punitive damages coverage, despite being on notice since *Baker* that we would not likely interpret the existing MFRA to require punitive damages coverage by liability insurers. Although we acknowledge that "[l]egislative silence is at best a tenuous guide to determining legislative intent," *Swink v. Fingado*, 115 N.M. 275, 283, 850 P.2d 978, 986 (1993), we are confident that our interpretation of the MFRA is not inconsistent with legislative goals in this area.

{18} Since *Stinbrink* was authored ten years ago, the way has been clear for insureds to obtain a more adequate, if not full, protection that includes punitive damages by purchasing adequate UM coverage. Responsibility has been placed upon each driver to act pro-actively instead of upon the liability carrier to expand coverage. A kind of equilibrium has been reached between the scope of the UM Act, as expanded in *Stinbrink*, and the scope of the MFRA, which we have no reason to disrupt.

CONCLUSION

{19} We reverse the declaratory judgment entered in favor of State Farm, and remand this case to the district court for further proceedings consistent with this opinion.

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

WE CONCUR: A. JOSEPH ALARID, Judge, and JONATHAN B. SUTIN, Judge.

2001-NMCA-104

35 P.3d 313

Tommy HUDSON, Plaintiff–Appellee,

v.

VILLAGE INN PANCAKE HOUSE OF ALBUQUERQUE, INC., Defendant–Appellant.

Nos. 20,646, 20,769.

Court of Appeals of New Mexico.

Oct. 16, 2001.

Charles R. Peifer, Browning & Peifer, P.A., Albuquerque, NM, for Appellee.

Steven L. Tucker, Tucker Law Firm, P.C., Santa Fe, NM, for Appellant.

OPINION

CASTILLO, Judge.

{1} In August of 1995, Paul Bronstein, chief executive officer (CEO) of Village Inn Pancake House of Albuquerque (Village Inn), and son of the sole shareholder of Village Inn, fired Tommy Hudson (Hudson), then president of Village Inn who had worked for the company almost continuously since 1963. This litigation ensued. After a bench trial, the court awarded Hudson damages for breach of an implied contract of employment. Village Inn raises three issues on appeal. First, Village Inn challenges the district court's determination that the parties had an implied contract of employment under which Hudson could only be discharged for just cause following specific warnings and an opportunity to correct deficient performance. Second, Village Inn challenges the amount of damages awarded, and specifically argues that it was improper to include the annual bonus as part of Hudson's income for the purpose of calculating damages. Finally, Village Inn asserts that the district court erred in awarding prejudgment interest because Hudson's motion was untimely. We affirm.

I. Implied Contract of Employment

{2} First we will discuss the elements necessary to prove the existence of an implied contract of employment. Then we will review the court's findings and the evidence presented to the district court. Lastly, we will discuss the findings of this case in the context of New Mexico law.

A. Standard of Review

{3} On appeal, Village Inn asserts that Hudson failed to overcome the presumption that his employment relationship was "at will" and that as a matter of law there was no sufficiently explicit promise of continued employment to support the district court's finding of an implied contract of employment. *See Hartbarger v. Frank Paxton Co.*, 115 N.M. 665, 673–76, 857 P.2d 776, 784–87 (1993) (holding that the evidence of oral and written statements, business practice of retaining employees for a long time, and retirement was not an offer or promise "sufficiently explicit to establish an implied contract"). Village Inn agrees, however, that whether an implied contract altering the "at will" relationship has been created is a question of fact. *Id.* at 669, 857 P.2d at 780. Consequently, the standard of review is whether the finding is supported by substantial evidence and as such this Court will view all the evidence in the light most favorable to the district court's findings to make that determination. *See id.*

{4} While there are a number of New Mexico cases regarding implied contracts of employment, we rely primarily on *Hartbarger* because it contains a comprehensive sum-

mary of New Mexico law on implied contracts. When there is no written contract defining an employment relationship, the general rule is that the employment is considered "at will" and the relationship can be terminated at any time by either party for any reason with no liability. *See id.* at 668, 857 P.2d at 779. There are, however, two exceptions to this general rule: retaliatory discharge and implied employment contracts restricting the employer's power to terminate the employment. *See id.* Implied employment contracts have been upheld "where the facts showed that the employer either has made a direct or indirect reference that termination would be only for just cause or has established procedures for termination that include elements such as a probationary period, warnings for proscribed conduct, or procedures for employees to air grievances." *Id.* In this case, witness testimony, language in the Village Inn Pancake House Employee Handbook (the Handbook), and the contents of the forms used by Village Inn provide the factual basis supporting the district court's decision that there was an implied employment contract between Village Inn and its employees.

B. The District Court's Findings

{5} The following is a summary of the district court's findings. Village Inn was owned by Ben Bronstein. Hudson, the president of Village Inn, had been employed with Village Inn for nearly thirty-two years when Ben Bronstein's son, Paul Bronstein, fired Hudson without prior warning, notice, or explanation, written or otherwise. The district court made an explicit finding that the testimony of Village Inn's CEO, Paul Bronstein, was not credible. The district court also found that Village Inn terminated Hudson's employment without just cause, and Village Inn does not challenge this finding.

{6} Although Village Inn had no written contract of employment with Hudson, it did provide Hudson and its other employees with an employment handbook. The Handbook stated that no employee would be discharged without being given the chance to succeed, and it listed specific instances of misconduct that could result in discharge.

{7} Village Inn had a policy and practice of (1) providing employees with a warning prior to terminating employment for sub-par performance or misconduct; (2) documenting employee warnings in the course of disciplining any employee; (3) giving progressive warnings; and (4) discharging employees only for justifiable cause except where the employee's conduct poses a serious threat to the safety of employees, customers, or property. The use of this policy resulted in significant reduction in the amount of unemployment compensation benefits Village Inn was required to pay and an increased employee morale. Hudson reasonably expected that he was not subject to termination except for justifiable cause after specific warnings and an opportunity to correct deficient performance.

C. The Evidence

{8} Although the evidence on the issue of the implied contract was conflicting, we review the evidence in the light most favorable to the decision below, resolving all conflicts in the evidence in favor of that decision and disregarding evidence to the contrary. *Las Cruces Prof'l Fire Fighters v. City of Las Cruces,* 1997–NMCA–044, ¶ 12, 123 N.M. 329, 940 P.2d 177. The fact that other evidence existed which would have supported different findings does not require reversal. It is the duty of the district court to resolve all the disputed factual issues. *Roybal v. Morris,* 100 N.M. 305, 311, 669 P.2d 1100, 1106 (Ct.App.1983). We will review the evidence in the light most favorable to the decision below. A synopsis of the essential portions of the evidence follows.

Patricia Phillips

{9} Patricia Phillips (Phillips), the comptroller and treasurer of Village Inn, testified that she was in charge of the weekly formal training for all assistant managers which included teaching company policies regarding hiring and firing. Phillips testified that she had taught the same policies at informal weekly managers' meetings for twenty-seven years.

{10} Phillips then explained the use of the two main forms that Village Inn had devel-

oped for use in employment situations: (1) the "Just for the Record" form was to be used when a verbal discussion of conduct had not produced satisfactory results, and (2) the "Warning" form was to be used when an employee had violated some rule and the manager needed to communicate the consequences of such action. Although Phillips initially maintained that the forms were management tools only and that their use was not a matter of company policy, on cross-examination she admitted that her deposition testimony was different. At her deposition she had agreed that it was company policy to use the forms and that she had trained assistant managers to give an employee a written warning if they were going to discipline someone. Phillips also testified that the use of these forms significantly benefitted the company by saving it money on unemployment claims. While Phillips also implied that use of the forms was not a company policy because the forms were used inconsistently, it was for the district court to weigh the evidence.

Tommy Hudson

{11} As president of Village Inn, Hudson had the responsibility to supervise and administer the personnel policies. Consistent with these policies, Village Inn was known to be a fair company to work for. Managers were trained to warn before they fired employees, and an employee who was about to lose his or her job could expect to be told in writing beforehand. Hudson testified that the warning policy was for the benefit of both the company and the employees, and that managers would "get in trouble" if they ignored the policy. Village Inn required managers to have good cause for terminating employees.

{12} Hudson testified that he expected he would be fired only for a good reason or just cause. Ben Bronstein told him that Hudson would be taking over Bronstein's position when Bronstein retired. Shortly after this conversation took place, Bronstein temporarily turned over the operation of all the Village Inn stores to Hudson, Phillips, and another employee for two-and-a-half years. This expression of confidence in Hudson and Hudson's conversation with Bronstein led Hudson to believe that he "was going to be there for a while."

Ben Bronstein

{13} Ben Bronstein denied that Village Inn had a policy requiring the use of a disciplinary or warning system, and he insisted that all employees, including supervisory employees such as Hudson, worked at the will of his company. He said that the use of disciplinary notices and warnings was discretionary with store managers and supervisors. These tools were used primarily to document terminations in order to avoid unemployment claims.

Ilene Valtierra

{14} Ilene Valtierra (Valtierra), a former store manager for Village Inn, testified that Village Inn trained her to refrain from discharging employees without any prior warning or write-up. Although the use of warnings and write-ups was a matter for her discretion, in practice she would not have dared to discharge an employee "for not doing their job" without a write-up because she "would have had Pat Phillips on [her] butt." While she believed she had the authority to discharge employees for very serious infractions without giving them any prior warning, she was taught to exercise that authority only if she had justifiable cause. Like Hudson, she expected that she would not be terminated without her supervisor giving her a chance to improve her performance.

Forms

{15} Various documentary exhibits were also admitted into evidence. One form was a completed "Just for the Record" warning form, written by a store manager and instructing her assistant store manager to document all incidents of poor employee performance. In response to the question on the form asking for a solution, the store manager wrote "Document everything." Various forms admitted into evidence supported the district court's conclusion that it was Village Inn's policy to document progressive employee discipline.

Handbook

{16} Hudson also introduced two versions of the Handbook whose material provisions are substantially similar and which support the district court's finding of an implied employment contract. The Handbook in one form or another had been used for approximately twenty years. The Handbook includes a section on performance review and employee conduct, which states, "Village Inn reserves the right to discharge an employee at any time without advance notice for unbecoming conduct or violation of any regulation." While there is no formal grievance procedure outlined in the Handbook, there is a process for handling complaints. The employee is directed to take these matters to his or her direct supervisor and, if the matter is not resolved or there are personal circumstances involved, to take the matter directly to the manager. The Handbook states: "Management is most willing to discuss any problems with you. After discussion with your unit manager, any unresolved situations may be brought to the attention of the General Manager."

{17} The Handbook also specifies conduct that may result in immediate discharge. The section on employee conduct states, "For the protection of our Company and its employees, it is important for you to be aware of certain rules which, if violated, may result in disciplinary [actions] which may include immediate dismissal." Various items are listed such as dishonesty, failure to report to work without a satisfactory reason, violating company policies, and discourtesy to any customer. The last enumerated item in this section states, "You may also be subject to immediate dismissal for justifiable causes other than those listed above."

{18} Hudson's personnel file further supported the district court's finding that Village Inn would terminate employees only on the basis of justifiable cause. The file contained a document which reiterated the Handbook's employee conduct section, including the list of specific grounds for immediate dismissal and the proviso that other justifiable cause could also result in immediate dismissal. Hudson signed the document and thereby indicated his understanding of these rules. This document clearly implied that an employee could expect continued employment in the absence of conduct constituting justifiable cause.

D. Discussion

{19} Viewing the totality of the evidence in the context of applicable New Mexico law, we affirm the district court's finding that Hudson had an implied employment contract with Village Inn. Two New Mexico cases demonstrate the validity of the district court's finding. One case that comes close to being factually on point is *Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 426, 773 P.2d 1231, 1233 (1989), where our Supreme Court affirmed a finding of an implied contract. In that case, there was evidence that the plaintiff understood he would have a great future with the company and that the company policy manual was "his bible." *See id.* at 427–28, 773 P.2d at 1234–35. There was evidence that the employees believed they would only be terminated from their jobs for a good reason. The policy manual stated that the employee controlled whether he or she would be discharged as the result of rule infractions, poor performance, or other " 'cause.' " *See id.* at 428, 773 P.2d at 1235. Our Supreme Court asserted that this statement suggested it was the employer's policy not to terminate except for a good reason and determined the totality of the parties' relationship, including the evidence of the manual, was sufficient to affirm the finding that there existed an implied contract of employment. *See id.*

{20} In *Kestenbaum v. Pennzoil Co.*, 108 N.M. 20, 24–26, 766 P.2d 280, 284–86 (1988), our Supreme Court upheld a finding of an implied contract even in the absence of any employee handbook. In that case, the employer's agent told plaintiff during negotiations that the employment would be permanent as long as the plaintiff did his job, and the employer conceded that in practice management did not terminate employees except for good cause. These facts, when viewed in combination with other employer policy statements regarding insurance benefits and severance pay, supported the jury's finding of an implied contract.

{21} Consistent with *Newberry* and *Kestenbaum*, the evidence in the present case supports the district court's finding of an implied contract of employment. There was evidence that employees were expected to follow the rules and procedures set forth in the Handbook. The Handbook supports the conclusion that Village Inn had a policy not to terminate except for a good reason because it stated that an employee could be subject to immediate dismissal for justifiable causes other than those listed. There was testimony that Village Inn trained its management to issue warnings and document poor work performance before terminating an employee, and that a store manager who disregarded Village Inn's warning forms did so at his or her own peril. Although the Bronsteins offered evidence to the contrary, we view the evidence in the light most favorable to the judgment and conclude there was substantial evidence to support the district court's findings regarding an implied contract of employment.

{22} We reject Village Inn's argument that the facts of this case are more similar to the situation in *Hartbarger*, where our Supreme Court reversed a finding of an implied contract. *See Hartbarger*, 115 N.M. at 676, 857 P.2d at 787. The Court determined that the employer's custom of retaining employees for long periods of time and its practice of only firing employees for a good reason did not by themselves establish the lack of an "at will" employment policy. *See id.* at 674, 857 P.2d at 785. However, in *Hartbarger*, the handbook's provision on "Fair and Square Policies" related only to rates of compensation. *See id.* at 673, 857 P.2d at 784. The Court also found that no language in the handbook directly or indirectly referred to a policy that the employer will fire employees only for just cause. *See id.* Although the employee handbook listed actions that could lead to severe disciplinary action or discharge, there was no indication that this list included a general statement that an employee could be subject to immediate dismissal for other just cause as there was in this case and in *Newberry*. In *Hartbarger*, unlike the present case, there was no assertion that the employer established policies or procedures, such as written warnings for terminations. *See id.*

{23} We affirm the district court's findings regarding the implied contract of employment.

II. Measure of Damages

{24} Village Inn challenges the inclusion of future bonuses in the measurement of damages, arguing that bonuses were awarded to Hudson entirely at Village Inn's discretion.

A. Preservation

{25} Hudson asserts that Village Inn failed to preserve the issue by not objecting to any of the damages evidence offered at trial or on appeal. We disagree for two reasons. First, Village Inn elicited testimony from its expert economist about the propriety of including the bonus in the calculation of damages, and Hudson cross-examined this expert on the bonus issue. There are numerous other instances in the record where testimony was elicited about the discretionary nature of the bonus and its calculation. Second, Village Inn's motions for a directed verdict specifically raised this issue. We therefore determine that the issue was preserved at trial. *See generally Martinez v. City of Grants*, 1996–NMSC–061, ¶ 14, 122 N.M. 507, 927 P.2d 1045 (preserving issue by defendant's objection to the jury instructions and motion for a directed verdict at close of trial of all the evidence and motion for a judgment notwithstanding the verdict). We also note that cases assigned to the general calendar are no longer restricted to briefing only those issues raised in the docketing statement. *See* Rule 12–213(A)(3) NMRA 2001. The issue is properly before this Court.

B. Standard of Review & Discussion

{26} The parties disagree on the appropriate standard of appellate review regarding this issue. Village Inn argues that it was undisputed that the bonus was discretionary; therefore, Hudson had no contractual right to receive any bonus in the future and awarding damages to include the bonus puts Hudson in a better position than he would have been had his employment not been terminated. Village Inn also contends

that Hudson did not prove the fact of his damages regarding the bonus to a reasonable certainty because any future bonus calculation would be contingent on the future financial success of the corporation over a twelve-year period as well as the satisfactory performance by Hudson. Village Inn further argues that the future expectation of future bonuses is not reasonable and cannot support an award of damages as a matter of law. Village Inn argues we should review this issue de novo and hold that the inclusion of any bonus in the award of damages was error. Hudson asserts the issue is really a question of whether substantial evidence supports the district court's award of compensatory damages. We agree with Hudson.

{27} In support of its position, Village Inn cites to numerous out-of-state cases that address the issue of whether there was an enforceable contract for bonuses or incentive payments. However, in our view, these cases hold that whether a contractual right to a bonus exists depends on the facts of each case. *See Christensen v. Bic Corp.*, 18 Conn. App. 451, 558 A.2d 273, 275–76 (1989) (holding there was no evidence of an implied contract to pay the plaintiff a bonus); *Conard v. Mitchell Indus., Inc.*, 155 Ind.App. 110, 291 N.E.2d 577, 578 (1973) (affirming the finding that there was no implied contract to pay a bonus); *Amant v. Kidde, Inc.*, 756 F.2d 685 (8th Cir.1985) (affirming the denial of a bonus as a contractual right where it was discretionary and the amount of past bonuses were not based on any fixed schedule); *Ashker v. Horizon Offshore Contractors, Inc.*, 2000 WL 516377 (E.D.La.2000) (affirming the granting of summary judgment regarding plaintiff's claim to a contractual right to a bonus); *Automatic Sprinkler Corp. v. Anderson*, 243 Ga. 867, 257 S.E.2d 283, 285 (1979) (affirming the judgment that there was no contractual right to an incentive compensation payment where the written employment contract stated that its payment was discretionary); *Parrish v. Gen. Motors Corp.*, 137 So.2d 255, 258 (Fla.Dist.Ct.App. 1962) (affirming the denial of an earned bonus where the written plan stated it was discretionary); *Spooner v. Reserve Life Ins. Co.*, 47 Wash.2d 454, 287 P.2d 735, 738 (1955) (determining a voluntary contribution did not give rise to a contractual right where the company explicitly stated in writing that the company could decrease or withhold the bonus with or without notice).

{28} The evidence presented in this case supports Hudson's right to a bonus. While it is true that Ben Bronstein characterized the bonus plan as discretionary, this does not end the inquiry. In his deposition, Ben Bronstein also stated that everybody assumed if Village Inn was doing well they would get a bonus and that this expectation was rational and reasonable. Hudson testified that based on the years that the program had been in effect, it was understood that bonuses would be paid. Phillips also testified that she considered the bonuses as part of her income. Village Inn's own expert witness presented the district court with a Department of Labor Survey showing that the restaurant industry commonly pays managers through a combination of salary and bonuses. Supervisors at Village Inn were paid compensation consisting of base salary and bonus. Hudson's expert witness testified that he included bonuses in his damage computation because the bonuses had been paid consistently and for a period of years and that it was reasonable to conclude Village Inn would have to continue paying bonuses to keep and attract employees.

{29} Apparently, the district court gave little weight to Bronstein's characterization of the bonus plan: it made no findings based on his testimony. On the contrary, the district court focused on Village Inn's actual practice begun in the early 1980's of paying Hudson a bonus of 3.5 percent of Village Inn's net profit at the end of each fiscal year and made a specific finding on this issue. The district court also made two other direct findings regarding the bonus: first, that Hudson reasonably relied on the bonus as part of his compensation and second, that even after Hudson was fired, bonuses were awarded to other employees who traditionally received bonuses. The findings support the conclusion that the bonus was part of the compensation portion of the implied employment contract. *See* Herbert B. Chermside, Jr., Annotation, *Master and Servant: Regular Payment of Bonus to Employee, Without*

Express Contract To Do So, As Raising Implications of Contract For Bonus, 66 A.L.R.3d 1075 (3d ed.2001).

{30} Other findings included Hudson's base annual salary amount and what his average salary had been for the four years prior to his termination. The district court awarded damages including the loss of Hudson's base salary, annual bonus, and fringe benefits from the time of the termination of his employment through age sixty-two with the appropriate discount factors. Village Inn did not challenge any of the findings regarding damages. The district court was entitled to consider the historical facts in calculating future lost earnings. *See generally Smith v. FDC Corp.,* 109 N.M. 514, 520–21, 787 P.2d 433, 439–40 (1990) (stating in the context of an employment discrimination case that it was not inappropriate to estimate future lost earnings based on past income). The award of damages is supported by substantial evidence. *See generally Moody v. Stribling,* 1999–NMCA–094, ¶ 37, 127 N.M. 630, 985 P.2d 1210 (stating in a fiduciary duty case damages are determined by "whether they are supported by substantial evidence"). Based on all the evidence, we affirm the use of the bonus in the calculation of damages awarded.

III. Prejudgment Interest

{31} Village Inn asserts that the district court erred in awarding prejudgment interest because Hudson's motion was untimely and the district court had no authority to extend the time for filing it. Based on the unique circumstances of this case and considerations of the equities involved, we determine that the district court properly entertained Hudson's motion for prejudgment interest.

{32} The district court's judgment specifically contemplated a prejudgment interest award and imposed a deadline on Hudson for filing an appropriate motion. The district court's order awarded compensatory damages "with Plaintiff's claims for prejudgment and post-judgment interest together with any cost issues being decided upon hearing of appropriate Motions filed within [fifteen] days after the entry of this Judgment." On the fifteenth day after entry of the judgment, Hudson filed a motion to award pre- and post-judgment interest. Two months later, the district court entered its order awarding pre- and post-judgment interest. Village Inn has argued that the post-trial motion for prejudgment interest was a motion to alter or amend the judgment and should have been filed within ten days of the judgment pursuant to Rule 1–059(E) NMRA 2001.

{33} Even if we were to assume without deciding that the June 16, 1999, judgment was final and that the motion for prejudgment interest was required to comply with the time constraints of Rule 1–059, we would affirm the award of prejudgment interest based on equitable considerations. If a party relies to its detriment on a trial court's extension of the time provided by rule, equity will permit the trial court to hear the motion within its discretion. *See, e.g., Pahuta v. Massey–Ferguson, Inc.,* 997 F.Supp. 379, 383 (W.D.N.Y.1998) (applying equitable exception that allows motion for a new trial when counsel relied to his detriment on trial court's extension of time); *Eady v. Foerder,* 381 F.2d 980, 981 (7th Cir.1967) (relying upon district court's order that extended time period was a justifiable excuse for plaintiff's failure to file motion within ten days of judgment); *see also Trujillo v. Serrano,* 117 N.M. 273, 278, 871 P.2d 369, 374 (1994) (permitting an appeal to be heard where the appellant relied on the magistrate court's statement that a judgment would not be issued until the parties were recalled to court but the magistrate court then filed the judgment without giving notice to the parties, causing the untimely filing of the appeal). Hudson relied on the language of the order allowing fifteen days to file his motion for prejudgment interest. Village Inn did not object to the time frame permitted by the order until it filed its response to the motion. It has not argued that it suffered any prejudice from the fact that the motion was filed fifteen rather than ten days after the judgment was entered. Under these circumstances, we conclude that the district court properly heard the motion for prejudgment interest.

CONCLUSION

{34} We determine that substantial evidence supported the finding of an implied contract of employment that was breached when Village Inn terminated Hudson's employment. We also affirm the district court's inclusion of future bonuses in the calculation of damages, and the award of prejudgment interest. The judgments of the district court are affirmed.

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

WE CONCUR: MICHAEL D. BUSTAMANTE, Judge, and CYNTHIA A. FRY, Judge.

2001-NMSC-035

35 P.3d 972

Marta LEWIS, as personal representative of the Estate of Martin C. LEWIS, deceased, Plaintiff-Respondent,

v.

Norberto R. SAMSON, Jr., M.D., and Raymond F. Ortiz, M.D., Defendants-Petitioners.

No. 25,990.

Supreme Court of New Mexico.

Nov. 9, 2001.

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Hinkle, Hensley, Shanor & Martin, L.L.P., William P. Slattery, David B. Lawrenz, Santa Fe, NM, Madison, Harbour, Mroz & Brennan, P.A., Lorri Krehbiel, Albuquerque, NM, for Petitioners.

The Holland Law Office, Jo Anne Shanks, Santa Fe, NM, for Respondent.

OPINION

SERNA, Chief Justice.

{1} Plaintiff Marta Lewis, acting as personal representative for decedent Martin C. Lewis, filed an action for wrongful death arising out of medical malpractice against Defendants Norberto R. Samson, Jr., M.D., and Raymond F. Ortiz, M.D. Following a jury verdict and judgment in favor of Defendants, Plaintiff appealed to the Court of Appeals. The Court of Appeals reversed the judgment and remanded for a new trial based on the conclusion that the district court abused its discretion in relation to a discovery ruling. *Lewis v. Samson,* 1999-NMCA-145, ¶ 2, 128 N.M. 269, 992 P.2d 282, *cert. granted,* No. 25,990, 128 N.M. 150, 990 P.2d 824 (1999). The Court of Appeals also ruled that the district court erred in denying Plaintiff's pretrial motion to exclude evidence concerning comparative fault. *Id.* ¶ 3. We granted Defendants' petition for writ of certiorari to the Court of Appeals in order to review both rulings made by the Court of Appeals. We now reverse.

I. Facts and Proceedings

{2} In February 1994, Moses Griego stabbed Martin Lewis in the back eight times during a fight in Tucumcari, New Mexico. Seven of the eight stab wounds penetrated Lewis's lungs. Following the stabbing, Lewis was treated by Defendants at the emergency room of Dan C. Trigg Memorial Hospital (Trigg Hospital) in Tucumcari. At some point during the treatment, Defendants telephoned the University of New Mexico Hospital (University Hospital) to request an emergency transfer of Lewis for a thoracotomy. University Hospital informed Defendants that Lewis would not survive a ground transfer and sent a specialist to Trigg Hospital by plane. Defendants attempted to stabilize Lewis but did not perform a thoracotomy; instead, they awaited the arrival of the specialist. Approximately two hours later, the specialist arrived and immediately performed a thoracotomy, but Lewis did not survive. Griego was later convicted of second degree murder for the stabbing.

{3} Plaintiff brought suit against Defendants, alleging medical negligence in their treatment of Lewis. Plaintiff also originally named University Hospital as a defendant and initially filed her complaint in October 1995 in the Second Judicial District. Following an amicable resolution of the claim against University Hospital, Plaintiff dismissed University Hospital as a defendant. Plaintiff then re-filed in the Tenth Judicial District in January 1997. The district court, in February 1997, set the trial date for July 14, 1997; however, the court rescheduled the trial for January 1998 due to an inability to seat an impartial jury.

{4} At trial, Plaintiff attempted to establish Defendants' negligence by introducing expert testimony that Defendants performed below the standard of care for a reasonable physician. Specifically, Plaintiff's expert testified that Defendants should have inserted chest tubes earlier, should have attempted to transfer Lewis more quickly, and should have attempted to perform a thoracotomy as a last resort. Plaintiff's expert testified that Lewis had a ninety percent chance of survival if he had received appropriate care. In response, Defendants testified that they were not properly trained to perform a thoracotomy, that they sought to transfer Lewis in a timely manner, and that they did not unduly delay the insertion of chest tubes. Defendant Samson, a general surgeon, testified that he had not performed a thoracotomy in sixteen years, that no physician had privileges to perform an open thoracotomy at Trigg Hospital at the time of the incident, and that the emergency room was not properly equipped and the staff not properly trained to perform an open thoracotomy. In addition, Defendants introduced expert testimony to support their contention that they performed within an acceptable range of medical care. Defendants' expert testified that the timing of the insertion of chest tubes made no difference in the outcome of Lewis's treatment. Defendants' expert testified that nothing could have been done to save Lewis's life given the number and severity of the stab wounds, the occurrence of the stabbing in the rural area of Tucumcari, and the unavailability of an experienced chest surgeon. With regard to the timeliness of seeking to trans-

fer Lewis, the parties disputed whether Defendant Ortiz first called University Hospital about transferring Lewis at 3:06 a.m., as claimed by Defendants, or at 3:57 a.m., as claimed by Plaintiff. Although telephone records indicated a call from Trigg Hospital to University Hospital at both 3:06 a.m. and 3:57 a.m., the parties disputed whether Lewis was the subject of the first call. Defendants also argued that Griego's tortious and criminal act of repeatedly stabbing Lewis constituted the sole proximate cause of Lewis's death. By special verdict, the jury found that Defendants were not negligent in their treatment of Lewis and returned a verdict in favor of Defendants.

II. Discovery Rulings

{5} This appeal implicates two separate discovery rulings made by the district court: (1) the partial granting of a defense motion to exclude witnesses due to a lack of timely disclosure; and (2) the denial of Plaintiff's motion to reopen discovery and to modify the discovery deadlines in a pretrial order. The Court of Appeals concluded that the district court abused its discretion in denying Plaintiff's motion to reopen discovery. *Lewis,* 128 N.M. 269, 992 P.2d 282, 1999–NMCA–145, ¶ 34. As a result, the Court determined that it was unnecessary to address the district court's earlier decision to exclude witnesses. *Id.* ¶ 24. As explained below, we believe that both of the district court's discovery rulings are interconnected, and we thus disagree with the Court of Appeals' review of the motion to reopen discovery in isolation. We believe it is necessary to review each ruling in order to assess the propriety of the district court's actions in this case.

A. Late Disclosure of Witnesses

{6} On February 12, 1996, Plaintiff responded to a list of interrogatories submitted by Defendant Samson which included a request to identify each witness whom Plaintiff intended to call at trial and a brief synopsis of their testimony. Plaintiff stated that she intended to call "any and all personnel from Dan Trigg Hospital. No other witnesses have been developed." Plaintiff did not supplement her answer to this interrogatory during the course of litigation.

{7} Over one year later, on March 14, 1997, Defendant Ortiz requested that Plaintiff supplement her responses to interrogatories. Defendant Ortiz expressly identified in this letter that he was "primarily interested in [Plaintiff's] trial witnesses and exhibits." Plaintiff failed to respond to this request. On May 30, 1997, approximately six weeks before the original trial date of July 14, 1997, Plaintiff served Defendants a document entitled "Plaintiff's Witness List for Trial." This list included fifteen witnesses that had not been previously disclosed by Plaintiff and were not personnel of Trigg Hospital. Even though the original trial date was imminent, Plaintiff failed to disclose the substance of these witnesses' testimony but stated in a cover letter that "[t]hese are friends and colleagues only and will testify about Martin's life." Plaintiff further indicated that she would, "of course, not call all of them and [would] provide a final list, when determined, by the last part of June," approximately two weeks before trial. Finally, Plaintiff informed Defendants that she would also be calling her expert witnesses. She attached a report from an economist, Dr. Brian McDonald, outlining his opinions concerning economic damages. Plaintiff had not previously disclosed this witness to Defendants, even though Dr. McDonald's report was dated February 26, 1997.

{8} On June 9, 1997, Defendant Ortiz filed a motion to exclude the fifteen fact witnesses disclosed by Plaintiff on May 30, 1997. Defendant Ortiz argued that Plaintiff's late disclosure of witnesses violated the rules of discovery and, due to the lack of specificity with respect to which of the witnesses would testify and the subject matter of the testimony, prejudiced Defendants' ability to depose Plaintiff's witnesses and to prepare rebuttal. In response to this motion, on June 11, 1997, Plaintiff agreed not to call the fifteen fact witnesses identified on May 30, 1997, but still intended to call the late-identified expert, Dr. McDonald, as well as Penny Griner, an employee of University Hospital, and Sharon Faison, an employee of Trigg Hospital. Defendant Samson then filed a motion to ex-

clude these three witnesses on the basis of late disclosure.

{9} The district court held a hearing on the motion to exclude the witnesses on June 30, 1997. At the hearing, Defendant Samson argued that Plaintiff ignored the rules of discovery by disclosing her witnesses at such a late date. Plaintiff did not provide an explanation for the late disclosure. Instead, Plaintiff merely characterized the late disclosure of Dr. McDonald and Griner as her "oversight[s]." She informed the court that Dr. McDonald was a necessary witness for her case and requested a continuance of the case in lieu of excluding Dr. McDonald's testimony. Plaintiff intended to call Griner to testify concerning the transfer telephone calls made by Defendants and, in particular, Defendant Ortiz's assertion that he first called University Hospital to request a transfer for Lewis at 3:06 a.m. instead of 3:57 a.m. Griner was not on duty on the night of the call and had no personal knowledge about the calls received by University Hospital on that night, but according to Plaintiff, Griner was familiar with the hospital's routine procedures for taking in-coming calls. Plaintiff indicated that she had not yet spoken with Griner and that she was not certain which party would benefit from Griner's testimony about hospital procedure. Plaintiff intended to introduce Faison's testimony to establish that rib spreaders were available at Trigg Hospital on the night of Lewis's stabbing. Plaintiff argued to the court that Defendants had access to Faison as an employee of Trigg Hospital and that Defendants were aware of her anticipated testimony because Faison completed an affidavit earlier in the case.

{10} In response to Plaintiff's arguments, Defendant Samson contended that an oversight did not excuse Plaintiff's failure to disclose Dr. McDonald and Griner. Additionally, Defendants argued that Plaintiff was previously aware of the disputed issue of Defendant Ortiz's telephone call to University Hospital and that Plaintiff's failure to identify Griner at an earlier date caused them to believe that all issues involving personnel from University Hospital had been resolved by Plaintiff's settlement of her claim against the hospital. Defendants also stated that Griner's availability prior to the original trial date appeared questionable. Defendants thus contended that they would be prejudiced by Plaintiff's late disclosure of Griner. Defendants finally contended that Faison's testimony would be cumulative of an admission made by Defendant Samson that rib spreaders were available at Trigg Hospital at the time of treatment.

{11} The district court ruled that, to the extent that Faison's testimony would be cumulative of Defendant Samson's admission, it would be excluded. The court also found that Plaintiff was aware of the issue of the telephone conversations with University Hospital from the very beginning of the case and that, as a result, Griner would be excluded due to Plaintiff's untimely disclosure. With respect to Dr. McDonald, the court indicated that Defendants had a right to view his report and that it was improper for Plaintiff to withhold the information. However, the court recognized that Dr. McDonald's testimony would be important to Plaintiff's case and denied Defendants' request to exclude Dr. McDonald's testimony in the interest of fairness.

{12} Typically, under our Rules of Civil Procedure, "[a] party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the party's response to include information thereafter acquired." Rule 1–026(E) NMRA 2001. However, an exception to this general rule applies in this case.

> A party is under a duty seasonably to supplement the party's response with respect to any question directly addressed to the identity of each person expected to be called as a witness at trial, the subject matter on which the party is expected to testify and the substance of the party's testimony.

Rule 1–026(E)(1). This exception applies to both fact witnesses and expert witnesses, the latter of which are subject to discovery as specifically provided in Rule 1–026(B)(5)(a) (requiring that a party "identify each person whom the ... party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts

and opinions to which the expert is expected to testify and a summary of the grounds for each opinion"). Furthermore, the failure to comply with the duty seasonably to supplement the disclosure of witnesses subjects a party to the discovery sanctions provided in Rule 1–037(B)(2) NMRA 2001. *See Allred ex rel. Allred v. Bd. of Regents of Univ. of N.M.*, 1997–NMCA–070, ¶ 19, 123 N.M. 545, 943 P.2d 579 (applying Rule 1–037(B)(2) to the failure to supplement answers to interrogatories in a proper manner); *see also* Rule 1–037(D) (providing that, in response to a failure to serve answers or objection to interrogatories, the trial court "may make such orders in regard to the failure as are just, and among others it may take any action authorized under Subparagraphs (a), (b) and (c) of Subparagraph (2) of Paragraph B of this rule").

{13} We review a trial court's decision to impose discovery sanctions under Rule 1–037(B)(2) for an abuse of discretion. *United Nuclear Corp. v. Gen. Atomic Co.*, 96 N.M. 155, 239, 629 P.2d 231, 315 (1980) ("It is well-settled that the choice of sanctions under Rule [1–037] lies within the sound discretion of the trial court. Only an abuse of that discretion will warrant reversal." (footnote omitted)). Applying this standard of review, we will disturb the trial court's ruling only "when the trial court's decision is clearly untenable or contrary to logic and reason." *Newsome v. Farer*, 103 N.M. 415, 420, 708 P.2d 327, 332 (1985). Moreover, whereas we more closely scrutinize, albeit still under an abuse of discretion standard, the severe sanction of dismissal, we entrust sanctions short of dismissal to the sound discretion of the trial court. *Gonzales v. Surgidev Corp.*, 120 N.M. 151, 158, 899 P.2d 594, 601 (1995); *accord Marchman v. NCNB Tex. Nat'l Bank*, 120 N.M. 74, 91, 898 P.2d 709, 726 (1995) ("Lesser sanctions . . . may be applied 'to *any* failure to comply with discovery orders.' " (quoting *United Nuclear*, 96 N.M. at 202, 629 P.2d at 278)). "Excluding a witness, while still a drastic remedy, is 'one of the lesser sanctions' available to the court." *Shamalon Bird Farm, Ltd. v. United States Fid. & Guar. Co.*, 111 N.M. 713, 716, 809 P.2d 627, 630 (1991) (quoting *Jenzake v. City of Brookfield*, 108 Wis.2d 537, 322 N.W.2d 516, 519 (App.1982)). Finally, we note that the trial court is not required to exhaust less severe sanctions in imposing a just remedy for a violation of discovery rules. *See Gonzales*, 120 N.M. at 158, 899 P.2d at 601.

{14} The record indicates that Plaintiff failed to supplement her answers to interrogatories concerning the identity of her witnesses at trial and therefore violated her duty under Rule 1–026(E)(1). Additionally, Plaintiff failed to respond to a specific request by Defendants to supplement her answers to interrogatories. With only approximately six weeks remaining before the original trial date, Plaintiff identified numerous previously undisclosed fact witnesses. At that same time, Plaintiff also offered a previously undisclosed expert witness, even though the date of the expert's report clearly indicated Plaintiff's prior awareness of this witness. Despite having the expert's report, Plaintiff did not include this witness in her answers to interrogatories, did not supplement her answers to interrogatories to disclose this witness, and did not disclose the witness's report, in violation of her duties under Rule 1–026(B)(5)(a).

{15} Rule 1–037(B)(2)(b) provides that a trial court may respond to an abuse of discovery by "refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence." Additionally, we have said that, "[i]n any just search for truth, a trial court must have broad discretion to admit or refuse testimony of witnesses whose identity was not revealed in answers to pretrial interrogatories." *Montoya v. Super Save Warehouse Foods*, 111 N.M. 212, 215, 804 P.2d 403, 406 (1991).[1]

1. In contrast to our deference to trial courts, the Federal Rules of Civil Procedure provide for mandatory exclusion of undisclosed witnesses. *See* Fed.R.Civ.P. 37(c)(1) ("A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed."); *Klonoski v. Mahlab*, 156 F.3d 255, 269 (1st Cir.1998) ("[T]he new rule clearly contemplates stricter adherence to discovery require-

In this case, there were numerous violations of the rules of discovery with respect to the requirement of timely witness disclosure. This type of conduct, if tolerated, would frustrate the general purposes of discovery and the specific purpose of witness disclosure. *See, e.g., State v. Ruiz,* 119 N.M. 515, 521, 892 P.2d 962, 968 (Ct.App.1995) ("The purpose of witness disclosure rules is to give parties a fair opportunity to test the credibility of the witnesses and to eliminate surprise and gamesmanship."); *Redman v. Bd. of Regents,* 102 N.M. 234, 238, 693 P.2d 1266, 1270 (Ct.App.1984) ("The discovery rules were adopted in the first place to eliminate surprise and allow for full preparation of a case.").

{16} The record indicates that the district court took into account the potential prejudice to Defendants from the discovery violations and the importance of the evidence to Plaintiff's case. The court also considered whether Plaintiff's conduct was excusable by ascertaining Plaintiff's prior awareness of the need for the late-disclosed witnesses. The court indicated an intention to ensure fairness to both parties. Based on these considerations, the district court entered the lesser sanction of excluding two of Plaintiff's witnesses, Griner and Faison, while allowing Plaintiff to call her third undisclosed witness, Dr. McDonald.

{17} In this case, Plaintiff demonstrated a repeated disregard for the rules of discovery. *Cf. Allred,* 123 N.M. 545, 943 P.2d 579, 1997-NMCA-070, ¶ 15 ("Plaintiffs consistently failed to timely comply with the requirements to supplement interrogatories."). The district court, after balancing the interests of both parties, imposed the lesser sanction of excluding Plaintiff's witnesses under Rule 1-037(B)(2)(b) and limited its ruling to witnesses that were, based on Plaintiff's proffer, relatively unimportant to Plaintiff's case. Reviewing the full record in this case, we believe there is substantial evidence in the record to support the district court's decision. Thus, we conclude that the district court acted well within its discretion in its imposition of sanctions for Plaintiff's violation of the rules of discovery.

B. Pretrial Order and Reopening Discovery

{18} On June 18, 1997, the district court entered a pretrial order, which included the parties' witness lists, and set a discovery deadline of June 27, 1997. Following the inability to seat a jury on the original trial date of July 14, 1997, and the postponement of trial until the following January, Plaintiff filed a motion to amend the pretrial order to allow additional discovery and the inclusion of more witnesses. In a brief in support of the motion, Plaintiff stated, "This court denied Plaintiff two witnesses because the witnesses were not named until six weeks prior to the scheduled beginning of the trial. Moreover, Plaintiff now wishes to add another witness from Amarillo to prove that Amarillo accepts patients from New Mexico. . . ." Plaintiff contended "that counsel is oftentimes faced with the difficulty of addressing and dealing with supplemental information that comes to light after the deadline for discovery passes." At a hearing on Plaintiff's motion, Plaintiff emphasized her request to call the witness from Amarillo but also indicated to the district court that she would like to call the specialist from University Hospital who flew to Tucumcari to treat Lewis, Dr. James Hanosh, apparently to testify about Defendant Ortiz's telephone calls to University Hospital. Plaintiff had not spoken with Dr. Hanosh but apparently believed that he would provide information regarding University Hospital's in-coming call procedure. Dr. Hanosh did not actually speak to Defendants on the telephone until 4:20 a.m. and had no personal knowledge about the subject of the 3:06 a.m. call. In addition to these witnesses, Plaintiff further hoped to reopen all of discovery through the day of trial. Plaintiff indicated that she was unaware of Defendant Ortiz's claim that he called University Hospital at an earlier time and that she needed additional witnesses to respond to that claim. Plaintiff further contended that the district court's earlier exclusion of Faison was based on the false premise

ments, and harsher sanctions for breaches of this rule, and *the required sanction in the ordinary case is mandatory preclusion.*" (emphasis added)).

that her testimony would be cumulative of an admission by Defendant Samson. According to Plaintiff, Defendant Samson's admission left some ambiguity about the availability of functional rib spreaders at Trigg Hospital at the time of treatment.

{19} The district court informed Plaintiff that "there's a reason for the pretrial order . . . [and] a reason for the time limits." The court found that Plaintiff was previously aware of the information she sought to discover and that the pretrial order did not prevent Plaintiff from ascertaining the information prior to the entry of the pretrial order. However, the court afforded some relief to Plaintiff by ensuring that Plaintiff's existing witnesses would be able to testify about the possibility of a transfer to Amarillo, by instructing Defendant Samson to clarify his admission, and by informing Plaintiff that the court would give her some latitude in her impeachment of witnesses.

{20} The Court of Appeals determined that the district court did not abuse its discretion in relation to Faison and the witness from Amarillo because these witnesses would have provided cumulative testimony. *Lewis*, 128 N.M. 269, 992 P.2d 282, 1999–NMCA–145, ¶ 30. However, the Court of Appeals concluded that the court abused its discretion in declining Plaintiff's request to add Griner to her witness list. *Id.* ¶ 31. The Court of Appeals did not address Plaintiff's broad request to reopen discovery until the date of trial or her request to add Dr. Hanosh as a witness. *Id.* ¶ 34.

{21} In reviewing the district court's ruling, we believe it is useful to separate Plaintiff's requests into two categories: (1) her request to add Griner and Faison as witnesses; and (2) her request to add the witness from Amarillo, to reopen discovery in general, and to add Dr. Hanosh as a witness. Addressing Plaintiff's first request, we note initially that Plaintiff's conduct in failing seasonably to disclose Griner and Faison as her witnesses, as well as Defendants' motion to exclude these witnesses for abuse of discovery, occurred prior to the district court's entry of the pretrial order. At the time of drafting the pretrial order, however, Defendants' motion to exclude Griner and Faison was still pending before the district court. As a result, the pretrial order listed Griner and Faison as two of Plaintiff's witnesses. Subsequently, the district court ruled on Defendants' motion and excluded Griner and Faison based on Plaintiff's abuse of discovery. Thus, the court's original exclusion of Griner and Faison had no relationship to the pretrial order or the discovery deadline imposed pursuant to Rule 1–016 NMRA 2001. It was not the discovery deadline in the pretrial order that prevented Plaintiff from calling Griner and Faison as witnesses for the original trial date. Instead, Plaintiff's inability to call these witnesses stemmed from the district court's decision to grant Defendants' motion to exclude them as witnesses based on Plaintiff's abuse of discovery. As a result, we will review the motion to reopen discovery, as it relates to Griner and Faison, as a motion to reconsider the district court's earlier decision to exclude these two witnesses due to Plaintiff's abuse of discovery.

{22} We do not believe the district court abused its discretion in denying the motion to reconsider. In ruling on the motion to reconsider, the court had before it the same issues presented at the hearing in June in relation to Plaintiff's multiple violations of the rules of discovery. With respect to Faison, the district court ascertained Defendant Samson's intended meaning with respect to his admission about the rib spreaders. The court instructed Defendant Samson to clarify his admission to reflect his intended meaning and determined that the clarification would obviate the need for Faison's testimony. We therefore agree with the Court of Appeals that the district court reasonably determined that Faison's testimony would have been cumulative.

{23} With respect to Griner, Plaintiff provided no additional information about the substance of Griner's testimony. Thus, from the district court's perspective, based on Plaintiff's initial proffer at the hearing on the motion to exclude late-disclosed witnesses, it was unclear whether Griner's testimony would have been favorable to Defendants or to Plaintiff. While it is certainly true that the degree of prejudice that would

have been experienced by Defendants if Griner was allowed to testify diminished significantly after the delay in the trial date, we reiterate that the decision to impose a lesser sanction for an abuse of discovery is a discretionary ruling. Potential prejudice is only one factor in the balancing of interests under Rule 1–037(B). *Enriquez v. Cochran*, 1998–NMCA–157, ¶ 48, 126 N.M. 196, 967 P.2d 1136 ("In determining the nature of the sanctions to be imposed, the trial court must balance the nature of the offense, the potential prejudice to the parties, the effectiveness of the sanction, and the imperative that the integrity of the court's orders and the judicial process must be protected."). "It is not our responsibility as a reviewing court to say whether we would have chosen a more moderate sanction." *United Nuclear*, 96 N.M. at 239, 629 P.2d at 315 (quoted authority omitted). Instead, we merely address whether we are convinced that the trial court's decision is irrational or clearly against logic. We have repeatedly deferred to lower courts' decisions to impose discovery sanctions, especially in the context of sanctions less severe than dismissal. *See, e.g., Gonzales v. N.M. Dep't of Health*, 2000–NMSC–029, ¶¶ 15–16, 129 N.M. 586, 11 P.3d 550 (stating that "[t]he choice of sanctions for abuse of the discovery process falls within the sound discretion of the trial court" and concluding that "[t]he sanctions imposed were proportional to the offenses"); *Medina v. Found. Reserve Ins. Co.*, 117 N.M. 163, 166–67, 870 P.2d 125, 128–29 (1994). We believe that it is appropriate to do so again in this case because we do not believe that the district court's sanction was unreasonably harsh. The district court allowed Plaintiff to utilize Dr. McDonald as an expert witness despite her failure to disclose this witness in a timely manner. It appears that the court selected a lighter sanction, the exclusion of a relatively unimportant witness as determined by Plaintiff's proffer, that was designed as a proportionate response to the precise abuse of discovery committed by Plaintiff. The unrelated delay in the trial date did not serve to absolve Plaintiff of her misconduct.

{24} We highlight the fact that Plaintiff repeatedly breached her duties under the rules of discovery. *See generally Allred*, 123 N.M. 545, 943 P.2d 579, 1997–NMCA–070, ¶¶ 29–30 (determining from a pattern of conduct that a litigant's abuse of discovery was conscious and intentional and thus supported the severe sanction of dismissal). Although a finding of willfulness is not required for the imposition of a lesser sanction, such as the exclusion of witnesses, we believe that the circumstances of this case indicate that the district court's exclusion of Griner may have been necessary in order to deter future misconduct and to protect the integrity of the court. *See Gonzales*, 120 N.M. at 157, 899 P.2d at 600 ("We note that an abuse of the discovery process affects more than private litigants. It also affects the integrity of the court and, when left unchecked, would encourage future abuses."). The district court did not abuse its discretion in denying Plaintiff's motion to reconsider.

{25} We now address the district court's denial of Plaintiff's motion to reopen discovery regarding the other witnesses identified in Plaintiff's motion. Under Rule 1–016(E), a pretrial "order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice." "[B]y the time of entry of the pretrial order, our rules contemplate that the issues to be tried will have been identified." *Fahrbach v. Diamond Shamrock, Inc.*, 1996–NMSC–063, 122 N.M. 543, 550, 928 P.2d 269, 276. Accordingly, the movant bears the burden of demonstrating a manifest injustice sufficient to warrant modification of a pretrial order. We review a trial court's decision with respect to a motion to modify a pretrial order for an abuse of discretion. *State ex rel. State Highway Dep't v. Branchau*, 90 N.M. 496, 497, 565 P.2d 1013, 1014 (1977). Courts have applied a number of factors in evaluating a trial court's ruling with respect to a motion to modify a pretrial order due to manifest injustice:

> 1) whether trial is imminent, 2) whether the request is opposed, 3) whether the nonmoving party would be prejudiced, 4) whether the moving party was diligent in obtaining discovery within the guidelines established by the court, 5) the foreseeabil-

ity of the need for additional discovery in light of the time allowed for discovery by the district court, and 6) the likelihood that the discovery will lead to relevant evidence.

Sil-Flo, Inc. v. SFHC, Inc., 917 F.2d 1507, 1514 (10th Cir.1990) (quoted authority omitted). We believe these factors are useful in evaluating a trial court's decision under Rule 1-016(E), but we emphasize that, under the ultimate standard of an abuse of discretion, we will not reverse unless we have "a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *United Nuclear*, 96 N.M. at 203, 629 P.2d at 279 (quotation marks and quoted authority omitted); *accord Sil-Flo*, 917 F.2d at 1514.

{26} With respect to reopening discovery generally until the day of trial, the district court clearly did not abuse its discretion in refusing Plaintiff's request. To have granted this request, the district court would have had to ignore the very purpose of entering a pretrial order. *See Fahrbach*, 122 N.M. at 550, 928 P.2d at 276 ("A pretrial order narrows the issues for trial, reveals the parties' real contentions, and eliminates unfair surprise."); *Branchau*, 90 N.M. at 497, 565 P.2d at 1014 (similar). Moreover, following the inability to seat a jury in July of 1997, the district court was forced to reschedule the trial for January 1998 because that was the first available date for a trial given the court's full docket. As a result, the court had a legitimate concern that the complete reopening of discovery would produce undue delay and interfere with the court's ability to control its docket. *See, e.g., Pizza Hut, Inc. v. Branch*, 89 N.M. 325, 327-28, 552 P.2d 227, 229-30 (Ct.App.1976) (upholding the dismissal of an action for the failure to comply with a court order to answer interrogatories fully and completely and stating "that trial courts have supervisory control over their dockets and inherent power to manage their own affairs so as to achieve the orderly and expeditious disposition of cases"). We also believe that the district court did not abuse its discretion in denying Plaintiff's request to add the witness from Amarillo. Plaintiff was afforded the alternative relief of having one of her existing witnesses testify at trial concerning the feasibility of transferring a patient from Tucumcari to Amarillo. *See Lewis*, 128 N.M. 269, 992 P.2d 282, 1999-NMCA-145, ¶ 30.

{27} Turning to Plaintiff's request to add Dr. Hanosh to her list of witnesses, we review this issue in light of the six factors articulated above. While it is true, as the Court of Appeals observed, that trial was not imminent and there was not a great deal of potential prejudice to Defendants, *see id.* ¶ 29, Plaintiff admitted she was not diligent in obtaining discovery. *Cf. Sil-Flo*, 917 F.2d at 1514 (upholding a lower court's denial of a motion to reopen discovery based in part on the fact that "the plaintiffs did not make diligent use of the long period the court originally provided for discovery"); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir.1992) ("If [a] party was not diligent, the inquiry should end."). As we have already discussed, Plaintiff was aware of the dispute concerning Defendant Ortiz's telephone calls to University Hospital from the beginning of the case and was also aware of Dr. Hanosh's role in relation to the telephone calls. Therefore, Plaintiff's need for this evidence was foreseeable at the time that the district court established the discovery deadline. *Cf. Reaves v. Bergsrud*, 1999-NMCA-075, ¶ 27, 127 N.M. 446, 982 P.2d 497 ("From the beginning of this case, however, Plaintiff should have known that an expert to testify regarding causation would be necessary.... Therefore, the need for such an expert was of no surprise to Plaintiff and there was no resulting unfairness to her."). Additionally, Plaintiff had over eighteen months of discovery, informed the court in February of 1997 that the only remaining discovery in the case was the deposition of Defendants' experts, and indicated to the court that she was fully prepared for trial. Finally, although Dr. Hanosh may have been able to provide some relevant testimony about University Hospital's in-coming call procedures, he did not have any personal knowledge about Defendant Ortiz's actions. Plaintiff indicated to the district court at the hearing on the motion to reopen discovery that she believed she had sufficient evidence

to support a claim for negligence without the additional witnesses and admitted that she had not yet spoken with Dr. Hanosh about his potential testimony. Under these circumstances, we believe that the district court was entitled to view Dr. Hanosh's testimony as only marginally relevant to Plaintiff's claim. It would appear then that the six factors listed in *Sil-Flo* weigh against Plaintiff and in favor of the denial of the motion to reopen discovery.

{28} However, the question we face is not whether we believe that a balancing of the relevant factors weighs in favor of one party or another. Our review is limited to deciding whether we are convinced that the trial court committed a clear error in judgment in *its* balancing of these factors. *See Reaves,* 127 N.M. 446, 982 P.2d 497, 1999-NMCA-075, ¶ 26 ("Emphasis, however, must be placed on the premise that amendment or modification is discretionary."). In reviewing the Court of Appeals' discussion of this issue, it appears that the Court of Appeals weighed the *Sil-Flo* factors and reached its own balance in favor of Plaintiff. *See Lewis,* 128 N.M. 269, 992 P.2d 282, 1999-NMCA-145, ¶ 29 ("Our review of the record *indicates to us* the significant presence of several of the six factors noted in *Sil-Flo* that would have warranted the amendment of the pretrial order in this appeal." (emphasis added)); *id.* ¶ 32 ("In summary, we conclude that the six factors balance in Plaintiff's favor."). In doing so, the Court of Appeals overlooked the proper standard of review; the six factors listed in *Sil-Flo* are intended to inform, not replace, the abuse of discretion standard that applies to trial court decisions under Rule 1-016(E). While the Court of Appeals' determination that the factors weighed in Plaintiff's favor in this case might be a reasonable view of the evidence, that is not the appropriate inquiry on appellate review.

{29} Under the applicable standard of review, we conclude that the district court reasonably determined that the factors weighed against Plaintiff and that Plaintiff failed to demonstrate a manifest injustice. *Cf. Reaves,* 127 N.M. 446, 982 P.2d 497, 1999-NMCA-075, ¶¶ 27-28 (upholding the denial of a motion for leave to name an unidentified expert because the district court did not abuse its discretion in determining that the movant failed to demonstrate a manifest injustice). In short, the district court believed that "[t]here was no showing that this was newly discovered or critically important evidence." *Branchau,* 90 N.M. at 497, 565 P.2d at 1014. The lack of adequate trial preparation due to dilatory conduct simply does not constitute a manifest injustice for purposes of relieving a party of the deadlines imposed in a pretrial order. *Cf. Johnson,* 975 F.2d at 609 ("[C]arelessness is not compatible with a finding of diligence and offers no reason for a grant of relief."). Under these circumstances, "[w]e will not interfere with the trial court's enforcement of pretrial deadlines." *Reaves,* 127 N.M. 446, 982 P.2d 497, 1999-NMCA-075, ¶ 28. Thus, we conclude that the district court did not abuse its discretion in denying Plaintiff's motion.

III. Concurrent and Successive Tortfeasors

{30} Prior to trial, Plaintiff requested that the district court restrict Defendants from arguing that the tortious actions of Lewis's assailant, Griego, caused Lewis's injuries. Plaintiff agreed to stipulate that Lewis arrived at the hospital with stab wounds, but she objected to any evidence or argument concerning the source of the wounds. The court denied Plaintiff's motion. At the conclusion of the trial, the district court instructed the jury on the topic of comparative negligence in accordance with UJI 13-302D NMRA 2001. The Court of Appeals made two separate rulings on this issue. First, the Court concluded that the district court's denial of Plaintiff's pretrial request was erroneous. *Lewis,* 128 N.M. 269, 992 P.2d 282, 1999-NMCA-145, ¶¶ 50-51. The Court determined that the "irrelevant evidence of the assailant's fault erroneously distracted the jury from properly examining Defendant's causation." *Id.* ¶ 52. As explained further below, we believe that the evidence of Griego's fault was of critical importance to the issue of proximate causation, and we therefore disagree with this ruling by the Court of Appeals. Second, the Court of Appeals determined that the district court erred in in-

structing the jury on comparative fault because the facts in the present case do not support a theory of concurrent tortfeasor liability. We agree with the Court of Appeals that the district court erred in giving a comparative fault instruction, but we do not believe that this instruction caused any prejudice to Plaintiff; on the contrary, the instruction relieved Plaintiff of the burden of proving an element of her claim.

{31} The Court of Appeals concluded that both of its rulings on this issue were compelled by our opinion in *Lujan v. Healthsouth Rehabilitation Corp.*, 120 N.M. 422, 902 P.2d 1025 (1995). The Court interpreted *Lujan* as standing for the proposition that medical malpractice committed while treating an injury caused by an initial tortfeasor and resulting in an enhanced injury constitutes a successive tort for which principles of comparative fault do not apply. *Lewis*, 128 N.M. 269, 992 P.2d 282, 1999-NMCA-145, ¶ 43. According to the Court of Appeals, "[w]hether a tort committed by a tortfeasor is concurrent or successive can be determined as a question of law." *Id.* ¶ 44. Because principles of comparative fault do not apply in a successive tortfeasor context, the Court determined that evidence of the original tortfeasor's negligence injects a false issue into a trial in an action against a successive tortfeasor. *Id.* ¶¶ 49–56. Additionally, the Court held that,

> if the facts of a particular case warrant the argument by either a plaintiff or a defendant that the theory of liability is one of successive and not concurrent tortfeasor liability, or vice versa, then the party arguing such liability has the burden of adducing evidence not only of the negligence of the tortfeasor but of the divisibility or indivisibility of the injury.

Id. ¶ 56. Based on this construction of *Lujan*, the Court of Appeals determined with respect to the present case that the district court should have ruled as a matter of law that Defendants were successive tortfeasors based on Plaintiff's mere allegation of an enhanced injury. *Id.* ¶¶ 41, 54, 902 P.2d 1025. The Court then held that "evidence of the assailant's fault, that is, his criminal liability or his negligence, was irrelevant and improper to a determination of Defendant[s'] liability by the jury." *Id.* ¶ 50, 902 P.2d 1025. Defendants contend that the Court of Appeals misconstrued our opinion in *Lujan*. We agree.[2]

{32} In New Mexico, the common law doctrines of contributory negligence and joint and several liability have been replaced with a system of pure comparative negligence and, with respect to concurrent tortfeasors, several liability. *See* NMSA 1978, § 41-3A-1(A) (1987); *see also Scott v. Rizzo*, 96 N.M. 682, 687–89, 634 P.2d 1234, 1239–41 (1981); *Bartlett v. N.M. Welding Supply, Inc.*, 98 N.M. 152, 158, 646 P.2d 579, 585 (Ct.App.1982). In *Lujan*, this Court explored the applicability of these principles to cases involving successive tortfeasors. 120 N.M. at 425–27, 902 P.2d at 1028–30. More specifically, *Lujan* addressed cases involving an initial injury caused by tortious conduct and a subsequent enhancement of the initial injury caused by foreseeable medical negligence occurring during the course of medical treatment for the initial injury. *Id.* at 426, 902 P.2d at 1029. We limit our discussion to this narrow class of cases.[3]

2. In this case, the jury found by special verdict that Defendants were not negligent. Because the jury first considered whether Defendants were negligent and thus did not reach the separate question of whether Defendants' negligence proximately caused Lewis's death or the question of the relative percentage of fault attributable to Defendants as compared to Griego, the district court's rulings regarding the admissibility of evidence of Griego's fault and regarding the jury instructions on comparative fault, even if erroneous, would constitute harmless error. *See Fahrbach*, 122 N.M. at 552–53, 928 P.2d at 278–79; *cf. Norwest Bank N.M., N.A. v. Chrysler Corp.*, 1999-NMCA-070, ¶ 15, 127 N.M. 397, 981 P.2d 1215 (concluding that a jury finding of no proximate causation rendered harmless a jury instruction concerning the allocation of fault). As a result, it is not necessary for us to conduct an exhaustive analysis of the law in New Mexico relating to successive tortfeasors. Nevertheless, given the existence of the Court of Appeals' opinion on this issue, we would be remiss if we did not take this opportunity to prevent any further misapprehension of our opinion in *Lujan*. We therefore address this more limited matter.

3. In particular, we need not examine in detail the distinction between concurrent and successive tortfeasors. *Compare Lujan*, 120 N.M. at 426, 902 P.2d at 1029 (listing factors that might

{33} In *Lujan,* we explained that, with respect to an action by the injured party against the original tortfeasor, the original tortfeasor is jointly and severally liable for the entire harm to the plaintiff, including the original injury and any foreseeable enhancement of the injury by medical negligence.[4] *Id.* at 426–27, 902 P.2d at 1029–30. "When a person causes an injury to another which requires medical treatment, it is foreseeable that the treatment, whether provided properly or negligently, will cause additional harm." *Id.* at 426, 902 P.2d at 1029; *accord* Restatement (Second) of Torts § 457 (1965). In other words, the original tortfeasor will not be heard to complain of foreseeable medical negligence precipitated by the initial tortious injury in defense of his or her own liability to the injured party. Accordingly, instead of treating the issue as a question of fact for the jury, as is typical of questions of proximate causation, *Calkins v. Cox Estates,* 110 N.M. 59, 61, 792 P.2d 36, 38 (1990), we impose as "a positive rule of decisional law" the requirement of joint and several liability upon the original tortfeasor for the original and enhanced injuries. *Herrero v. Atkinson,* 227 Cal.App.2d 69, 38 Cal.Rptr. 490, 493 (1964).[5] Thus, an original tortfeasor's liability in the context of subsequent medical negligence operates as an exception to the general rule of several liability. *See* § 41–3A–1(C)(4) (providing that joint and several liability applies "to situations . . . having a sound basis in public policy").

{34} With respect to claims against the subsequent tortfeasor, we adopted in *Lujan* the standard for enhanced injuries that the Court of Appeals had previously applied in *Duran v. General Motors Corp.,* 101 N.M. 742, 749–50, 688 P.2d 779, 786–87 (Ct.App. 1983), *overruled on other grounds by Brooks v. Beech Aircraft Corp.,* 120 N.M. 372, 902 P.2d 54 (1995). *Lujan,* 120 N.M. at 426, 902 P.2d at 1029. The Court of Appeals in *Duran* derived this standard from *Huddell v. Levin,* 537 F.2d 726, 737 (3d Cir.1976), in which the Third Circuit discussed the proof requirements for claims against a car manufacturer for design defects resulting in an enhancement of injuries that were caused by an initial car accident, referred to as crashworthiness or second collision claims. Under our application of the standard to medical malpractice cases in *Lujan,* a plaintiff, whether the initial tortfeasor seeking indemnity or the injured party seeking damages, who pursues an action against a physician and who alleges an enhanced injury caused by tortious medical treatment arising out of an original tort must prove (1) that the successive tortfeasor's negligence resulted in injuries separate from and in addition to the injuries which otherwise would have been caused by the initial tort, and (2) the degree of enhancement caused by the medical treatment by introducing evidence of the injuries that would have occurred absent the physician's negligence. *Lujan,* 120 N.M. at 426, 902 P.2d at 1029. Under the first element from *Lujan,* unless the plaintiff establishes an enhancement of the initial injury, then the physician's negligence cannot be said to be a cause in fact of the plaintiff's harm; the plaintiff would have suffered the same harm regardless of the physician's negligence. Under the second element from *Lujan,* if the initial tortfeasor, or the injured party, as the

be relevant to such an inquiry), *with Lewis,* 128 N.M. 269, 992 P.2d 282, 1999–NMCA–145, ¶ 75 (Hartz, J., concurring in part, dissenting in part) (suggesting that the factors listed in *Lujan* do not provide a useful framework for distinguishing concurrent and successive tortfeasors).

4. The original tortfeasor is not liable for injuries caused by medical negligence that are so remote from the original injury as to be unforeseeable.

5. There has been some disagreement as to whether this principle operates as a positive rule of law, and some courts have held that the principle is instead merely a product of the general rules of proximate causation. *See Kemper Nat'l P & C Cos. v. Smith,* 419 Pa.Super. 295, 615 A.2d 372, 375–76 (1992). However, we rejected this position in *Lujan* by determining that the original tortfeasor may seek indemnity from the negligent physician for the entirety of the enhanced injury, a determination for which we relied in part on *Herrero. See Lujan,* 120 N.M. at 427, 902 P.2d at 1030. If, as the court held in *Smith,* the original tortfeasor's liability arose from his or her "own negligent conduct and not from a positive rule of law," *id.* at 376, then the original tortfeasor would be liable for a portion of the enhanced injury to the extent that the enhancement was proximately caused by the original tortfeasor, and the original tortfeasor could not seek indemnity for this liability.

case may be, is unable to establish the degree of enhancement, then the initial tortfeasor remains responsible for the entire harm. This two-part proof requirement from *Lujan* effectuates the Legislature's intent that, "[w]here a plaintiff sustains damage as the result of fault of more than one person which can be causally apportioned on the basis that distinct harms were caused to the plaintiff, ... [e]ach person is severally liable only for the distinct harm which that person proximately caused." Section 41–3A–1(D).

{35} Based on the principles articulated above, we conclude that the Court of Appeals erroneously concluded that Defendants could not introduce evidence of Griego's fault. Defendants argued that Griego was wholly responsible for Lewis's death. It is the plaintiff's burden in a negligence case to prove the element of proximate causation. *See* UJI 13–302B NMRA 2001. Thus, Defendants' argument concerning Griego represents a basic proximate cause defense; if Griego was the sole cause of Lewis's death, as Defendants argued, then Plaintiff would fail to establish that Defendants' negligence proximately caused Lewis's harm. In a typical negligence case involving concurrent tortfeasors, the jury assesses whether each defendant's negligence is a cause of the plaintiff's harm and, if so, then the jury compares the negligence of each tortfeasor in order to assign a percentage of fault. *See* UJI 13–2219 NMRA 2001. In an enhanced injury case, a jury does not compare the negligence of the tortfeasors for the enhanced injury, but the plaintiff must still prove that the physician's negligence proximately caused an enhancement of the initial harm suffered at the hands of the original tortfeasor. *Lujan,* 120 N.M. at 426, 902 P.2d at 1029. The physician is only responsible for the enhanced injury if the plaintiff satisfies his or her burden under *Lujan* of proving both an enhancement and the degree of enhancement.

{36} Plaintiff introduced evidence in this case, in the form of expert testimony, that Lewis would have survived but for Defendants' negligent treatment. Defendants countered this theory through contrary expert testimony and by arguing to the jury that Griego alone was responsible for Lewis's death. This is an issue of proximate cause, which is an issue on which Plaintiff bore the burden of proof and an issue that must be resolved by the jury. The Court of Appeals, although recognizing that Defendants' argument related to proximate causation, *Lewis,* 128 N.M. 269, 992 P.2d 282, 1999–NMCA–145, ¶ 51 ("The court thus essentially allowed Defendants ... to successfully argue ... that the assailant, not Defendants, proximately caused the patient's death."), mistakenly extended our remarks in *Lujan* concerning comparative fault to the issue of proximate causation. "A *Bartlett*-style apportionment of fault is inapplicable to a successive and distinct enhancement," *Lujan,* 120 N.M. at 426, 902 P.2d at 1029, because "the doctrine of joint and several liability applies ... to the enhanced portion of the injury," *id.* at 427, 902 P.2d at 1030. However, the application of joint and several liability to the enhanced injury requires that the plaintiff first carry the burden of proving proximate causation by establishing an enhanced injury and the degree of enhancement. *See id.* at 427, 902 P.2d at 1030 (stating that joint and several liability applies to an enhanced injury "[i]n cases involving successive tortfeasors whose separate causal contributions to the plaintiff's harm can be measured").

{37} The Court of Appeals' holding that any evidence of the initial tort must be excluded creates an impracticable, artificial inquiry which removes any context from the jury's determination of causation. If, based on the two-part *Lujan* test, a plaintiff fails to prove that a physician's negligence enhanced the original injury, then the original tortfeasor's negligence is the sole proximate cause of the entire harm. Thus, because the issue of proximate cause rests with the jury and because the plaintiff bears the burden of demonstrating an enhancement of the original injury under *Lujan,* we conclude that a physician accused of subsequent medical negligence may rebut the plaintiff's evidence of causation through evidence of the initial tortfeasor's responsibility for the entire harm.

{38} The Court of Appeals, based on its interpretation of *Lujan,* also concluded that

the district court erred in instructing the jury on comparative fault. *Lewis*, 128 N.M. 269, 992 P.2d 282, 1999-NMCA-145, ¶¶ 55-56. We agree with the Court of Appeals that the district court's comparative fault instruction was erroneous, but for somewhat different reasons. As noted above, Plaintiff introduced evidence that Lewis would have survived if he had received proper medical treatment. Thus, Plaintiff introduced evidence which, if accepted by the jury, would satisfy the first element of *Lujan* requiring proof of an enhanced injury. However, Plaintiff failed to introduce any evidence of the injuries that Lewis would have received absent negligence on the part of Defendants. As a result, Plaintiff failed to satisfy the second element of the *Lujan* standard. Indeed, Plaintiff's failure of proof in this case is analogous to the failure of proof in *Duran* and *Huddell*.

{39} In *Duran*, the injured party was involved in an initial car accident unrelated to the vehicle's design. *Duran*, 101 N.M. at 743-44, 688 P.2d at 780-81. In a claim against the manufacturer of the vehicle, the plaintiff argued that injuries sustained from a defective design of the vehicle constituted a "second collision" and that the vehicle's lack of crashworthiness was the sole proximate cause of the serious injuries suffered in the accident. *Id.* at 750, 688 P.2d at 787. The plaintiff's expert attempted to establish the extent of injury that the plaintiff would have suffered in a car accident in the absence of a defective design. *Id.* at 752, 688 P.2d at 789. However, in formulating his opinion about the degree of enhancement, the expert assumed not only the absence of a defective design but also the absence of particular damage to the vehicle that was caused by the initial car accident. *Id.* The Court of Appeals explained that, in a crashworthiness case,

> [d]efendants are not liable for injuries caused by the initial impact and [damage to the vehicle] resulting therefrom. They are only liable, if at all, for that portion of the damage or injury caused by the defects *over and above* the damage or injury that probably would have occurred as a result of the [accident] without those defects. The [expert] does not address this in his testimony....

Id.

{40} Like *Duran*, *Huddell* also involved a crashworthiness claim against the manufacturer of a vehicle that was involved in an initial automobile accident. *Huddell*, 537 F.2d at 731. The plaintiff, the victim's personal representative, attempted to establish that a defective design caused the victim's death. Similar to the present case, the plaintiff's experts testified that the car accident in which the injured party was involved would have been "survivable" but for the defective design. *Id.* at 738. However, the experts did not testify concerning "the extent of injuries, if any, which would have resulted in a survivable crash." *Id.*

> Without proof to establish what injuries would have resulted from a non-defective [design], the plaintiff could not and did not establish what injuries resulted from the alleged defect.... Without such proof, the jury could not have properly ... assessed responsibility against [the manufacturer] for the death of [the victim].

Id.

{41} As in *Huddell*, although Plaintiff introduced evidence that Lewis would have survived if he had received proper medical treatment, Plaintiff failed to demonstrate the extent of injuries that Lewis would have suffered in the absence of Defendant's alleged medical negligence. The Court of Appeals explained in *Duran* that a failure of proof of this type will result in a directed verdict for a defendant. *Duran*, 101 N.M. at 753, 688 P.2d at 790. Instead of directing a verdict for Defendants under *Lujan*, however, the district court denied Plaintiff's pretrial request to prevent the jury from considering Griego's role in Lewis's death and, at the request of both Plaintiff and Defendants, gave an instruction on comparative fault in accordance with UJI 13-302D. While the district court correctly denied Plaintiff's pretrial request, it was error to instruct the jury on comparative fault for two reasons. First, the comparative fault instruction improperly placed the burden on Defendants to show that Griego was a proximate cause of Lewis's death. *See* UJI 13-

302D. Contrary to our adoption of the *Huddell* test in *Lujan,* this instruction inappropriately relieved Plaintiff of the burden of proving an enhancement of the original injury caused by Griego and shifted the burden of proving the degree of enhancement to Defendants. Thus, although the Court of Appeals correctly determined that it was error to give this instruction, this error did not prejudice Plaintiff. Second, assuming Plaintiff had successfully demonstrated an enhanced injury and the degree of enhancement, it would be improper to instruct the jury on comparative fault because Defendants would have been liable for the entirety of the enhanced injury and apportionment of fault with respect to the enhancement would be improper. This error also did not prejudice Plaintiff because she failed to introduce any evidence of the degree of enhancement and because the jury did not reach the issue of apportionment of fault.

{42} It appears that Plaintiff's basic strategy in this case was to attempt to hold Defendants' jointly and severally liable for the entire harm initiated by Griego. Plaintiff sought to exclude all evidence of Griego's fault and made no effort to prove the degree of enhancement of Lewis's injuries caused by the alleged medical negligence. Plaintiff simply sought to hold Defendants liable for the entirety of Lewis's damages for wrongful death. However, a theory of joint and several liability against a successive medical care provider for the entire harm suffered from both torts is antithetical to the policies underlying our opinion in *Lujan* and contrary to New Mexico's adoption of several liability. "Although an original tortfeasor may be held liable for plaintiff's entire harm, a medical care provider who negligently aggravates the plaintiff's initial injuries is not jointly and severally liable for the entire harm, but is liable only for the additional harm caused by the negligent treatment." *Lujan,* 120 N.M. at 427, 902 P.2d at 1030.

{43} The Court of Appeals recognized this aspect of *Lujan. See Lewis,* 128 N.M. 269, 992 P.2d 282, 1999–NMCA–145, ¶ 46 ("A successive tortfeasor's liability for the enhancement to the original injury is not accurately described as joint and several. Successive tortfeasors are simply liable for the entire enhancement if proximately caused by their negligence."). However, by prohibiting any evidence of the initial tortfeasor's fault and by concluding that trial courts may, in medical malpractice cases, determine "successive tortfeasor liability before trial," *Lewis,* 128 N.M. 269, 992 P.2d 282, 1999–NMCA–145, ¶ 38, the Court of Appeals' interpretation of *Lujan* is tantamount to instructing trial courts to find for plaintiffs as a matter of law on the issue of proximate causation, as determined by both parts of the *Lujan* test, based solely on an allegation of an enhanced injury. *See id.* ¶ 41, 902 P.2d 1025. While we agree that it is possible to determine as a matter of law that a case involving medical treatment for an injury caused by an initial tort is a case that implicates the proof requirements of *Lujan,* it is for the jury to determine the issue of proximate causation. If a plaintiff is unable to establish a distinct enhancement of injury and the degree of enhancement, then the plaintiff has failed to carry the burden of proving proximate causation in a successive tortfeasor case under the principles we adopted in *Lujan,* and the original tortfeasor remains liable for the entire harm.

{44} In this case, the district court did not err in denying Plaintiff's request to exclude evidence of Griego's fault. Although it was error to instruct the jury on principles of comparative fault, this error had the effect of shifting Plaintiff's burden of proving causation under *Lujan* to Defendants and therefore did not cause her prejudice.

IV. Conclusion

{45} The district court did not abuse its discretion in excluding witnesses in response to discovery violations by Plaintiff. The district court also did not abuse its discretion in denying Plaintiff's motion to reopen discovery. Under *Lujan,* Plaintiff bore the burden of proving that Defendants, and not the initial stabbing by Griego, proximately caused Lewis's death. As a result, Defendants were entitled to rely on evidence of Griego's fault in their argument that Griego's tortious actions were the sole proximate cause of Lewis's death. Plaintiff bore the burden of dem-

onstrating an enhanced injury over and above the injuries suffered as a result of the initial tort and the degree of enhancement by introducing evidence of what injuries would have occurred in the absence of the alleged medical negligence. The comparative fault jury instruction improperly relieved Plaintiff of this burden. We reverse the Court of Appeals on both issues presented to this Court on certiorari. The judgment in favor of Defendants is reinstated.

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

WE CONCUR: JOSEPH F. BACA, Justice, GENE E. FRANCHINI, Justice, PAMELA B. MINZNER, Justice, PETRA JIMENEZ MAES, Justice.

2001-NMCA-100

35 P.3d 989

Nicholas LISANTI and Geraldine Lisanti, Plaintiffs–Appellants,

v.

ALAMO TITLE INSURANCE OF TEXAS, a member of the Fidelity National Group of Companies, and Fidelity National Title Insurance Company, Defendants–Appellees.

No. 21,051.

Court of Appeals of New Mexico.

Sept. 11, 2001.

Certiorari Granted, No. 27,166, Nov. 16, 2001.

Stephanie Landry, Margaret C. Ludewig, Landry & Ludewig, L.L.P., Albuquerque, NM, for Appellants.

Charlotte H. Hetherington, Simons, Cuddy & Friedman, L.L.P., Santa Fe, NM, for Appellees.

OPINION

ALARID, Judge.

{1} By regulation, every policy of title insurance issued in New Mexico must contain a provision providing for arbitration of disputes arising out of or relating to the policy. Where the amount of insurance is $1 million or less, either party may require the other to submit to arbitration. Appellee, an insurer, invoked this provision to force Appellants, who are insured under a policy of title insurance issued by Appellee, to litigate their dispute before a panel of private arbitrators. Appellants argue that mandatory arbitration of their common-law claims pursuant to this provision violates their constitutional right to trial by jury. Appellants also argue that a regulation providing for mandatory arbitration of their statutory causes of action cannot override the Legislature's provision for judicial determination of these statutory claims. We agree with Appellants and reverse the trial court's order referring this dispute to arbitration.

BACKGROUND

{2} Title insurance is subject to the New Mexico Title Insurance Law, NMSA 1978, §§ 59A-30-1 to -15 (1985, as amended through 1999). Subsection A of Section 59A-30-4 provides that "[t]he superintendent shall promulgate such rules and regulations as are necessary to carry out the provisions of the New Mexico Title Insurance Law, including rules and regulations requiring uniform forms of policies...." (Citation omitted). Section 59A-30-5 provides that "[n]o title insurer or title insurance agent shall use any form of title insurance policy other than the uniform forms promulgated by the superintendent...." In the exercise of this statutory authorization, the superintendent has promulgated a uniform title insurance policy containing the following provision relating to arbitration:

> Unless prohibited by applicable law, either the Company or the insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy.... All arbitrable matters when the Amount of Insurance is $1,000,000 or less shall be arbitrated at the option of either the Company or the insured.... Arbitration pursuant to this policy ... shall be binding upon the parties....

13 NMAC § 13.18.14 (1986) renumbered as 13 NMAC 14.6.A.8 through 14.6A.12 (2000).

{3} In November 1995, Appellee, Alamo Title Insurance of Texas (Alamo) [1], issued a policy of title insurance insuring title to property located in Torrance County. Appellants, Nicholas and Geraldine G. Lisanti (the Lisantis), are the named insureds. The amount of insurance is $68,818. The policy contains the mandatory arbitration provision quoted above. When a dispute arose between Alamo and the Lisantis, Alamo filed a demand for arbitration, seeking a determination that "[Alamo] has complied with its obligations under the terms of the [policy], and has provided the services it is obligated to provide under the policy provisions .... [and] that the insureds have not sustained any monetary loss for matters covered by the policy."

{4} In response to Alamo's demand for arbitration, the Lisantis filed a complaint in Torrance County District Court. The Lisantis asserted common-law claims against Alamo for breach of contract, breach of the covenant of good faith and fair dealing, and breach of fiduciary duty, and statutory claims for unfair insurance practices and unfair trade practices. The Lisantis sought declaratory relief and damages. The Lisantis asserted a claim directed to the arbitration clause in which they sought a declaration that the arbitration clause is unenforceable and an injunction precluding Alamo from proceeding with arbitration.

{5} The Lisantis accompanied their complaint with a motion for preliminary injunction to prevent Alamo from pursuing arbitration. The Lisantis argued that "having to arbitrate the claims in this case would cause Plaintiffs irreparable harm by depriving Plaintiffs of access to the courts, due process, and their right to a jury trial." Citing *Bd. of Educ. of Carlsbad Mun. Schs. v. Harrell,* 118 N.M. 470, 476, 882 P.2d 511, 517 (1994), the Lisantis argued that an arbitration provision required by regulation was not an enforceable agreement to arbitrate. On December 9, 1999, the trial court denied the Lisantis' motion for preliminary injunction and ordered that the present action be stayed "until completion of arbitration." On January 20, 2000, the trial court entered an order staying arbitration pending appeal.

STANDARD OF REVIEW

{6} Although this case comes before us from a denial of a preliminary injunction, we believe that the trial court's ruling is more properly viewed as the denial of a stay of arbitration, and therefore, the proper analytical framework is provided by NMSA 1978, § 44–7–2(B) (1971) rather than Rule 1–065 NMRA 2001. Unlike the grant of a preliminary injunction, the grant of a stay under Section 44–7–2(B) is not a matter of discretion: if there is no agreement to arbitrate, or if the purported agreement is unenforceable, arbitration must be stayed. Where, as here, the operative facts are not in dispute, denial of a stay of arbitration presents a pure question of law, subject to de novo review. *See DMS Properties–First, Inc. v. P.W. Scott Assoc., Inc.,* 748 A.2d 389, 391 (Del.2000).

DISCUSSION

{7} Alamo argues the Lisantis contractually waived the right to a judicial resolution of their dispute with Alamo by entering into a contract containing an arbitration clause. We disagree. Under *Harrell,* the Lisantis cannot be said to have voluntarily consented to arbitration by entering into a contract containing an arbitration clause imposed on them by the State: their "putative agreement" was a "nonconsensual submission" to state-compelled arbitration. 118 N.M. at 476, 882 P.2d at 517; *see also Massey v. Farmers Ins. Group,* 837 P.2d 880, 883 (Okla.1992) (holding that legislature may not waive insured's right to jury trial by enacting statute that requires all fire insurance policies to include provision for binding appraisal); *Molodyh v. Truck Ins. Exch.,* 304 Or. 290, 744 P.2d 992, 995 (1987) (rejecting argument that insured waived right to jury trial by entering into contract containing mandatory appraisal provision).

{8} The Lisantis argue that binding state-compelled arbitration abridges their

1. According to the Complaint, Defendant Alamo has merged with Defendant Fidelity National Title Insurance Company.

right to a jury trial of their common-law counts. We agree. Article II, Section 12 of the New Mexico Constitution provides that "[t]he right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate." "[T]he phrase 'as it has heretofore existed' refers to the right to jury trial as it existed in the Territory of New Mexico at the time immediately preceding the adoption of the Constitution." *State v. Greenwood*, 63 N.M. 156, 161, 315 P.2d 223, 226 (1957).

{9} Alamo, citing *Harrell*, argues that the State, in the exercise of its police powers, may assign any claim, including legal claims traditionally triable to a jury, to a non-judicial forum in which there is no right to a jury. Alamo misreads *Harrell*. In *Harrell*, the Supreme Court relied upon the "public rights" exception to the right to jury trial in rejecting the argument that mandatory arbitration abridged the right to jury trial guaranteed by the New Mexico Constitution. The Supreme Court's statement in *Harrell* regarding the Legislature's authority to reassign legal claims cognizable at common law to administrative tribunals, *Harrell*, 118 N.M. at 482, 882 P.2d at 523 (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n. 4, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989)), must be read in the context of the Supreme Court's reliance on the public rights exception. *See Granfinanciera*, 492 U.S. at 51–52, 109 S.Ct. 2782 ("Congress may devise novel causes of action involving public rights free from the strictures of the Seventh Amendment.... But it lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury."). The right to jury trial could scarcely be considered "inviolate" if, as Alamo argues, the State has complete freedom to reassign private claims traditionally triable to a jury to non-judicial tribunals in which a jury is unavailable. *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L.Rev. 639, 664 (1973) (noting argument offered in support of Seventh Amendment that inclusion of constitutional guarantee of trial by jury would safeguard right from "misguided national legislature").

{10} Our review of early New Mexico cases satisfies us that contract actions seeking money damages were routinely tried to juries during the territorial period. *E.g., Lewis v. Baca*, 5 N.M. 289, 21 P. 343 (1889); *Smith v. Hicks*, 14 N.M. 560, 98 P. 138 (1908); *see also, Molodyh*, 744 P.2d at 996 (collecting cases; noting that "a jury trial on factual issues concerning an insurance policy long has been an established practice in this country."). All three of the Lisantis' common-law claims are contractual, UJI 13–1702 NMRA 2001, Committee comment; UJI 13–1708 NMRA 2001, Committee comment, and all three seek the legal relief of money damages. N.M. Const. art II, § 12 therefore guarantees the Lisantis a jury trial as to these claims. The Lisantis' may insist on having their common-law claims resolved in a court of law where trial by jury is available. *See Williams v. Williams*, 110 Nev. 830, 877 P.2d 1081 (1994) (holding that statutorily-mandated arbitration of claims arising out of motor vehicle accident unconstitutionally interfered with right of jury trial).

{11} With respect to their statutory claims, the Lisantis argue that the mandatory arbitration clause promulgated by the superintendent conflicts with NMSA 1978 § 59A–16–30 (1990), which provides that any person who has suffered damages as the result of a prohibited insurance practice "is granted a right to bring an action in district court to recover actual damages," and with NMSA 1978, § 57–12–10 (1967, as amended through 1987) which contemplates that any private action seeking redress for an unfair or deceptive trade practice will be brought in a "court." We agree. The Legislature's specific designation of courts as the proper tribunal for resolution of these statutory claims controls over any inconsistent forum selection provision imposed by the superintendent of insurance. *See Jones v. Employment Serv. Div. of the Human Servs. Dep't*, 95 N.M. 97, 99, 619 P.2d 542, 544 (1980) ("If there is a conflict or inconsistency between statutes and regulations promulgated by an agency, the language of the statutes shall prevail. An agency by regulation cannot overrule a specific statute."). The Lisantis may insist on having their statutory claims heard in a court of law.

CONCLUSION

{12} The trial court's order referring the Lisantis' claims to arbitration is reversed. On remand the trial court shall enter an order staying arbitration. The Lisantis' request for attorney's fees incurred in prosecuting this appeal is denied without prejudice. The Lisantis may apply to the trial court for an award of such fees should the Lisantis prevail on a cause of action as to which there is a right to attorney's fees. Costs incurred by the Lisantis in prosecuting this appeal shall be allowed as provided in Rule 12–403 NMRA 2001.

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

WE CONCUR: MICHAEL D. BUSTAMANTE, Judge, CYNTHIA A. FRY, Judge.

2001–NMCA–102

35 P.3d 993

STATE of New Mexico, Plaintiff–Appellee,

v.

Myrvin NYSUS, Defendant–Appellant.

No. 20,185.

Court of Appeals of New Mexico.

Sept. 24, 2001.

Certiorari Denied, No. 27,173, Nov. 19, 2001.

[redacted]

Patricia A. Madrid, Attorney General, M. Victoria Wilson, Assistant Attorney General, Santa Fe, NM, for Appellee.

Phyllis H. Subin, Chief Public Defender, Carolyn R. Glick, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

ARMIJO, Judge.

{1} Myrvin Nysus (Defendant) appeals his conviction for aggravated stalking. Defendant asserts on appeal that his Motion to Dismiss and/or Suppress Evidence Due to Illegal Arrest should have been granted because (1) the University of New Mexico (UNM) campus police officer who arrested him did not have jurisdiction to arrest him; (2) the inventory search was invalid as to the items that were seized, but not inventoried in the vehicle tow report; and (3) admission of the illegally-seized evidence was not harmless error. Defendant also claims ineffective assistance of counsel. We affirm the conviction.

FACTUAL AND PROCEDURAL BACKGROUND

{2} Defendant was convicted of aggravated stalking of his ex-wife, Jennifer Nysus (Victim). Defendant and Victim were divorced in February 1995 from a troubled marriage of twenty-three years. After the divorce, Victim obtained a series of temporary restraining orders (TRO) against Defendant. The record includes restraining orders issued in 1994, 1996, and 1997. The most recent TRO was in effect from October 21, 1997 to October 21, 1998, during which time the alleged aggravated stalking occurred. This order instructed Defendant not to abuse Victim, including harassing, restraining, assaulting, swearing at, threatening, destroying property, throwing things at, following, making harassing telephone calls, causing physical injury to, battering in any manner, or stalking. It further provided that he must not come within 100 yards of where she works or lives. Victim testified that she did not want to put her home or work address on the order because she was afraid that Defendant would carry out the threats he made on her life.

{3} Victim's daughter, Mercedes (Daughter), also had a restraining order issued against Defendant, her father, in 1997. She testified that she was afraid of Defendant and sought a restraining order because "he would follow my mom and me wherever we went." She testified that Defendant had a bad temper and that she was afraid for Victim's safety.

{4} Victim testified that Defendant followed her on two occasions in early 1998. On March 30, 1998, Victim observed Defendant following her in a Volvo as she drove through the streets of Albuquerque. He followed her as she drove to a McDonald's drive-thru window and continued after she left McDonald's until she was able to locate a police officer. After this incident, Victim became fearful that Defendant would find her and hurt her.

{5} On April 2, 1998, Victim left work early and took a different route home in an attempt to avoid another encounter with Defendant. While driving southbound on Carlisle Boulevard, she saw Defendant drive past her in the same Volvo, heading north. In her rearview mirror, she observed him turn around in the middle of the road and begin to follow her again. She proceeded to drive to a police substation located near Girard Boulevard and Central Avenue. When an officer came out to look for Defendant, he was gone. After both of these incidents, Victim filed reports with the police.

{6} The following day, on April 3, 1998, Victim and Daughter, who worked in the same building, went out to the parking lot after work and found a piece of paper under-

neath a windshield wiper of Victim's car. The paper was a copy of an advertisement from the March 15, 1998 edition of the *Albuquerque Journal* that stated, "Anyone knowing the whereabouts in [Albuquerque] of Monique, Mikhail, Mercedes & Jennifer Nysus, please call . . . 892–8997." The ad was highlighted in pink and a message was written on the side of the ad, "Thanks to Hagars [sic]." Victim was terrified that Defendant had located her and that "Thanks to Hagars" was his way of telling her that he learned of her whereabouts from her friends, Carol and Yaqui Haagar. The telephone number in the ad was the number for the address where Defendant lived. Monique, Mikhail, and Mercedes are Defendant's and Victim's three children. Victim called the district attorney's office and the University of New Mexico Police Department immediately after finding the ad on her windshield.

{7} At the time of the stalking incidents, Victim worked for the University of New Mexico, Center for Development and Disabilities. Her office was located at 2300 Menaul Boulevard and was off campus, but on UNM property. Detective Merges, a UNM police officer, responded to her call regarding the April 3 incident. At the time he responded to the call, he had previously investigated incidents and was aware of the restraining orders issued against Defendant. He had previously been contacted by the district attorney's office and had also been involved in assuring Daughter's safety while she was on campus. On April 3, the detective was concerned for the women's safety and took them to a "safe house." The following day, he went to Defendant's home and observed Defendant driving a maroon or brown Volvo matching the description of the car given by Victim.

I. *The Arrest and Search*

{8} Another stalking incident, which led to the filing of charges against Defendant, occurred on April 7, 1998. On that afternoon, Detective Merges was patrolling in an unmarked police car in the parking lot outside Victim's workplace. He testified that he was surveilling the parking lot when he saw what looked like Defendant's car drive into the parking lot. He further testified that he approached the car and observed that Defendant was driving. He called dispatch and requested backup. He then proceeded to follow Defendant out of the parking lot and onto Menaul Boulevard. He followed Defendant westbound on Menaul and then north on Broadway Avenue. Defendant turned east onto Candelaria Road. According to Detective Merges, Defendant stopped at the intersection of Candelaria and the entrance to Interstate 25 and made a left-hand turn onto the highway. The detective followed Defendant as he drove northbound on Interstate 25, west on Tramway Boulevard, north on Highway 313, into the Town of Bernalillo, west on Calle de Bosque, and finally north on Avenida San Ysidro in Bernalillo. During the chase, Detective Merges and Defendant drove through Sandia Pueblo and through Bernalillo. Throughout this time, Detective Merges was in contact with dispatch concerning his whereabouts.

{9} Once in Bernalillo, the vehicles approached an intersection where a school bus was stopped. Defendant stopped. Detective Merges pulled over to the right-hand side of Defendant's car. Officer Bello, a UNM police officer who responded to the dispatch call for backup, and Officer Armijo of the Sandia Pueblo Police Department, stopped behind Defendant. Officer Bello was in uniform and in a marked police car. At some point, two officers from the Bernalillo Police Department arrived.

{10} Officer Armijo ordered Defendant to shut off the engine and get out of the car. Defendant initially refused to get out of the car. The officers pulled him out of the vehicle. Officer Bello handcuffed Defendant, put him in the back of his police car, and read him his *Miranda* rights.

{11} Chief Camponozzi of the Sandia Pueblo Police Department handed Detective Merges three pieces of paper that allegedly fell out of Defendant's pockets while being arrested. One piece of paper was a Bank of America Versateller receipt and the other two were two halves of a ripped postcard.

II. *The Inventory Search*

{12} An inventory search was conducted of Defendant's car. Officer Bello filled out a standard "Tow-in-Report" form before having Defendant's car towed. He listed the following items under "Inventory of Vehicle" on the form: "1 Swiss Gear Pocket Knife[,] 1 set of Cuff Links [and] Tie Tack (inexpensive)[,] 1 Hand Held Light[,] 1 Electric Razor." These items were found in the main compartment of the car. In addition to the items listed on the tow sheet, the officers found a copy of the ad asking for the whereabouts of Victim attached to the driver's side visor and a gray fanny pack.

{13} The trunk of Defendant's car was opened, either by using Defendant's keys or the trunk lever inside the car. The officers noticed a briefcase inside the trunk. Defendant and Detective Merges testified that the briefcase was closed with the combination set in the open position. Detective Merges looked inside the briefcase during the inventory search. Among the papers found in the briefcase was a copy of the ad asking for Victim's whereabouts and a pink highlighter.

{14} The items discovered during the inventory search were left in the trunk of the car with the exception of the ad found on the driver's seat visor and the gray fanny pack, which were taken into police custody. After securing a search warrant for Defendant's car and briefcase, Detective Merges searched the car at the tow company premises. During this search, he found store receipts and a bank Versateller machine receipt. These items were placed in police custody.

III. *Motion to Dismiss Based on Jurisdictional Grounds*

{15} Defense counsel moved to dismiss on the ground that Officer Bello lacked jurisdiction to arrest Defendant. Defendant argued that the officer lacked jurisdiction because the arrest took place outside of university property. The State responded that Detective Merges had authority to arrest Defendant under the fresh pursuit doctrine because Defendant was observed by university police personnel to have committed a felony on university property. The felony was identified as aggravated stalking—a fourth-degree felony. The State further argued that even though Detective Merges did not himself arrest Defendant, the arrest was legal under a "team concept" approach. Officer Bello, the State argued, was on the scene in response to the backup request made by Detective Merges. The trial court denied the motion to dismiss.

IV. *Motion to Suppress*

{16} Defense counsel also moved to suppress evidence seized as a result of the arrest upon two grounds: (1) the items seized after the illegal search were fruit of a poisonous tree and (2) the search of the briefcase was beyond the scope of an inventory search and therefore constituted an illegal warrantless search. The State responded that the officer properly searched the unlocked briefcase as part of an inventory search designed to protect his agency from liability from a claim of lost or stolen property. The trial court denied the motion to suppress.

DISCUSSION

I. *Jurisdiction of Arresting Officers*

{17} Defendant claims that, because there was no jurisdiction for the arrest, all evidence seized as a result of the arrest should have been suppressed. He argues that Officer Bello, as a UNM police officer, did not have jurisdiction to arrest Defendant in Bernalillo. He further argues that Detective Merges had no authority to stop and arrest Defendant because he was not in uniform. Defendant also claims that even if Detective Merges did have authority to arrest Defendant, he could not confer such authority to Officer Bello to make an arrest outside UNM's jurisdiction.

{18} We will not disturb a trial court's denial of a motion to suppress on appeal if it is supported by substantial evidence unless it appears that the determination was incorrectly premised. *State v. Jacobs,* 2000-NMSC-026, ¶ 34, 129 N.M. 448, 10 P.3d 127 (citing *State v. Boeglin,* 100 N.M. 127, 132, 666 P.2d 1274, 1279 (Ct.App.1983)). On appeal, we look to whether the law was correctly applied to the facts and review the

evidence in the light most favorable to support the decision reached below, resolving all conflicts and indulging all inferences in support of that decision. *Id.* The interpretation of a statute is a matter of law which we review de novo. *State v. Dawson*, 1999-NMCA-072, ¶ 8, 127 N.M. 472, 983 P.2d 421.

{19} The jurisdiction of UNM police officers is limited to "within the exterior boundaries of lands under control of the board of regents employing them, including public streets and highways within such boundaries." NMSA 1978, § 29-5-2(B) (1975). It is undisputed that the arrest was made outside the limits imposed by statute. The State contends, however, that the UNM officer who arrested Defendant had jurisdiction to arrest Defendant under the common law rule of "fresh pursuit," even though the arrest did not take place on "lands controlled by the board of regents." *Id.* Our Supreme Court recognized the common law doctrine of fresh pursuit for warrantless arrests made outside of an officer's jurisdiction. *Benally v. Marcum*, 89 N.M. 463, 466, 553 P.2d 1270, 1273 (1976) (recognizing that "[t]he common law doctrine of fresh pursuit allows a peace officer to arrest beyond the boundaries of his jurisdiction only in pursuit of a person believed to have committed a felony."). New Mexico has also adopted the Uniform Act on Fresh Pursuit, which recognizes the fresh pursuit exception to the jurisdictional requirement for peace officers of other states pursuing a felon into New Mexico. NMSA 1978, § 31-2-1 (1937).

{20} The first question we address is whether the fresh pursuit doctrine applies to university police in New Mexico. We believe that it does. Our legislature has given university police officers the powers of peace officers to enforce the laws of the state within their jurisdictions. Section 29-5-2(B).

{21} Section 29-5-2(B) states:

> At all times while on duty, university police officers shall carry commissions of office issued by the board of regents. University police officers have the powers of peace officers within the exterior boundaries of lands under control of the board of regents employing them, including public streets and highways within such boundaries. Within this territory, a university police officer may enforce all applicable laws, ordinances and campus traffic regulations.

As Defendant correctly states, this statute limits the jurisdiction of the UNM police department to lands under control of the board of regents. *Dawson*, 1999-NMCA-072, ¶ 17, 127 N.M. 472, 983 P.2d 421 (holding that UNM officers possessed the powers of peace officers in dealing with the defendant as long as he was parked " 'within the exterior boundaries' " of the university) (quoting § 29-5-2(B)). However, that a police department has a limited jurisdiction does not mean that the fresh pursuit doctrine does not apply to that police department. For example, the New Mexico State Police, as well as the county and municipal police departments, all have limited jurisdictions established by statute or local ordinance. NMSA 1978, § 29-2-18(A) (1979) provides that the New Mexico State Police "shall be conservators of the peace within the state." These peace officers, however, can assume jurisdiction over a fleeing felon outside their designated jurisdiction under the common law fresh pursuit doctrine. *See Benally*, 89 N.M. at 466, 553 P.2d at 1273.

{22} We see no reason why the fresh pursuit doctrine should not apply to university police as well. Because the legislature confers upon UNM police the authority to enforce all state laws within their jurisdiction, including felonies such as aggravated stalking, we cannot assume that the legislature intends to give them less authority than other peace officers to enforce those laws. *Cf. Commonwealth v. Holderman*, 284 Pa.Super. 161, 425 A.2d 752, 756 (1981) ("In order for a campus police agency to adequately protect the campus and its residents and to act as an effective adjunct to the local police force, its officers must be permitted to pursue and arrest persons who commit summary offenses on campus and attempt to escape into the adjoining municipality."). We conclude, therefore, that our legislature intended that university police have the same power to make warrantless arrests when in fresh pursuit of a felon as do other law enforcement personnel.

{23} We next address whether Officer Bello, the arresting officer, was in fresh pursuit of a person he believed to have committed a felony. We conclude that he was in such a pursuit.

{24} Prior to the date of Defendant's arrest, Detective Merges knew of Victim's history with Defendant and the previous incidents of stalking and harassment. He had been given copies of the various restraining orders issued against Defendant. The restraining orders prohibited Defendant from coming within 100 yards of Victim's place of work. They further prohibited Defendant from contacting Victim in any way. With this knowledge, Detective Merges had reason to believe that when Defendant drove into the parking lot of the building where Victim worked, Defendant was committing the crime of aggravated stalking—a fourth-degree felony. *See* NMSA 1978, § 30-3A-3.1(A)(1) (1997). This incident occurred in the parking lot of a building owned by UNM and was within the jurisdiction of the UNM police. Detective Merges, under the circumstances, had jurisdiction to pursue Defendant outside of his statutory jurisdiction and ultimately stop and effect his arrest under the common law fresh pursuit doctrine.

{25} Defendant contends that even if Detective Merges had jurisdiction to arrest Defendant in Bernalillo under the fresh pursuit doctrine, he could not have transferred this jurisdiction to Officer Bello, the officer who made the actual arrest. We note that Defendant does not argue that Officer Bello lacked probable cause to make the arrest. Instead, Defendant appears only to suggest that the fresh pursuit doctrine did not permit Officer Bello to join the pursuit after his assistance was requested by Detective Merges. Again, we look at the facts established at trial in the light most favorable to the State. Evidence was presented at trial that, upon recognizing Defendant in the parking lot at Victim's work place, Detective Merges contacted dispatch to request backup to assist him in stopping and arresting Defendant. The initial call to dispatch was made while Detective Merges was within his jurisdiction. He continually advised dispatch of his location while he pursued Defendant. Officer Bello remained in constant contact with dispatch and was advised over his radio of Detective Merges' location at all times during the pursuit. Thus, Officer Bello was involved in the pursuit of Defendant from the time the request for backup was made. Defendant points to no authority which would render the doctrine of fresh pursuit unavailable to an officer who joins a pursuit, but who does not commence it. We conclude that Officer Bello had jurisdiction to arrest Defendant outside of his statutory jurisdiction under the common law doctrine of fresh pursuit and that the arrest was legal.

II. *Suppression of Evidence*

{26} Inventory searches are well established as an exception to the warrant requirement of the Fourth Amendment. *State v. Shaw,* 115 N.M. 174, 176, 848 P.2d 1101, 1103 (Ct.App.1993). In *State v. Ruffino,* 94 N.M. 500, 502, 612 P.2d 1311, 1313 (1980), our Supreme Court established three requirements for a lawful inventory search: (1) the search must be of a vehicle in police control or custody, (2) the search must be conducted pursuant to established police regulations or procedures, and (3) the search must be reasonable.

{27} In the present case, the basis for the police taking custody of the vehicle was Defendant's arrest. Defendant argues that if his arrest was illegal, police custody of the vehicle was not legally obtained. We have heretofore determined that the arrest of Defendant was legal.

{28} Defendant further asserts that the seizure of items not listed in the vehicle tow report was illegal. He argues that the State failed to prove that these items were seized according to established police regulations—the second requirement of a valid inventory search.

{29} When questioned about the standard practice of conducting an inventory search, Officer Bello testified:

> When you tow a vehicle[,] just to make sure that nothing is stolen from the vehicle[,][w]e do what is known as an inventory search because it has come back where someone has said that this was in the

> vehicle, and then it comes to question as to whether or not it actually was. So what we do is we take anything of value from the vehicle.... [W]e will take anything that we believe is of value, and we will note it on the inventory sheet, and then normally I will lock it in the trunk ... so that is my normal procedure for doing an inventory search. You open the trunk, make sure there is nothing in there.

The inventory search conducted in this case did not deviate from the procedure testified to by Officer Bello. The officers were lawfully entitled to search the entire vehicle, including the trunk. Officer Bello listed the items on the tow sheet that he thought were of value: a swiss army pocket knife, a set of cuff links, a tie tack, a hand-held light, and an electric razor. He did not testify that it was standard procedure to list every single item found in the car.

{30} Defendant does not cite any authority for the proposition that only the items listed in the vehicle tow report are admissible into evidence. He does not cite to evidence in the record below that the inventory procedures utilized by Officer Bello and Detective Merges deviated from the standard procedure. When an appellant cites no authority to support a specific proposition, the appellate court presumes that no supporting authority exists. *In re Doe,* 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984). Further, we note that the items at issue were not seized during the inventory search, but were seized pursuant to a search warrant obtained by Detective Merges after the car had been towed.

{31} The ad and the fanny pack were seized prior to the issuance of the search warrant. A search warrant should normally be obtained prior to seizing evidence of a crime found during an inventory search. *Ruffino,* 94 N.M. at 502, 612 P.2d at 1313. However, the seizure of these items does not require reversal for two reasons. Defendant did not argue below or on appeal that a warrant should have been obtained for these items. Therefore, Defendant failed to preserve this issue for review. *See State v. Varela,* 1999–NMSC–045, ¶ 25, 128 N.M. 454, 993 P.2d 1280 (stating that to preserve an error for appeal, an objection below must be made with sufficient specificity to alert the trial court to the error). Notwithstanding this lack of preservation, Defendant has not demonstrated on appeal how the outcome of the trial was prejudiced by its admission, or that it made Defendant's guilt any less certain. *Jacobs,* 2000–NMSC–026, ¶ 58, 129 N.M. 448, 10 P.3d 127.

{32} Finally, we review whether the inventory search was reasonable. An inventory search is generally found to be reasonable if it is made pursuant to established procedures and it furthers any of the three following purposes: "(1) to protect the arrestee's property while it remains in police custody; (2) to protect the police against claims or disputes over lost or stolen property; or (3) to protect the police from potential danger." *Shaw,* 115 N.M. at 177, 848 P.2d at 1104; *see also State v. Romero,* 2001–NMCA–046, ¶ 15, 130 N.M. 579, 28 P.3d 1120; *State v. Johnson,* 1996–NMCA–117, ¶ 15, 122 N.M. 713, 930 P.2d 1165. Inventory searches, like all warrantless searches, are presumed to be unreasonable. *Shaw,* 115 N.M. at 176, 848 P.2d at 1103. The burden of establishing their validity rests upon the State. *Romero,* 2001–NMCA–046, ¶ 15, 130 N.M. 579, 28 P.3d 1120; *Shaw,* 115 N.M. at 176, 848 P.2d at 1103. Defendant argues that the inventory search was unreasonable as to the items not listed on the vehicle tow report. Specifically, he argues that Officer Bello's testimony established that seizure of non-valuable items did not serve these purposes. Again, Defendant cites no authority. Yet, he argues that the court's error in admitting the seized evidence was not harmless error. Because we find that the evidence was properly admitted, we do not address this claim.

III. *Ineffective Assistance of Counsel*

{33} Daughter testified that Defendant had stalked her and that she was afraid of him. Defendant argues that this testimony was inadmissible under Rules 11–404(B) and 11–403 NMRA 2001 to prove that Defendant stalked Victim, and that defense counsel's failure to object to it was ineffective assistance of counsel.

{34} Counsel is ineffective when (1) performance falls below the standard of a reasonably competent attorney and (2) the deficient performance prejudices the defendant. Prejudice occurs if there is a reasonable probability that, but for the attorney's errors, the result of the proceeding would have been different. *State v. Brazeal,* 109 N.M. 752, 757–58, 790 P.2d 1033, 1038–39 (Ct.App.1990). A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id.*

{35} While this Court has held that an attorney's failure to object to testimony concerning prior bad acts was ineffective assistance of counsel, *State v. Dartez,* 1998–NMCA–009, ¶ 34, 124 N.M. 455, 952 P.2d 450, Defendant's claim here fails for two reasons. First, defense counsel before trial objected to all testimony concerning prior bad acts. Defense counsel made a motion in limine to exclude testimony regarding Defendant's prior conviction, testimony regarding incidents involving people other than Victim, and testimony regarding prior restraining orders, including the restraining orders pertaining to Daughter. Later in the trial, counsel acknowledged that the motion in limine was an objection to the admission of the restraining orders. Second, defense counsel's cross-examination of Daughter suggests the strategic decision not to place emphasis on Daughter's testimony by objecting to it in front of the jury. "A prima facie case [of ineffective assistance of counsel] is not made if there is a plausible, rational strategy or tactic to explain counsel's conduct." *Id.* ¶ 26. For example, on direct examination, Daughter testified that she was afraid of Defendant. Defense counsel on cross-examination then attempted to impeach Daughter by asking her if it was not true that Defendant never hit her, implying that she had no reason to fear Defendant. Thus, it appears plausible that defense counsel made a strategic decision not to object to Daughter's testimony.

{36} Further, prior to trial, the court determined that the restraining orders, as well as incidents with other people, were admissible because they "demonstrate a course of conduct, which is necessary to prove stalking." Thus, the trial court determined that Daughter's restraining order and testimony concerning the restraining order could be relevant to Defendant's stalking of Victim. Daughter testified that she lived with Victim and that she was afraid that if Defendant found her, he would find Victim as well. Defense counsel could have reasonably concluded that any further objection would not have resulted in a different outcome. We reject Defendant's claim of ineffective assistance of counsel.

CONCLUSION

{37} Defendant's conviction for aggravated stalking is affirmed.

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

WE CONCUR: JAMES J. WECHSLER, Judge, and JONATHAN B. SUTIN, Judge.

2001-NMSC-036

36 P.3d 438

STATE of New Mexico,
Plaintiff–Appellee,

v.

Demond GAINES, Defendant–Appellant.

No. 26,189.

Supreme Court of New Mexico.

Nov. 28, 2001.

Phyllis H. Subin, Chief Public Defender, Will O'Connell, Assistant Appellate Defender, Santa Fe, for Appellant.

Patricia A. Madrid, Attorney General, Margaret McLean, Assistant Attorney General, Santa Fe, for Appellee.

OPINION

MAES, Justice.

{1} Defendant was charged and convicted of the first degree murder of Ray Campbell. He was sentenced to life imprisonment, and we therefore have jurisdiction over his appeal under Article VI, Section 2 of the New Mexico Constitution. On appeal Defendant contends the trial court erred in rejecting his instruction on self-defense. We hold that

insufficient evidence was presented at trial to warrant the giving of a jury instruction on self-defense, and therefore we affirm.

FACTS AND ISSUES

{2} October 14, 1997, Campbell was stabbed and killed outside the Arbor Apartments in Albuquerque. He had just been arguing with his sometime friend, Defendant. The encounter was witnessed in part by several people, and there is no discrepancy in their testimony that Defendant was the apparent aggressor throughout. The testimony of Cora Wyatt, however, was that she saw the victim "[try] to give another man [Defendant] something in his hand and he kicked it away," or that she saw the victim drop something. This happened at a time and place prior to, and other than, where the actual death occurred. Marvin Barnes, criminalistics detective with the Albuquerque crime scene unit, testified that an object, identified as a small knife, was found in a grassy area just north of the apartment office building and around the corner of the building from where the body was found. The knife appeared to have had blood on it. Other witnesses included Lindsey and Amy Brown, two sisters who lived in Phoenix where Defendant went after the killing. Lindsey, Defendant's ex-girlfriend, testified that Defendant told her he had killed a man in self-defense. He told Amy basically the same thing. Defendant tendered a self-defense jury instruction based on UJI 14–5171 NMRA 2001. The court refused to give an instruction on self-defense.

STANDARD OF REVIEW

{3} On appeal Defendant contends that he was entitled to an instruction on self-defense, because he had told the Brown sisters he acted in self-defense and because there was evidence of a dropped object, based on Wyatt's testimony, and of a small knife found near the crime scene. We address this evidence in two sections, because none of the evidence provides a basis for a self-defense instruction, but for different reasons.

{4} There are two different standards which must be articulated and then used to analyze the issues in this case. First is the standard of appellate review. The propriety of denying a jury instruction is a mixed question of law and fact that we review de novo. *See State v. Salazar*, 1997 NMSC 044, ¶ 49, 123 N.M. 778, 945 P.2d 996. We do not weigh the evidence but rather determine whether there is sufficient evidence to raise a reasonable doubt about self-defense. *See State v. Ungarten*, 115 N.M. 607, 611, 856 P.2d 569, 573 (Ct.App.1993). Failure to instruct on self-defense when there is a sufficient quantum of proof to warrant it is reversible error. *See State v. Trammel*, 100 N.M. 479, 481, 672 P.2d 652, 654 (1983). *See generally State v. Cooper*, 1999 NMCA 159, ¶ 7, 128 N.M. 428, 993 P.2d 745.

{5} The second standard that applies is the substantive standard: what is the quality and quantity of evidence that Defendant must show existed at trial in order to demonstrate to this Court that the instruction on self-defense should have been given? It has been said that "even where there is only slight evidence to establish self-defense, the trial court must give such an instruction." *State v. Lara*, 110 N.M. 507, 515, 797 P.2d 296, 304 (Ct.App.1990). "In New Mexico, an instruction on self-defense is warranted if there is any evidence, even slight evidence, supporting the claim." *Cooper*, 1999–NMCA–159, ¶ 7, 128 N.M. 428, 993 P.2d 745, (citing *State v. Duarte*, 1996–NMCA–038, ¶ 3, 121 N.M. 553, 915 P.2d 309). Importantly, for purposes of this case, it has also been held that "[w]hile an accused is entitled to instruction on his *theory of the case* if evidence exists to support it, the court need not instruct if there is absence of such evidence." *State v. Gardner*, 85 N.M. 104, 107, 509 P.2d 871, 874 (1973) (citing *State v. Ortega*, 77 N.M. 7, 20, 419 P.2d 219, 229 (1966)) (emphasis added). This is important because not only is the evidence in support of Defendant's claims extremely weak, Defendant also never developed any theory of the case until his appeal in this Court.

{6} The United States Supreme Court has said that generally, a criminal defendant is entitled to an instruction as to any defense, provided the instruction has an evidentiary foundation and accurately states the law. *Mathews v. United States*, 485 U.S.

58, 63, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988). "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. *Stevenson v. United States,* 162 U.S. 313, 16 S.Ct. 839, 40 L.Ed. 980 (1896)." *Id.*

STATEMENTS TO THE BROWN SISTERS

{7} With respect to the statements he made to the Brown sisters, Defendant argues they constitute sufficient evidence to have warranted an instruction on self-defense. We are to look at the evidence from Defendant's point of view:

> The significance of the difference in viewing circumstances from the standpoint of the "defendant alone" rather than from the standpoint of a "reasonably cautious person" is that the jury's consideration of the unique physical and psychological characteristics of an accused allows the jury to judge the reasonableness of the accused's actions against the accused's subjective impressions of the need to use force rather than against those impressions which a jury determines that a hypothetical reasonably cautious person would have under similar circumstances.

State v. Leidholm, 334 N.W.2d 811, 818 (N.D. 1983). This indicates that the inquiry should focus on the time of the incident and what a defendant's thoughts might have been at that time ("under similar circumstances"), not several days later, which is when the statements to the Browns were made.

{8} In this analysis of whether the statements to the Browns were slight but adequately substantial evidence, we find useful an analogy to Rule 11-801(D)(1)(b) NMRA 2001 on prior consistent statements in order to assess the probative value of the statements in issue. An excellent discussion of that rule was provided in *State v. Casaus,* 121 N.M. 481, 486-87, 913 P.2d 669, 674-75 (Ct.App.1996):

> The drafters [of Rule 801(D)(1)(b)], by permitting prior consistent statements to be used to rebut a charge of recent fabrication or improper influence or motive as nonhearsay, do so under the premise that these statements, if made before the improper influence or motive is alleged to have originated, are inherently reliable. 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 406, at 188 (2d ed.1994) (an impeaching effort that suggests fabrication, influence, or motive makes prior consistent statements relevant only if they were uttered before such corrupting forces came into play); 4 Jack B. Weinstein et al., *Weinstein's Evidence* ¶ 801(d)(1)(b)[01], at 188-89 (1995) ("Evidence that merely shows that the witness said the same thing on other occasions when his motive was the same does not have much probative force, 'for the simple reason that mere repetition does not imply veracity.' ") (quoting *United States v. McPartlin,* 595 F.2d 1321, 1351 (7th Cir. ... 1979)) ... Thus, if a prior consistent statement is to be classified as nonhearsay as a result of its reliability, it must be made before the alleged motive to fabricate arises to be admissible under the rule. Michael H. Graham, *Handbook of Federal Evidence* § 801.12, at 752-58 (3d ed.1991).

Defendant's point of view becomes less probative with the passage of time, but here not much time had elapsed. Nonetheless, Defendant had a strong motivation to lie to the Brown sisters, and his conclusory statement that he acted in self-defense would not in any event be sufficient to warrant an instruction. *See State v. Lopez,* 2000-NMSC-003, ¶ 23, 128 N.M. 410, 993 P.2d 727 (describing the state of facts on which a defendant must submit evidence). We conclude their testimony was not an adequate showing to require the giving of an instruction on self-defense.

THE DROPPED OBJECT AND THE SMALL KNIFE

{9} There are two other facts which bear on the possibility that Defendant acted in self-defense when he stabbed the victim. The first is the testimony of Cora Wyatt that while the two men were arguing she saw the victim drop an object that Defendant kicked away. This took place, however, before and at a place other than where the ultimate altercation occurred. It did not happen with-

in the area demarked by detectives as the crime scene. No argument that the object was a weapon which prompted Defendant to attack was made by defense counsel. The second fact is the discovery of a key chain with a small knife on it found in the grassy area north of where the victim finally collapsed. The knife was said to have had blood on it, but apparently no tests were ever run to see whose blood it might have been. Defendant argues for the first time on appeal that the jury may have inferred that this knife may have been used to kill the victim or that the victim may have employed it against Defendant. Except for one brief reference to the item by Detective Barnes, it was never referred to during trial again. We think the failure of defendant to take up either of these two facts—the dropped object or the small knife—indicates that he did not believe them to be, or lead to, even slight evidence of self-defense. Defendant's "obligation is to introduce evidence that [would] raise in the minds of the jurors a reasonable doubt about the matter." *State v. Parish,* 118 N.M. 39, 44, 878 P.2d 988, 993 (1994). Defendant is attempting to raise a reasonable doubt in the mind of this Court, having failed, or even failed to try, to do so below. Furthermore, there is no dispute on the point that the dropping of the object took place well before Defendant might have been under attack such that he was responding to the attack when the stabbed he victim. Also, the victim did not collapse at the place of the altercation, and the knife was found away from and beyond the point where the victim did collapse. There is no testimony or other evidence linking the dropped object with the found knife, and the facts are not amenable to any possible reconstruction of events which could lead to the conclusion that the victim used a knife to initially attack Defendant. Considering the general failure on the part of Defendant to get the issue before the jury or to inject the suggestion that the facts indicated he acted in self-defense, we have no difficulty concluding there was effectively no evidence of self-defense as to the matters of the dropped object and the knife, *see Cooper,* 128 N.M. 428, 993 P.2d 745, 1999-NMCA-159, ¶ 7, and that there was no evidentiary foundation at trial for the presentation of the issue to the jury.

CONCLUSION

{10} Defendant has argued that the self-serving, thoroughly non-probative oral statements to the Brown sisters, made long after the killing, must be the basis for giving an instruction on self-defense. We reject the argument. We also reject Defendant's argument regarding an object that one witness says was dropped by the victim well before the altercation, and the unrelated discovery of a small knife a good distance away from the victim's body. We hold these could not be the basis for an instruction on self-defense. The judgment of the district court is affirmed.

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

PATRICIO M. SERNA, Chief Justice, JOSEPH F. BACA, GENE E. FRANCHINI, and PAMELA B. MINZNER, JJ., concur.

2001-NMCA-105

36 P.3d 441

Phyllis H. SUBIN, Chief Public Defender New Mexico Public Defender Department, Petitioner–Appellant,

v.

Williette ULMER, Respondent–Appellee.

No. 22,169.

Court of Appeals of New Mexico.

Oct. 19, 2001.

Maureen A. Sanders, Sanders & Westbrook, P.C., Albuquerque, NM, for Appellant.

Nancy L. Simmons, Law Offices of Nancy L. Simmons, P.C., Albuquerque, NM, for Appellee.

OPINION

PICKARD, Judge.

{1} This case involves the district court's authority to order the New Mexico Public Defender Department (Department) to pay expert witness fees on behalf of an indigent defendant who is represented by private counsel. Upon Respondent–Appellee's (Defendant's) request, the district court entered an order potentially requiring such payment. The Department sought a writ of error, which we granted. We now affirm under the limited facts and circumstances of this case. However, although we do so, we also hold that there is no authority for the district court to have granted Defendant's request at the time it was granted.

FACTS

{2} Defendant was charged with an offense that potentially required the services of expert witnesses to mount a defense. Defendant was qualified for Department representation, but her family was able to raise sufficient funds to retain private counsel. However, there were insufficient funds to pay for needed expert assistance. Defendant sought funds for such assistance from the Department, but was told that Department policy prohibited such assistance. Defendant thereafter filed an ex parte motion seeking a court order requiring the Department to treat her request in the same way it did requests from counsel hired by the Department to handle cases in which the Department had a conflict of interest. The district court heard the matter in chambers and, following the hearing, wrote a letter decision and filed an order granting Defendant's request. The district court required the Department to provide Defendant with the same services and utilize the same procedures it would if this were a case in which Defendant were represented by the Department.

DISCUSSION

{3} We first discuss the district court's authority as a general proposition, a question we review de novo. We next discuss the application of that law to the unusual facts of this particular case.

Authority of District Court in General

{4} Defendant and the court below rely on the power of the district courts to appoint counsel for indigent defendants and the constitutional requirement of meaningful access to justice, which includes access to expert witness services. *See Ake v. Okla.*, 470 U.S. 68, 77, 83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) (holding that states must provide expert witness services as part of their constitutional obligation to provide indigents with

meaningful access to justice); *State ex rel. Quintana v. Schnedar*, 115 N.M. 573, 578, 855 P.2d 562, 567 (1993) (holding that the courts have the power and responsibility to determine indigency and appoint counsel for indigent defendants). We do not quarrel with the proposition that courts have the power to insure that indigent defendants are provided adequate defense services, but we do not believe that the proposition applies to the facts of most cases like this case. Moreover, we find nothing in any constitutional doctrine or statutory provisions authorizing the district court generally to order the Department to provide services to people who are not its clients. Finally, authorizing courts to order the Department to expend its budget in ways that are not constitutionally or statutorily required appears to us to be an unwarranted intrusion into the administrative affairs of another agency.

{5} It is important to note at the outset that the Department's position is that it stood ready, willing, and able to provide expert witness assistance to Defendant as part of its duty to represent her, if she would only have accepted its representation. Thus, at the time the district court ruled, this case was not about a person who was being denied services. The State of New Mexico, either through its Public Defender Department or through its courts, was not proposing to deny Defendant access to anything to which she was constitutionally entitled. It only sought to put conditions on that entitlement, the same conditions with which every other indigent defendant must abide. According to current Department policy, to avail oneself of defense services provided by the Department, one must be a client of the Department or be represented by a lawyer on contract with the Department, and then must utilize Department procedures to access expert witness services.

{6} Defendant contends that she was willing to utilize Department procedures and was therefore in no different position from any Department client. We disagree. In our view, at the time the district court ruled, this case was about a person who wished to pick and choose what services she wanted and from whom, and not about a person who just wanted to be in the same position as any other indigent defendant. It is well-settled law that indigent defendants have no right to choose their own counsel or to insist that one attorney be substituted for another. *See State v. Hernandez*, 104 N.M. 268, 272, 720 P.2d 303, 307 (Ct.App.1986); *State v. Salazar*, 81 N.M. 512, 514, 469 P.2d 157, 159 (Ct.App.1970). Yet, what Defendant advocates would have permitted her and others like her to do just that.

{7} Since the district court's order was not necessary to insure that Defendant's constitutional rights were protected at the time it was entered, we next look to see whether there is statutory authority for the order. Defendant relies on the Indigent Defense Act, which, in several of its provisions, states that indigent defendants are entitled to representation and related services to the same extent as persons having their own counsel. *See* NMSA 1978, §§ 31–16–2(B), –3(A), –3(C) (1968, as amended through 1973). Defendant contends that the Public Defender Act, NMSA 1978, §§ 31–15–1 to –12 (1973, as amended through 2001), particularly in Section 31–15–7(B), created the Department and authorized it to provide indigent defendants, such as herself, with the services required by the Indigent Defense Act. Defendant contends that these two acts must be read together. We do not need, in this case, to determine whether the Department would be authorized to provide Defendant with the services she requests. The question we must address is whether the Department must provide those services without concomitant representation and under pain of court order.

{8} We review both the Indigent Defense Act and the Public Defender Act to see what they have to say about court orders. The only section to which our attention has been specifically directed is NMSA 1978, § 31–16–8 (1968). Section 31–16–8(B) requires that the court assigning counsel under the Indigent Defense Act shall pay attorney fees according to a schedule and shall pay reimbursement for direct expenses. Section 31–16–8(A)(2) states that payment of these fees and expenses shall be made from funds appropriated to the district court with respect to proceedings in the district courts.

{9} However, the parties agree that no funds have been appropriated to the district court for either counsel fees or expenses and that all such funds are contained in the Department's appropriation. Thus, if these statutes mean anything in terms of district court authority, they may mean that the district court can order the payment of expert witness expenses from the budgets of the district courts. But that is not what the district court ordered. The district court's order here was an order for funds to be paid by the Department. If the legislature had wanted district courts to have the authority to order funds to be paid by the Department, we believe it would have amended Section 31–16–8 at the time it either created the Department or put all indigent defense funding in the Department's budget. Such amendment would have provided that payment of funds ordered to be expended by the district courts will come from the Department's budget.

{10} Each party to this proceeding makes practical and ethical arguments about what powers a district court ought or ought not have to best provide indigent defense services. We do not believe that any of the arguments hit the mark. The question before us is not what is a better system, but instead what the constitution or statutes require. And, notwithstanding that the statutes arguably could be read to allow the Department to provide the services Defendant sought, we find nothing in them or in our general jurisprudence permitting courts to order the services in the absence of special circumstances not present when the district court entered its order.

{11} We are also not persuaded by the Department's argument that it had specifically requested that the legislature increase its budget so that it could provide defense services to private attorneys retained on behalf of indigent clients and was specifically turned down. Such action by the legislature does not necessarily mean such defense services are not permitted; it may mean only that the legislature thinks that such services can be provided within the existing budget. There being neither constitutional nor statutory authority for the district court's order at the time it was entered, we hold that the court erred in entering it. Due to the circumstances that we discuss in the next section of this opinion, however, we are constrained to affirm the order under the facts of this case as they have evolved.

{12} In closing on the issue of the courts' general powers, we wish to note that while the district court's order appears at first blush a reasonable and narrowly tailored effort to obtain better representation for more people, we question whether it will have that effect in the long run. As a practical matter, the Department must provide defense services to all clients found by the courts to be indigent and it must do so within budgetary constraints subject only to constitutional considerations. We are informed that the funds for services of experts are limited and are administered on a state-wide basis. The Department is ultimately responsible for the fair administration of those funds. If, in addition to the Department, all of the state's trial judges can also order funds to be made available to individual clients, the fair administration of the funds could well be compromised. It bears repeating that this case, at the time it was before the district court, was not a case about any particular individual or class of individuals getting less in the way of representation or defense services than the constitution requires. That being so, we see no reason for the district court to have interfered with the Department's administration.

{13} In so ruling, we wish to also make clear that we do not perceive a separation of powers issue to be present in this case. Our ruling is based on the absence of constitutional and statutory authority and may flow from prudential concerns. But, in appropriate cases, courts as guardians of the constitution or as interpreters of statutes may well order executive departments to make funding available as needed.

Application to this Case

{14} The district court's order was entered in March of 2001, and the Department petitioned for a writ of error in April. We granted the writ and assigned the case to our general calendar. The Department sought a stay from the district court, which was not

ruled upon, and sought review of the district court's inaction on the stay in this Court. We granted a stay in August. The brief in chief was filed in August, and the answer brief was filed on October 1, together with a motion to expedite decision or lift the stay of the district court's decision. The grounds for the latter request were that trial was scheduled for October 29 and Defendant did not want any further delay inasmuch as the matter had been pending for three years. We note that Defendant has pending in front of the district court a motion to dismiss for speedy trial violations. We have expedited the decision, and we now lift the stay.

{15} Although we have ruled that, in general, district courts do not have constitutional or statutory authority to order the payment of expert witness fees from the Department, the present case at the present time is an example of a case in which one or another of Defendant's constitutional rights could be violated if the Department is not ordered to abide by the district court's order. We heard oral argument in the case on October 16, barely two weeks from the start of trial. Our opinion will not be issued until the matter is even closer to the trial setting. To say now that Defendant is required to choose Department representation, as we have held is required in the ordinary case, will necessarily mean another delay while new counsel prepares. To say that Defendant needs to choose to proceed without expert witnesses to preserve what is left of her right to speedy trial appears to us to put this case on the horns of a constitutional dilemma. We resolve the dilemma by giving effect to both constitutional rights in this case. *Cf. Simmons v. United States,* 390 U.S. 377, 394, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) (stating "it [is] intolerable that one constitutional right should have to be surrendered in order to assert another"). Because of the delays necessarily caused by the time this case was in this Court, we believe that it is our constitutional duty to require the Department to follow the district court's order in this case.

CONCLUSION

{16} The district court's order is affirmed. We had previously stayed it, and the stay is now lifted.

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

JAMES J. WECHSLER, Judge, concurs.

MICHAEL D. BUSTAMANTE, Judge (concurring in part and dissenting in part).

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

{18} I concur in the action of the Court lifting the stay. The combination of events described in the opinion and the march of time places Defendant in an intolerable situation which requires our action. However, the fact that we are willing-and have the apparent authority-to enforce this particular order against the Department speaks volumes about the real issue the case raises.

{19} The Department argues that by enacting the Public Defender Act (PDA) the legislature intended to create a "sole source" or "package deal" system of representation for indigent defendants in New Mexico. The Department asserts it has no authority to provide any assistance to persons unless they are its clients and it is providing full representation. The Department admitted at argument that its position is not viable if its interpretation of the PDA is not accurate. Defendant responds by reminding us that there is a constitutional right at stake and that the State has responded to its constitutional obligation by enacting both the Indigent Defense Act (IDA) and the PDA. Defendant argues that the IDA and PDA read together do not clearly require defendants to become full clients of the Department in order to receive benefits. The Defendant concedes that if New Mexico has a "sole source" system, her position would not be viable.

{20} I do not believe, and I do not believe the majority disagrees, that the IDA and PDA are clear on the question. The majority chooses not to resolve the issue. Given this basic lack of clarity, what role do the courts have to play in these circumstances? I believe the answer is provided by our Supreme Court in *State ex rel. Quintana v. Schnedar,* 115 N.M. 573, 855 P.2d 562 (1993). The specific holding in *State ex rel. Quintana* involved the court's power to determine indi-

gency and appoint counsel for defendants in the face of an argument by the Department that the PDA gave it exclusive statutory power to determine indigency. The broader rule of the case, however, is that the courts retain power and inherent authority to act "to guarantee the enforcement of constitutional civil liberty protections in criminal prosecutions" 115 N.M. at 575, 855 P.2d at 564.

{21} It seems inescapable to me that the courts have the power to do what the district court did here: That is, hear a motion for relief when the Department has refused a request for a benefit from a privately represented indigent Defendant, and order the Department to consider the request as it would a similar request made by one of its staff attorneys. As the district court said in its letter decision, "*State Ex Rel Quintana* makes clear that the District Court retains the ultimate authority to insure the Defendant's statutory and constitutional rights are protected.... It seems logical to me that if I can appoint a lawyer to represent a criminal defendant I should be able to insure that that lawyer can have the resources to provide that defense."

{22} It is part of the business of the courts to interpret and apply the law-statutory and constitutional. When the constitutional right is clear and the statutory law is honestly open to interpretation, the courts have an obligation to act. The prudential considerations the majority cites do not counsel inaction; they do counsel caution and circumspection. Viewed in that light, I can find no fault with the district court's well-measured order.

2001-NMCA-109

36 P.3d 446

STATE of New Mexico, Plaintiff–Appellee,

v.

Roberto SANCHEZ, Defendant–Appellant.

No. 21,752.

Court of Appeals of New Mexico.

Nov. 7, 2001.

Certiorari denied, No. 27,227, Dec. 12, 2001.

Patricia A. Madrid, Attorney General, Santa Fe, NM, Max Shepherd, Assistant Attorney General, Albuquerque, NM, for Appellee.

Phyllis H. Subin, Chief Public Defender, Nina Lalevic, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

BOSSON, Chief Judge.

{1} Defendant, Roberto Sanchez, appeals from the judgment and sentence of the trial court for aggravated driving while under the influence of alcohol (DWI), pursuant to NMSA 1978, Section 66–8–102(D)(3) (1999). On appeal, Defendant raises four issues. Defendant argues that (1) there was insufficient probable cause to arrest him for DWI, (2) there was insufficient evidence to support his conviction for aggravated DWI, (3) statements made to the arresting officer should have been suppressed for failure to advise Defendant of his *Miranda* rights, and (4) the trial court erred by not appointing new counsel for Defendant at trial. Not persuaded by Defendant's arguments, we affirm.

BACKGROUND

{2} Defendant approached a DWI roadblock on August 22, 1999. Officer Massis was one of the officers working the roadblock. Officer Massis approached Defendant's vehicle, after Defendant had stopped at the roadblock, and asked Defendant for his driver's license, registration and proof of insurance. Instead of a driver's license, Defendant gave Officer Massis a New Mexico identification card. Further questioning by the officer revealed that Defendant was driving with a revoked license. While talking to Defendant, Officer Massis noticed that Defendant had a strong odor of alcohol on his breath, and blood-shot, watery eyes. According to the officer's testimony, when asked if he had been drinking, Defendant responded that he had consumed two beers that night. At this point, Officer Massis told Defendant to pull over to the side of the road and get out of the car so that he could administer the field sobriety testing. The officer told Defendant to move to the front of his patrol car so that the tests could be videotaped. The videotape, which was admitted into evidence, shows that Defendant flatly refused to consent to the field sobriety testing saying, "I am not going to do nothing. Let's go to jail." It is also clear, from the videotape, that Defendant was wearing a leg brace at the time. After Defendant refused to consent to the field sobriety testing, Officer Massis placed him under arrest for DWI, and for driving with a revoked license. Defendant offered no explanation for refusing to take the field sobriety tests, and only alluded to having a knee problem later, after the officers had performed a pat-down and were in the process of helping Defendant into the patrol car.

{3} At trial, Officer Massis testified that, prior to Defendant's refusal to consent to the field sobriety testing, he thought there was reasonable suspicion, but not probable cause, to conclude that Defendant was guilty of DWI. When asked what brought him to the point of determining that he did have probable cause to arrest Defendant, the officer testified, "because [Defendant] refused to do my field sobriety tests." After Defendant refused to perform field sobriety tests, Officer Massis placed him under arrest, read him the Implied Consent Act, and asked him if he would take a blood test. *See* NMSA 1978, §§ 66–8–105 to –112 (as amended through 1993). Defendant also refused to consent to a blood test.

{4} At a bench trial, Defendant testified that he told Officer Massis that he would not take the field sobriety testing because of his bad knee. However, the videotape does not show Defendant offering any such explanation. At trial, Defendant could not explain why that alleged portion of the conversation was not on the videotape. The trial judge ruled that the videotape had not been altered, and found that Officer Massis had probable cause to question and detain Defendant based on his observations. Additionally, the trial judge found that Defendant's refusal to take the field sobriety testing could indicate a consciousness of guilt, and that Defendant's refusal, combined with the other factors observed by the officer, justified Defendant's arrest. Ultimately, the trial court convicted Defendant of aggravated DWI un-

der Section 66–8–102(D)(3), as well as driving with a revoked license.

DISCUSSION

Officer Massis Had Probable Cause to Arrest Defendant For DWI

{5} Defendant contends that Officer Massis lacked probable cause to arrest him for DWI because Defendant did not exhibit signs of impaired driving. At trial, Officer Massis conceded that Defendant was not driving improperly, and that Defendant would not have been stopped, if not for the roadblock. Defendant places great emphasis on the officer's testimony that, until Defendant refused to perform the field sobriety testing, Officer Massis felt that he had no more than reasonable suspicion that Defendant might be driving under the influence. Defendant argues that his refusal to perform the field sobriety testing, without any direct evidence of impaired driving, did not rise to the level of probable cause. We disagree that the officer needed to observe Defendant driving, and conclude that Officer Massis had probable cause for an arrest, based on everything the officer observed about Defendant.

{6} A police officer has probable cause when facts and circumstances within the officer's knowledge, or about which the officer has reasonably trustworthy information, are sufficient to warrant an officer of reasonable caution to believe that an offense is being committed or has been committed. *State v. Salas,* 1999–NMCA–099, ¶¶ 17–18, 127 N.M. 686, 986 P.2d 482. It is unlawful for any person who is under the influence of intoxicating liquor to drive any vehicle within the state. Section 66–8–102(A). A person is under the influence of intoxicating liquor if "as a result of drinking liquor [the driver] was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to [the driver] and the public." UJI 14–4501 NMRA 2001; *see State v. Deming,* 66 N.M. 175, 180, 344 P.2d 481, 484 (1959); *State v. Sisneros,* 42 N.M. 500, 507, 82 P.2d 274, 278 (1938). An officer does not have to observe a suspect actually driving in an impaired manner if the officer, based upon all the facts and circumstances, has "reasonable grounds to believe that Defendant had been driving while intoxicated." *State v. Jones,* 1998–NMCA–076, ¶ 10, 125 N.M. 556, 964 P.2d 117.

{7} In this case, Officer Massis needed to have knowledge of facts sufficient to allow him, or an objectively reasonable officer in his position, to conclude that Defendant had been driving while he was "to the slightest degree" unable to exercise the clear judgment and steady hand necessary to handle a vehicle in a safe manner. The State does not argue for a general principle that refusal to perform the field sobriety testing, standing alone, constitutes probable cause for an arrest. However, the State does argue that such a refusal can be considered, in combination with other factors, to constitute probable cause.

{8} In the case before us, Officer Massis had information other than Defendant's refusal to submit to the field sobriety testing. The officer observed that Defendant smelled strongly of alcohol, and had blood-shot, watery eyes. According to the officer's testimony, Defendant had admitted to drinking two beers that night. An objectively reasonable officer could take all of these factors into account in determining whether there was probable cause to make an arrest.

{9} The State can use evidence of a driver's refusal to consent to the field sobriety testing to create an inference of the driver's consciousness of guilt. *McKay v. Davis,* 99 N.M. 29, 32, 653 P.2d 860, 863 (1982); *State v. Wright,* 116 N.M. 832, 834–36, 867 P.2d 1214, 1216–18 (Ct.App.1993). Officer Massis, or an objectively reasonable officer in his position, could logically infer from Defendant's refusal to consent to the field sobriety testing that Defendant knew he was driving under the influence of alcohol and that these tests might reveal his impairment. This inference, combined with the officer's other observations of Defendant, gave Officer Massis probable cause to arrest Defendant for DWI.

{10} Defendant attempts to rebut that inference with evidence of his leg brace. He argues that the officer should have known that there was a plausible explanation, other than consciousness of guilt, for Defendant's

refusal to perform the field sobriety testing. However, the court was entitled to find, as an issue of fact, that Defendant made no attempt to explain his refusal by referring to the leg brace or to any problems with his knees. The court was not required to conclude that the officer should have attributed Defendant's refusal to the leg brace when Defendant failed to articulate a rationale for refusing to take field sobriety tests.

{11} Defendant relies on the officer's testimony that he erroneously believed that Defendant's refusal to perform the field sobriety testing violated the Implied Consent Act. *See* § 66–8–107(A) (providing that drivers shall be deemed to have given consent to blood or breath testing). We are not persuaded by Defendant's argument. It is irrelevant that this particular officer may have been confused about the requirements of the Implied Consent Act. Probable cause is an objective test based on whether "an officer of reasonable caution [would] believe that an offense is occurring." *Salas*, 1999–NMCA–099, ¶ 10, 127 N.M. 686, 986 P.2d 482; *see also State v. Gomez*, 1997–NMSC–006, ¶ 42, 122 N.M. 777, 932 P.2d 1. "We demand that police officers at the scene of an occurrence act reasonably. We judge reasonableness by an objective standard, mindful that probable cause requires more than a suspicion, but less than a certainty." *Salas*, 1999–NMCA–099, ¶ 18, 986 P.2d 482. The trial court properly concluded that the officer had objectively reasonable grounds to justify an arrest.

{12} Defendant also relies on certain New Mexico cases in which the evidence of probable cause showed more direct or circumstantial evidence of actual impairment than the State may have demonstrated in Defendant's case. *See, e.g., Jones*, 1998–NMCA–076, ¶ 10, 125 N.M. 556, 964 P.2d 117 (articulating probable cause when defendant had been in an automobile accident, swayed while talking to police, had strong odor of alcohol, and failed the field sobriety testing); *State v. Ruiz*, 120 N.M. 534, 540, 903 P.2d 845, 851 (Ct.App.1995) (providing probable cause for arrest when officer observed that defendant was weaving, had a strong smell of alcohol, glassy eyes, and was unable to perform field sobriety testing); *Boone v. State*, 105 N.M. 223, 227, 731 P.2d 366, 370 (1986) (remanding case to trial court to make appropriate determination on probable cause when driver had slurred speech and was unsteady on feet). Defendant's comparison with particular facts from other cases is not persuasive. Each case stands on its own facts; there is no one set of circumstances required for probable cause. In the case before us, the officer had evidence of drinking, and he observed Defendant's behavior, demeanor, and appearance. For the reasons previously discussed, this evidence, combined with the fair inferences flowing from Defendant's refusal to perform the field sobriety testing, was enough to establish probable cause. *See Salas*, 1999–NMCA–099, ¶¶ 17–18, 127 N.M. 686, 986 P.2d 482.

The Verdict of Aggravated DWI is Supported by Substantial Evidence

{13} Because the State presented no direct evidence of impaired driving, Defendant argues that the State lacked sufficient evidence to support a verdict of aggravated DWI beyond a reasonable doubt. Section 66–8–102(D)(3) states:

> Aggravated driving while under the influence of intoxicating liquor . . . consists of a person who:
>
> . . .
>
> (3) refused to submit to chemical testing, as provided for in the Implied Consent Act [66–8–105 to 66–8–112 NMSA 1978], and in the judgment of the court, based upon evidence of intoxication presented to the court, was under the influence of intoxicating liquor. . . .

There is no dispute that Defendant "refused to submit to chemical testing." Thus, the sole question is whether substantial evidence supports the trial court's conclusion that Defendant "was [driving] under the influence of intoxicating liquor."

{14} In reviewing a claim of insufficient evidence, we must determine whether there is substantial evidence of either a direct or a circumstantial nature to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to

conviction. *State v. Sutphin,* 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988). Substantial evidence is that which is acceptable to a reasonable mind as adequate support for a conclusion. *State v. Isiah,* 109 N.M. 21, 30, 781 P.2d 293, 302 (1989), *overruled on other grounds by State v. Lucero,* 116 N.M. 450, 453–54, 863 P.2d 1071, 1074–75 (1993). We review the evidence "in the light most favorable to the State, resolving all conflicts and indulging all permissible inferences to uphold a verdict of conviction." *State v. Sanders,* 117 N.M. 452, 456, 872 P.2d 870, 874 (1994). The test is not whether substantial evidence would support an acquittal, but whether substantial evidence supports the verdict actually rendered. *State v. Sosa,* 2000–NMSC–036, ¶ 8, 129 N.M. 767, 14 P.3d 32. In analyzing the evidence under that standard, we disregard conflicts in the evidence that would have supported a contrary verdict.

{15} As we have seen, the trial court had before it Officer Massis' observations of Defendant's behavior and appearance, coupled with Defendant's unexplained refusal to perform field sobriety tests and his unusual demand to be taken to jail instead. The officer had evidence that Defendant had been drinking, including the odor of alcohol, bloodshot, watery eyes, and Defendant's own admission. The Court also viewed the videotape and found Defendant's statements and demeanor to be consistent with a person who was under the influence of alcohol. The trial judge characterized Defendant as "babbling" on the videotape, which could lead the court to infer that Defendant was intoxicated. The trial judge heard Officer Massis testify that, upon being placed in the patrol car, Defendant began kicking the car, which required the police to place restraints on his ankles to prevent him from hurting himself.

{16} Defendant argues that, while this evidence may be probative of Defendant's drinking, it is not probative of him being impaired or driving while impaired. Defendant maintains that there was no evidence beyond a reasonable doubt that Defendant's drinking actually affected his driving. We disagree. Although the evidence to support a conviction for DWI is marginal at best, we do not agree that the evidence is insufficient as a matter of law.

{17} Defendant came to a stop only moments before he began talking with Officer Massis and Officer Massis began observing his behavior, the same behavior viewed by the court on the videotape. As the finder of fact, the trial court could reasonably have concluded that behavior exhibited by Defendant on the videotape, and described by Officer Massis, were indicative of Defendant's condition and behavior only moments before, while he was driving. This evidence, including reasonable inferences therefrom, could have reasonably persuaded the trial court that Defendant was less able "to the slightest degree ... to exercise the clear judgment ... necessary to handle a vehicle." UJI 14–4501(2).

{18} Defendant cites to *Territory v. Lucero,* 16 N.M. 652, 655, 120 P. 304, 305 (1911), for a difference between an inference and a presumption, and particularly for that court's holding that a mere inference of guilt created by fleeing the scene of a crime is not enough, standing alone, to support a verdict of guilty. Similarly, Defendant argues that any inference of guilt from his refusal to perform the field sobriety testing was not enough to convict him.

{19} As previously discussed, the trial court had before it more than just a negative inference of guilt equivalent to fleeing the scene of a crime. If the evidence in this case were confined to Defendant's refusal to perform the field sobriety testing, the principle for which *Lucero* is cited might be appropriate. However, as we have seen, there was far more here than a mere inference of consciousness of guilt. Considered in conjunction with these other pieces of evidence, that inference was probative of Defendant's guilt.

The Trial Court Did Not Err in Denying Defendant's Motion to Suppress His Statements at the Roadblock

{20} Officer Massis testified that once a driver is under suspicion, he holds them until he can determine through a computer check whether that driver has a valid driver's license. This process can take up to ten minutes. Officer Massis admitted that

Defendant was not free to leave while he was running the computer check.

{21} Defendant argues that the officer should have advised Defendant of his constitutional rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Defendant argues that, at this point, he was in custody, and that it would have been unreasonable for a person in his position to believe he was free to leave. Defendant also argues that, when Officer Massis asked him questions concerning his driver's license and whether he had been drinking, those questions were designed to elicit an incriminating response and constituted interrogation. *See State v. Fekete*, 120 N.M. 290, 300–02, 901 P.2d 708, 718–20 (1995). Defendant contends that the trial court should have found that he was interrogated while in custody, without his rights being explained to him and, therefore, any statements made by him should have been inadmissible.

{22} Defendant's argument is contrary to established precedent. "The roadside questioning of a motorist pursuant to a routine traffic stop does not constitute custodial interrogation." *See Armijo v. State ex rel. Transp. Dep't*, 105 N.M. 771, 773, 737 P.2d 552, 554 (Ct.App.1987). Historically, police have been allowed to ask preliminary questions regarding a driver's license and registration, and even to make "reasonable requests . . . to perform field sobriety tests," without rising to the level of custodial interrogation, which would require *Miranda* warnings. *Id.; see also Berkemer v. McCarty*, 468 U.S. 420, 421, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) (questioning of a motorist pursuant to a routine traffic stop does not constitute custodial interrogation). Accordingly, we find Defendant's argument to be without merit.

The Trial Court Did Not Err When It Refused Defendant's Motion to Appoint New Trial Counsel

{23} Defendant was unsatisfied with the legal representation he received from appointed counsel. Defendant claims that defense counsel did not fully investigate the possibility of evidence tampering in regard to the videotape that was admitted into evidence. Before trial, defense counsel made a motion to have the court appoint new counsel. The trial court questioned Officer Massis about the videotape and inquired into the possibility of tampering. The court asked Officer Massis where he kept the videotape, and who had access to it. Being satisfied with the answers provided by Officer Massis, and concluding that the videotape had not been altered, the trial court denied Defendant's motion.

{24} In *State v. Hernandez*, 104 N.M. 268, 272, 720 P.2d 303, 307 (Ct.App. 1986), this Court stated that an indigent defendant has no right to choose or substitute his appointed counsel. The decision to appoint substitute counsel is within the sound discretion of the trial judge. *Id.* Defendant has not shown that the trial court abused its discretion in denying his motion for new counsel. *See id.* Defendant has not shown any likelihood that substitute counsel could have demonstrated that the videotape was, in fact, altered, or that Defendant suffered any prejudice, in connection with the videotape, because of his appointed counsel. We find Defendant's argument on this point to be without merit.

CONCLUSION

{25} For the reasons stated above, we affirm Defendant's conviction for aggravated DWI.

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

WE CONCUR: CELIA FOY CASTILLO, Judge, and IRA ROBINSON, Judge (specially concurring).

ROBINSON, Judge (special concurrence).

{27} I do not find comfort in *Davis*, which holds that a defendant's refusal to submit to a field sobriety test gives rise to an inference that the defendant has a guilty conscience. I am convinced that there are other valid inferences, including that of innocence, fear of police, apprehension, and confusion that are equally reasonable, logical and realistic.

{28} Furthermore, the line of cases supporting the "reasonable officer" standard for probable cause, as opposed to allowing the

testimony of the officer on the scene to govern what constitutes probable cause for arrest, may be distinguishable. Almost all of those cases deal with a police officer who testifies that he *did* have probable cause to arrest. Here, the officer testified that he *did not* believe he had probable cause, and that is what sparked the controversy.

{29} In this case there is enough evidence to find the Defendant not guilty. The problem with such a conclusion is that we would be substituting our own judgment for that of the trial judge, and that is not our job. We must resist the temptation to re-weigh the evidence on appeal. In this case, the temptation is great because the officer at the scene testified, on cross-examination by defense counsel, that he did not find probable cause for arrest until the Defendant refused to take the field sobriety test. If this testimony stood throughout the trial, I could not concur in the majority decision to affirm. However, the trial judge asked the officer what circumstances led him to believe that he had probable cause. At that time, the officer stated that it was not just the Defendant's refusal to take the field sobriety test, but also the fact that the Defendant had watery, bloodshot eyes and an odor of alcohol on his breath. This testimony provides substantial evidence supporting the arrest and later the trial court's finding of guilt.

{30} I, therefore, concur.

2001-NMSC-038

37 P.3d 81

Jeremias SILVA, Plaintiff–Appellee,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, a national labor union, Defendant–Appellant,

and

Luis Arellano and Evelina Marquez, Defendants.

No. 26,641.

Supreme Court of New Mexico.

Nov. 26, 2001.

Jones, Snead, Wertheim, Wentworth & Jaramillo, P.A., Arturo L. Jaramillo, Jerry Todd Wertheim, Santa Fe, NM, Rothstein, Donatelli, Dahlstrom, Schoenburg and Enfield, L.L.P., Robert R. Rothstein, Santa Fe, NM, Bredhoff & Kaiser, P.L.L.C., W. Gary Kohlman, Alice O'Brien, Washington, DC, for Appellant.

Robert L. Pidcock, Albuquerque, NM, for Appellee.

OPINION

MINZNER, Justice.

{1} In this case, we accepted certification of several questions relating to the tort of retaliatory discharge from the United States Court of Appeals for the Tenth Circuit. *See Silva v. Am. Fed'n of State, County, and Mun. Employees,* 231 F.3d 691 (10th Cir.2000). These questions arose in an appeal by the American Federation of State, County and Municipal Employees (AFSCME) from the denial of their motions for judgment, for a new trial, and for remittitur following a substantial jury verdict for an employee who was subject to a collective bargaining agreement. We have jurisdiction under NMSA 1978, § 39–7–4 (1997) and Rule 12–607 NMRA 2001. The first question certified is:

> Does the New Mexico Supreme Court's holding in *Gandy v. Wal–Mart Stores, Inc.,* 117 N.M. 441, 872 P.2d 859 (1994), allow a plaintiff who is not an at-will employee to pursue an action for the tort of retaliatory discharge under the public policy exception outlined in *Silva v. Albuquerque Assembly & Distribution Freeport Warehouse Corp.,* 106 N.M. 19, 738 P.2d 513, 515 (1987), when the plaintiff has an alternative remedial grievance procedure

available under a collective bargaining agreement?

231 F.3d at 691. We conclude that *Gandy* does not "allow a plaintiff who is not an at-will employee to pursue an action for the tort of retaliatory discharge under the public policy exception," to the at-will doctrine. Because we answer the first question in the negative, we do not need to address the remaining questions that were certified.

I.

{2} Jeremias Silva worked for AFSCME as a union organizer, and Silva's employment was governed by a collective bargaining agreement. 231 F.3d at 692. That agreement, in relevant part, states that "[n]o employee shall be discharged or otherwise disciplined except for just and sufficient cause." The agreement also provides for a grievance procedure potentially ending in final and binding arbitration. *Id.*

{3} AFSCME fired Silva. After he was fired, he brought several claims against his former employer in federal district court: (1) breach of employment contract, (2) intentional infliction of emotional distress, (3) violations of the Americans with Disabilities Act, and (4) retaliatory discharge. The federal district court granted AFSCME's motion to dismiss the first two claims and at the close of Silva's case granted AFSCME's motion for judgment as a matter of law on the third.

{4} The retaliatory discharge claim went to the jury, which awarded Silva $624,940 in compensatory damages and $1,000,000 in punitive damages. AFSCME then moved for judgment as a matter of law, or an order granting a new trial and vacating the punitive damage award, or a remittitur of the punitive damage award. The district court denied these motions.

{5} AFSCME appealed the denial of these motions to the Court of Appeals for the Tenth Circuit. On appeal, AFSCME argued, among other things, that the New Mexico tort of retaliatory discharge did not apply to Silva because his employment contract protected him from wrongful discharge.

{6} The Court of Appeals for the Tenth Circuit then certified three questions to this court. The first question, quoted above, asked about the effect of *Gandy* on this Court's statements in *Silva* concerning the tort of retaliatory discharge. The second and third questions concern the effect of the collective bargaining agreement on the tort, and expressly request a response only if the answer to the first question is yes.

{7} AFSCME had argued on appeal to the Tenth Circuit—and continues to argue—that *Silva* states a holding not affected by *Gandy.* AFSCME relied on the following language from *Silva:*

> A retaliatory discharge cause of action was recognized in New Mexico as a narrow exception to the terminable at-will rule; its genesis and sole application has been in regard to employment at-will. The express reason for recognizing this tort, and thus modifying the terminable at-will rule, was the need to encourage job security for those employees not protected from wrongful discharge by an employment contract. Obviously, if an employee is protected from wrongful discharge by an employment contract, the intended protection afforded by the retaliatory discharge action is unnecessary and inapplicable.

106 N.M. at 21, 738 P.2d at 515 (citations and internal quotation marks omitted).

{8} Silva argued to the federal district court and on appeal—and continues to argue—that *Gandy* modifies or clarifies the holding in *Silva.* Silva relied on the following language in *Gandy:*

> Wal-Mart relies on *Silva v. Albuquerque Assembly & Distribution Freeport Warehouse Corp.,* 106 N.M. 19, 738 P.2d 513 (1987) and *McGinnis v. Honeywell, Inc.* 110 N.M. 1, 791 P.2d 452 (1990), for the proposition that the tort of retaliatory discharge will not lie where an employee is protected against wrongful discharge by another cause of action (in those cases, breach of an employment contract). We agree with Wal-Mart's position to the extent it intimates that a plaintiff cannot recover twice for the same harm—once under the employment contract (or the

> Human Rights Act, as the case may be) and again under the tort....

117 N.M. at 444, 872 P.2d at 862.

{9} We agree with AFSCME that *Gandy* does not alter the rule reiterated in *Silva*. Thus, we answer the first question in the negative. Our reasons are as follows.

II.

{10} The law of retaliatory discharge in New Mexico must be read against the backdrop of the doctrine of at-will employment. Absent an express employment contract that limits the ability of an employer to discharge his or her employees, the employer or the employee may terminate the relationship "for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong." *Vigil v. Arzola*, 102 N.M. 682, 686, 699 P.2d 613, 617 (Ct.App.1983) (quoted authority and quotation marks omitted), *rev'd on other grounds*, 101 N.M. 687, 687 P.2d 1038 (1984), *overruled in part by Chavez v. Manville Prods. Corp.*, 108 N.M. 643, 649, 777 P.2d 371, 377 (1989). New Mexico common law has recognized breach of implied contract and retaliatory discharge as two exceptions to this doctrine and has rejected a third—the implied covenant of good faith and fair dealing. *Melnick v. State Farm Mut. Auto. Ins. Co.*, 106 N.M. 726, 730, 749 P.2d 1105, 1109 (1988).

{11} In recognizing the tort of retaliatory discharge, the Court of Appeals characterized it as a limited exception to the doctrine of at-will employment:

> In view of present economic conditions and the need to encourage job security, we believe that a cause of action should exist when the discharge of an employee contravenes some clear mandate of public policy. We do not abrogate the at will rule; we only limit its application to those situations where the employee's discharge results from the employer's violation of a clear public policy.

Vigil, 102 N.M. at 688, 699 P.2d at 619. In defining the tort, the *Vigil* court equated its purpose with job security: "What is at stake is job security, not reparation for every conceivable ill." 102 N.M. at 689, 699 P.2d at 620.

{12} In *Silva* this Court recognized that, having been created as an exception to the at-will rule in New Mexico, the tort of retaliatory discharge would not extend as a matter of logic to employees who are not at-will. Because "its genesis and sole application has been in regard to employment at-will," it is "unnecessary and inapplicable" when the employee is protected from wrongful discharge by an employment contract. 106 N.M. at 21, 738 P.2d at 515. It was therefore not error for the trial court to instruct the jury that it could find either a breach of contract or a retaliatory discharge, but not both.

{13} As a practical matter, one might reason that the tort is "unnecessary" for contract employees because a requirement that an employee can be disciplined only for just cause protects the employee from retaliation and limits the employer's ability to violate a public policy of New Mexico. As a logical matter, one might reason that the tort is "inapplicable" to contract employees because it was created only to be an exception to the at-will status, a status many employees have and for which the tort is a necessary protection. Therefore, there was no reason to extend the tort to employees whose at-will status is limited by contract.

{14} The Tenth Circuit asks, we think, on what basis and by what reasoning we resolved the issues presented in *Silva*. We understand the Tenth Circuit to have thought *Gandy* either put in doubt this Court's holding in *Silva* or perhaps modified that holding. We conclude *Gandy* addressed a different issue than presented in *Silva*, and thus should not be read to alter or modify *Silva*.

III.

{15} In *Gandy*, we addressed the specific question of whether an at-will employee's right to bring a retaliatory discharge action should be limited by the existence of a statutory remedy. 117 N.M. at 444, 872 P.2d at 862. In that case, the defendant argued that the tort of retaliatory discharge should not be available to the employee because its protection was unnecessary; the employee had a

remedy under the Human Rights Act, NMSA 1978, §§ 28-1-1 to -15. We noted that the defendant's position conflicted with our statements in *Vigil*, 102 N.M. at 688-89, 699 P.2d at 619-20, and *Shovelin v. Central New Mexico Electric Cooperative*, 115 N.M. 293, 303, 850 P.2d 996, 1006 (1993). *See Gandy*, 117 N.M. at 444, 872 P.2d at 862. In those cases we said that the Human Rights Act could furnish the public policy statement underlying the tort of retaliatory discharge notwithstanding the fact that the Human Rights Act contains its own remedial scheme. We therefore rejected Defendant's argument. *See id.* at 445, 872 P.2d at 863.

{16} After reviewing *Silva* and *Gandy*, we believe that *Silva* articulated the logical consequence of the limited nature of the tort of retaliatory discharge described in *Vigil*. We are not persuaded that *Silva* announced a new rule. Specifically, we do not believe that *Silva* should be read to mean that the mere existence of an alternative remedy renders the tort of retaliatory discharge unavailable. Such a holding would have been overruled implicitly by *Gandy*. Rather, *Silva* noted that the tort of retaliatory discharge was limited to those cases in which the employee can be fired without just cause. The question resolved by *Gandy* is inapposite. There, the Court concluded that the tort of retaliatory discharge, as an exception to the at-will doctrine, was not preempted by the legislative recognition of another exception to that doctrine in the Human Rights Act. *Gandy*, 117 N.M. at 444, 872 P.2d at 862. The presence of the Human Rights Act remedy does not convert an otherwise at-will employee to one terminable only for just cause, and the need for the tort of retaliatory discharge is still present.

{17} We recognize that we have not always kept the two causes of action analytically distinct. For example, in *McGinnis v. Honeywell, Inc.*, 110 N.M. 1, 791 P.2d 452 (1990), we affirmed the plaintiff's compensatory award on the basis of breach of contract. We noted, in dicta, that had the plaintiff alleged emotional distress damages, we might have remanded the case for a trial on the retaliatory discharge claim. 110 N.M. at 8-9, 791 P.2d at 459-60. We think part of the confusion arises because a plaintiff may proceed to a jury with alternative and mutually exclusive theories. *See Boudar v. E.G. & G., Inc.*, 106 N.M. 279, 283, 742 P.2d 491, 495 (1987). In such circumstances, the trial court should instruct the jury as *Silva* dictates: the jury may find a breach of contract or a retaliatory discharge, but not both. *Silva*, 106 N.M. at 21, 738 P.2d at 515. To the extent that dicta in these cases might suggest a different approach, we do not think they are accurate statements of the law of retaliatory discharge in New Mexico.

{18} We note that the jury in *Gandy* was instructed as in *Silva*. The applicable jury instructions in *Gandy* directed the jury to first determine whether there was an implied contract, and whether it was breached. Only if the answer to those questions was "no" was the jury to determine whether "Defendant discharge[d] Plaintiff Susan Gandy solely in retaliation for [her] filing a complaint with the New Mexico Department of Labor-Human Rights Division[ ]." Jury Instruction No. 8, *Gandy* (No. 21,035); Record Proper at 733-a. Additionally, the jury was provided a special verdict form on which to provide their answers. The jury determined that there was no implied contract, but that Defendant did retaliate against Plaintiff. *See* Special Verdict Form, *Gandy* (No. 21,035); Record Proper at 759. We take judicial notice of these records. *Cf. State v. Turner*, 81 N.M. 571, 576, 469 P.2d 720, 725 (Ct.App.1970) ("We take judicial notice of the records on file in this court.").

{19} For *Gandy* to "allow a plaintiff who is not an at-will employee to pursue an action for the tort of retaliatory discharge," 231 F.3d at 691, it would have had to expand that tort as it was described in *Vigil* and *Silva*. We do not think that *Gandy* can be read to have done this.

{20} *Gandy* refused, we think, to limit the protection *Vigil* had provided at-will employees. Because the tort of retaliatory discharge was created to fulfill a limited purpose, *Silva* properly sustained the district court's decision not to permit the plaintiff in that case to recover both contract and tort damages. *Gandy* properly sustained the district court's decision to permit the plaintiff in

that case to pursue a tort remedy notwithstanding the existence of a statutory remedy.

IV.

{21} We were asked the limited question of whether *Gandy* "allow[s] a plaintiff who is not an at-will employee to pursue an action for the tort of retaliatory discharge." 231 F.3d at 691. Because we conclude that the holding in *Gandy* does not expand a retaliatory discharge action beyond the principles announced in *Vigil* and *Silva*, we must answer that question in the negative.

{22} We note that we should quash a certification order if there is a "controlling appellate precedent." NMSA 1978, § 39–7–4 (1997). We have not quashed the order because the issue presented is one this court has not addressed. That issue is whether *Gandy* modified *Silva*. We conclude that it did not.

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

PATRICIO M. SERNA, Chief Justice, JOSEPH F. BACA, Justice, GENE E. FRANCHINI, Justice, PETRA JIMENEZ MAES, Justice.

2001-NMSC-037

37 P.3d 85

STATE of New Mexico, Plaintiff–Appellee,

v.

Donald STANLEY, Defendant–Appellant.

No. 25,664.

Supreme Court of New Mexico.

Dec. 11, 2001.

[redacted]

[redacted]

[redacted]

Law Office of Leonard J. Foster, Leonard J. Foster, Albuquerque, NM, for Appellant.

Patricia A. Madrid, Attorney General, Max Shepherd, Assistant Attorney General, Santa Fe, NM, for Appellee.

OPINION

MAES, Justice.

{1} Defendant, Donald Stanley, was convicted of one count of first-degree murder as well as intimidation of a witness following a jury trial. He was sentenced to life imprisonment plus three years. This Court has original appellate jurisdiction over sentences imposing life imprisonment. *See* Rule 12-102(A)(1) NMRA 2001.

{2} On appeal, we consider four evidentiary issues raised by Defendant: (1) whether the trial court abused its discretion in excluding expert witness testimony relating to suicidal tendencies of the decedent, Toby Peek; (2) whether the trial court abused its discretion in limiting testimony relating to Peek's alleged practice of inhalant abuse to reputation and/or opinion evidence, and in not permitting impeachment through prior inconsistent witness statements on this matter; (3) whether the trial court erred in denying the suppression of evidence obtained pursuant to a search warrant; and (4) whether the trial court committed fundamental error in allowing rebuttal testimony concerning the recorded time on a security video showing Defendant in a convenience store on the night of the incident. Defendant also argues sufficiency of the evidence, error in not holding a hearing on his motion for a new trial, ineffective assistance of counsel and cumulative error.

{3} We reverse Defendant's conviction for first-degree murder and remand for a new trial based on: (1) the erroneous exclusion of

expert witness testimony relating to Peek's suicidal tendencies; (2) the failure of the trial court to allow impeachment of a witness regarding his statement about Peek's alleged reputation for inhalant abuse; and (3) the prejudicial effect of the cumulative errors.

Factual Summary

{4} Defendant lived with Peek in a Farmington apartment which had no phone. At approximately 5:00 a.m., on the morning of February 28, 1998, Defendant walked to the home of Pasqual Montaño, Peek's de facto guardian for the receipt of his disability benefits, and told Montaño that he believed Peek was dead. According to Montaño, Defendant stated he had gone out, returned to find Peek on fire, and made efforts to extinguish the fire with water. Montaño drove Defendant the short distance back to the apartment and called 911 en route. Peek was discovered dead as a result of a small fire which burned primarily his clothes and body and caused little other damage to the apartment. Defendant was questioned both at the scene and at the police station. The following day, he was arrested and charged with murdering Peek. The remaining facts pertinent to the appeal will be set forth as needed in the analysis of the issues.

Evidentiary Issues

Standard of Review

{5} We examine the admission or exclusion of evidence for abuse of discretion, and the trial court's determination will not be disturbed absent a clear abuse of that discretion. *State v. Worley,* 100 N.M. 720, 723, 676 P.2d 247, 250 (1984). "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason." *State v. Woodward,* 121 N.M. 1, 4, 908 P.2d 231, 234 (1995).

{6} All relevant evidence is generally admissible, unless otherwise provided by law, and evidence that is not relevant is not admissible. Rule 11–402 NMRA 2001. Evidence is relevant if it has a tendency to make more or less probable a fact that is of consequence to the determination of the action. Rule 11–401 NMRA 2001. Any doubt should be resolved in favor of admissibility. *State v. Stampley,* 1999–NMSC–027, ¶ 38, 127 N.M. 426, 982 P.2d 477.

1) Whether the Trial Court Abused its Discretion in Excluding Evidence on the Decedent's Suicidal Tendencies

{7} Defendant argues the trial court abused its discretion in excluding evidence relating to Peek's suicidal tendencies and he was prejudiced as a result. In support of his theory that Peek burned himself to death, Defendant sought to introduce evidence of Peek's mental illness, his suicidal ideations, and prior suicide attempts.

{8} Defendant proffered the testimony of Dr. William Foote, a clinical and forensic psychologist, who reviewed Peek's extensive psychological and psychiatric history. Dr. Foote would have testified that Peek had been diagnosed as suffering from schizophrenia and bouts of severe depression, and had attempted suicide on at least six occasions since 1987. Five of the attempts occurred by way of an overdose of prescription drugs and the other by slashing himself. Dr. Foote would have also testified that Peek was a substance abuser, consuming mainly alcohol, but also prescription drugs, solvents or whatever else was available. There were indications in his medical records that Peek had sustained brain injury as a result of solvent abuse. According to Dr. Foote, Peek's behavior tended to follow a consistent pattern in which violent or suicidal behavior would result in hospitalization and stabilization through therapeutic drugs. However, following hospital release, Peek would cease taking his medication and begin abusing alcohol or other substances. That, in turn, would contribute to his suicidal ideations and lead to other violent incidents or suicide attempts.

{9} Peek appeared to be following this pattern at the time of his death. Three weeks prior to his death, he had expressed to his counselor suicidal ideations and that he intended to stop taking his medication. Also, in the weeks leading up to his death, Peek

missed several counseling appointments. The absence of therapeutic drugs in his system indicated that Peek had not taken his medication for at least two weeks prior to his death. Finally, Dr. Foote would have testified that, based on studies of people who commit suicide by self-immolation, Peek was more likely than the average person to have ended his life in this manner due to the combined effects of schizophrenia, depression, his history of personality disorder and violent behavior, and intoxication at the time of death.

{10} The trial court determined the evidence of Peek's mental illness and suicidal propensities was irrelevant under Rules 11–401 and 11–402 and therefore inadmissible. It stated that, even if such evidence had been somewhat relevant, it was more prejudicial than probative and would have inserted a confusing issue at trial under the balancing test of Rule 11–403 NMRA 2001. As an alternate ground for exclusion, the trial court considered Rule 11–404(A) NMRA 2001, which prohibits the use of character evidence offered to prove conduct. The trial court further noted Defendant had failed to show that Peek's possible suicide was an essential element of his defense. Finally, the trial court believed there was no physical evidence specifically indicating suicide.

{11} Initially, we note the trial court's recognition that evidence of suicide is not an element of the defense was correct, given that suicide is not a recognized affirmative defense. *See generally* UJI 14–5101 NMRA 2001 (insanity as an affirmative defense); UJI 14–5171 NMRA 2001 (self-defense as an affirmative defense). However, the evidence of Peek's suicidal tendencies was relevant to the element of causation, which the State had the burden of proving. *See State v. Munoz*, 1998–NMSC–041, ¶ 16, 126 N.M. 371, 970 P.2d 143 (explaining the State's burden of proving causation). For the reasons that follow, we hold the trial court abused its discretion in its exclusion of this evidence.

{12} Rule 11–403 provides, in part, that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury...." While the trial court believed the evidence of the decedent's prior suicide attempts to be at least minimally relevant, it appears its balancing test under Rule 11–403 went awry, in that it erroneously gave inordinate weight to the possible prejudice from such evidence.

{13} Many jurisdictions have dealt with the issue of the admission or exclusion of evidence relating to the possible suicide or suicidal tendencies of an alleged victim of a homicide. In *State v. Drach*, 268 Kan. 636, 1 P.3d 864, 868–69 (2000), the court acknowledged that a clear majority and nearly all cited jurisdictions have held that evidence of suicide is admissible as tending to show the decedent's state of mind, and that the cases indicate that evidence of a suicide theory is generally admissible since the jury is capable of determining its validity and attaching the proper weight. Generally, in a homicide defense, "[a] suicidal tendency or disposition may be shown in order to create the presumption of suicide, where the testimony shows that death may have been produced by deceased, or there is no positive and direct proof of homicide." 41 C.J.S., Homicide, § 215, p. 55 (footnote omitted). "[A]ny evidence otherwise competent tending to show that deceased came to his death by his own act is admissible[.]" *Id.* (footnote omitted). Thus, for example, in *People v. Taylor*, 112 Cal.App.3d 348, 169 Cal.Rptr. 290, 299 (1980), the court held admissible any competent evidence tending to show the decedent came to his death as a result of his own actions, noting that it was the victim's inclination or propensity to commit suicide under stress that was relevant.

{14} The time between the decedent's death and his or her actions or statements indicating, or relating to, suicide does not necessarily impact its admissibility. *See, e.g., State v. Jaeger*, 973 P.2d 404, 407 (Utah 1999) (holding past suicide attempts made three years before the alleged murder were not so remote as to be irrelevant); *People v. Salcido*, 246 Cal.App.2d 450, 54 Cal.Rptr. 820, 827 (1966) (holding evidence of victim's earlier suicide attempts, one several months prior to death, should have been admitted). The court in *Salcido* specifically held that any

acts, conduct or declarations of a decedent tending to prove she may have committed suicide are relevant and material even though they may have occurred many months prior to death. *See also Drach,* 1 P.3d at 868–69 (allowing admission of evidence of deceased's declarations or threats indicating suicidal disposition where facts did not preclude possible suicide).

{15} We agree with the rationale of other jurisdictions, which have dealt with this issue, that evidence of suicide is admissible as tending to show the decedent's state of mind, and that evidence of a suicide theory is generally admissible since a properly instructed jury is fully capable of evaluating its validity and attaching the proper weight. Accordingly, it was error for the trial court to require that Defendant first provide direct evidence specifically indicating Peek had committed suicide on the night in question before allowing the admission of evidence concerning the suicide theory.

{16} Furthermore, evidence of Peek's suicidal tendencies was not so remote as to be irrelevant. Rather, competent evidence, from Dr. Foote, was available which suggested that Peek may have succeeded in committing suicide on this occasion. There was evidence that Peek had been following a pattern of behavior at the time of his death similar to behavior which preceded prior suicide attempts. Based on the above, we hold the testimony of Dr. Foote was not minimally relevant, but rather highly relevant, making such evidence presumptively admissible. *See* Rule 11–402.

{17} Having decided that the excluded evidence was highly probative, the trial court could only properly exclude such evidence if it deemed it so extraordinarily inflammatory to the jury that the evidence substantially outweighed its probative value. *See* 11–403. "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Advisory Committee's Note on Fed. Rule Evid. 403.,* 28 U.S.C.App., p. 860. "Evidence should be excluded as unfairly prejudicial in the sense of being too emotional if it is best characterized as sensational or shocking, provoking anger, inflaming passions, or arousing overwhelmingly sympathetic reactions, or provoking hostility or revulsion or punitive impulses, or appealing entirely to emotion against reason." 1 Christopher B. Mueller and Laird C. Kirkpatrick, Federal Evidence § 94 (2d ed.1987). The evidence that Peek suffered from mental illness and had attempted suicide in the past is not the type of evidence that has the unusual propensity to prejudice, confuse, inflame or mislead the fact finder.

{18} In *Jaeger,* the Utah Supreme Court reached a similar conclusion on the admission of such evidence when it held that medical records, containing statements that the victim had previously attempted suicide, were admissible when introduced in a case where defendant claimed the victim committed suicide. *Jaeger,* 973 P.2d at 408. *See generally State v. Boeglin,* 105 N.M. 247, 253, 731 P.2d 943, 949 (1987) (holding that it was not an abuse of discretion to admit gruesome photograph because the danger of unfair prejudice was not, as a matter of law, greater than the probative value of the evidence). Furthermore, under Rule 11–403, consumption of time was not a factor in the case at hand where the testimony was not cumulative and its exclusion affected the fundamental right of Defendant to present his defense. Defendant had a fundamental right to present evidence negating the State's evidence on causation and the fact finder should have been given the opportunity to consider such evidence and determine what weight, if any, to give to it in light of all other evidence. Based on the foregoing, we hold the trial court abused its discretion in denying the admission of evidence relating to the decedent's suicidal tendencies. Under Rules 11–401 and 11–402, the evidence was relevant and should not have been excluded under Rule 11–403.

{19} The State argues that even if the trial court abused its discretion in excluding the evidence, Defendant was not prejudiced by the error. *See State v. Wright,* 84 N.M. 3, 5, 498 P.2d 695, 697 (Ct.App.1972) (stating that in order for error to be reversible it must be prejudicial). We

do not agree. When a substantial right of a party is affected, evidence may not be excluded. *See State v. Varela,* 1999–NMSC–045, ¶ 37, 128 N.M. 454, 993 P.2d 1280.

{20} In the present case, the issue of suicide was never allowed to be presented to the jury. The only explanation the fact finder had before it for the presence of gasoline on the deceased and the fire was that Defendant purchased the gasoline, transported it back to the apartment, poured it on Peek and intentionally set him on fire. The trial court never allowed the defense to inquire of the experts whether it was possible that Peek started the fire intentionally. It appeared the State's experts had not seriously considered the possibility that Peek himself started the fire since they, themselves, were apparently unaware of his suicidal propensities. Since the fire was ignited within inches of Peek and the ignition source was unknown, it would appear from the record that it was possible for the fact finder to conclude that Peek started the fire. The proffered testimony of Dr. Foote would have supported the plausible explanation that Peek intentionally started the fire himself, as a means of committing suicide. We conclude the exclusion of the evidence in question was prejudicial to Defendant. We further conclude that the evidence relating to Peek's suicidal tendencies should have been admitted for the jury to consider and determine what weight and effect, if any, to place on it. Based on the foregoing, we reverse the trial court on its exclusion of evidence relating to Peek's suicidal tendencies.

{21} Although the trial court considered, but ultimately did not decide on, excluding the proffered suicide evidence under Rule 11–404, we address that issue to avoid confusion upon retrial regarding whether it is appropriate to categorize evidence of a decedent's suicidal tendencies as "character evidence." Rule 11–404(A) provides that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion. . . ." The evidence of prior suicide attempts is not appropriately analogized to prior bad acts which are inadmissible to show character, as provided for under Rule 11–404(B).[1] Rather, the evidence here was of a serious, long-term mental illness treatable with medication and specific manifestations of that illness.

{22} We hold that evidence of suicidal tendencies of a deceased should not be considered character evidence for purposes of Rule 11–404. Suicidal dispositions typically stem from mental illness, not from a person's "bad character" or trait of character. *See generally In re Joseph G.,* 34 Cal.3d 429, 194 Cal.Rptr. 163, 667 P.2d 1176, 1178 (1983) (In Bank) (recognizing that suicide in the United States has continued to be considered an expression of mental illness). The Supreme Court of South Dakota recently held that expert testimony concerning the risk factors for suicide, such as mental illness, depression, significant physical illness, chemical dependency, suicidal ideation or previous suicidal behavior, was relevant and admissible. *State v. Guthrie,* 627 N.W.2d 401, 410–11 (S.D.2001). This holding was reached despite the high court's cautiousness in authorizing definitive opinions based on psychological syndromes. *Id.* at 417–18. However, the court determined that insight into the state of mind of suicidal individuals was of benefit to the fact finder. *Id.* at 417. With similar reasoning, in *State v. Hueglin,* 2000–NMCA–106, ¶ 16, 130 N.M. 54, 16 P.3d 1113, our Court of Appeals held that psychological testimony concerning the functional age of a victim with Down Syndrome was properly admitted into evidence.

{23} In determining whether evidence of suicide and suicidal tendencies is admissible, jurisdictions that have analyzed its admissibility have not considered the application of Rule 11–404. *See, e.g., Jaeger,* 973 P.2d at 406–10; *Taylor,* 169 Cal.Rptr. at 298–300. In New Mexico, and under the facts of this case, exclusion of such evidence under Rule 11 404 would be inconsistent with the main purpose of our Rules of Evidence, that being the ascertainment of the truth. *See State v.*

1. *See State v. Sandate,* 119 N.M. 235, 242, 889 P.2d 843, 850 (Ct.App.1994) (noting that evidence of prior crimes is not probative of the fact that the accused acted consistently with his past conduct).

Dorsey, 88 N.M. 184, 185, 539 P.2d 204, 205 (1975) (suggesting the Rules of Evidence should not be applied mechanistically to defeat their purpose). A finding of relevancy under Rule 11–401 and the careful application of the balancing test under Rule 11–403 are sufficient to prevent the misuse of expert evidence pertaining to typical characteristics of suicidal individuals.

{24} Although this Court is generally deferential to the evidentiary rulings of trial courts, *see Woodward*, 121 N.M. at 4, 908 P.2d at 234, the complete exclusion of any evidence concerning suicide cannot reasonably be justified under the facts of this case. The denial of an opportunity for Defendant to develop a major part of his defense was an abuse of discretion. *See generally State v. Duncan*, 111 N.M. 354, 356, 805 P.2d 621, 623 (1991) (holding that evidence of defendant's state of mind was of such import to the defense that excluding it constituted an abuse of discretion). Here, the evidence of the deceased's suicidal tendencies was relevant under Rule 11–401, and, therefore, admissible under Rule 11–402. It was not excludable under Rule 11–403 or Rule 11–404. We reverse the trial court on this issue.

2) Whether the Trial Court Abused its Discretion in its Rulings on Evidence Relating to the Deceased's Alleged Practice of Inhalant Abuse

{25} Defendant argues the trial court abused its discretion by: (1) limiting evidence regarding Peek's inhalant abuse to opinion or reputation testimony; and (2) not allowing the defense to impeach witness Montaño regarding prior inconsistent statements. Impeachment, according to the State, would have necessarily involved highly prejudicial testimony that went beyond Montaño's opinion or Peek's alleged reputation.

{26} Defendant sought to introduce evidence revealing that Peek's de facto guardian, Montaño, believed Peek had inhaled or "huffed" flammable petroleum products on previous occasions. Defendant sought to introduce this opinion to bolster his theory that Peek's death could have resulted from his inhalation of the gasoline, either from accidental ignition of liquid gasoline on Peek's clothing or accidental ignition of gasoline vapors. Defendant argues that such evidence was also necessary to rebut the State's contention that the gasoline on Peek's body had been purchased by Defendant with the intention of pouring it on the decedent and setting him on fire.

{27} During a hearing on evidentiary motions, Montaño indicated he based his belief that Peek had "huffed" in the past on the following: (1) the failure of Peek, who did not own a car, to explain the presence of diesel fuel treatment in his apartment one or two months prior to his death; (2) an occasion in which Peek smelled of starter fluid; and (3) Montaño's impression that Peek had been evicted from a previous apartment for "huffing." Montaño reported his observations to a Farmington police officer on the day of Peek's death. He also told the same officer that while he had never actually witnessed Peek "huffing," his observations led him to suspect that Peek did engage in that activity. At the pretrial hearing, Montaño testified about his opinion that Peek used inhalants.

{28} The trial court ruled the evidence of Peek's "huffing" of petroleum products was highly relevant, and, therefore, admissible under Rule 11–404(A)(2), as a pertinent character trait. Thus, the court allowed Defendant to introduce this evidence through reputation or opinion testimony under Rule 11–405(A) NMRA 2001, which provides in pertinent part, "[i]n all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion."

{29} Defendant argues he should have been allowed to present evidence of Montaño's specific references to Peek's alleged petroleum product inhalant abuse under Rule 11–405(B). He argues such evidence went to an essential element of his defense that Peek's death was accidental and the result of the deceased's own actions. Rule 11–405(B) NMRA 2001 provides that "[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof may also be made of specific instances of that person's conduct." When Rule 11–405(B) is not applicable, evi-

dence of character is limited to reputation or opinion. *See* NMRA 11–405(A).

{30} Evidence of Peek's alleged "huffing" was not necessary to satisfy any legal element of a defense. Accident does not appear to be a recognized affirmative defense in New Mexico. In *Munoz,* 1998–NMSC–041, ¶ 15, 126 N.M. 371, 970 P.2d 143, this Court held that since a defendant did not bear the burden of proof that the decedent caused a fatal crash, the defense's accident theory was not an affirmative defense, but rather "one of many ways in which the defense may attempt to cast doubt on the State's case that the accused caused the death at issue." We believe that same analysis is applicable to the case before the Court. Accordingly, the trial court properly limited testimony concerning Peek's alleged penchant for "huffing" inhalants to reputation or opinion evidence under Rule 11–405(A). We therefore affirm the trial court on this portion of this issue.

{31} We next address the trial court's refusal to allow Defendant to impeach Montaño by asking him specifically about his personal knowledge of Peek's use of inhalants. When asked at trial about Peek's reputation for "huffing" petroleum products, Montaño responded that he did not know whether Peek had such a reputation. Defendant argues Montaño's testimony implied that his knowledge of Peek's drug habits was limited to the decedent's abuse of alcohol. This testimony was inconsistent with what Montaño told a Farmington police officer shortly after the fire, as well as with his statements at the pretrial hearing. Specifically, Montaño stated that he understood Peek had been evicted from an apartment because of his inhalant abuse. This statement clearly implicates Peek's reputation for "huffing." It is not, however, proper to impeach Montaño's statement about Peek's reputation with Montaño's personal knowledge. Consequently, Montaño's statements regarding the fuel additive bottle and Peek's smelling of starter fluid were properly excluded. The trial court doubted Montaño's truthfulness, but refused to allow impeachment. The court reasoned that because evidence of specific instances of "huffing" would tend to devalue Peek's life, such evidence would be more prejudicial than probative. *See* Rule 11–403.

{32} A witness's prior inconsistent statement about material matters is admissible at trial to impeach the witness, but admission of such evidence must meet the balancing test of Rule 11–403. *State v. Davis,* 97 N.M. 130, 133, 637 P.2d 561, 564 (1981). Importantly, the trial court determined that evidence of Peek's alleged reputation for "huffing" flammable liquids was "highly probative." We agree with the trial court. Both of the State's fire experts testified that possible accidental causes of a fire must be ruled out before it can be concluded it was intentionally set. Since fire investigation, according to the experts, sought to eliminate all accidental causes before considering intentional ignition, the defense was denied an essential opportunity to present a reasonable, logical explanation for the presence of flammable liquid on Peek's body. The absence of any testimony concerning Montaño's previously stated suspicions and interactions with Peek rendered an accidental fire scenario considerably less plausible. Although evidence of inhalant abuse may carry some prejudice, we believe it is doubtful the jury would have concluded that Peek somehow deserved his fate simply because he engaged in such practices.

{33} This situation is distinguishable both from cases in which the State seeks to introduce prior bad acts of an accused merely to show a general conformity with his alleged character,[2] and from cases in which any party seeks to introduce testimony from a witness with prior bad acts for similar purposes. We acknowledge the State's right to be free of unfair prejudice. However, in this case, the impact of the prejudice would not have been heavy. The decedent was not a witness and his credibility was not at issue. Under these circumstances, the probative value of

2. *See Sandate,* 119 N.M. at 242, 889 P.2d at 850 (discussing concerns of evidence attempting to prove accused acted in conformity with his past conduct); *see also State v. Hamilton,* 2000–NMCA–063, ¶ 16, 129 N.M. 321, 6 P.3d 1043 (observing that evidence of prior uncharged conduct may be of little probative value but highly prejudicial).

the impeachment evidence outweighed the risk of prejudice; however, the trial court's balancing under Rule 11–403 properly accorded weight to the probative value of the evidence. In the light of the fire experts' conclusions, the value of the excluded evidence would have been especially probative. Once it was clear that Montaño would contradict the opinion he had expressed both to the local police officer and during the pretrial hearing, the trial court was in error in weighing the impeachment evidence as being more prejudicial than probative. We conclude that the trial court's refusal to allow the impeachment of Montaño with his prior inconsistent statements was an abuse of discretion. The great prejudice of this error to Defendant is clearly illustrated by the State's use of the presence of gasoline on Peek's body as evidence of intent by Defendant to murder the deceased. The trial court's exclusion significantly affected Defendant's fundamental right to present a defense. Accordingly, we reverse on this portion of the issue. On remand, we note that the trial court should be mindful of the requirement of Rule 11–801(D)(1)(a) NMRA 2001 that prior inconsistent statements be made under oath.

3) Whether The Trial Court Erred in Denying Defendant's Motion to Suppress Evidence Relating to the Search of His Apartment

{34} Defendant claims the trial court erred in denying his motion to suppress evidence seized from Peek's apartment. Specifically, he argues the search warrant was invalid because: (1) it was issued to search the wrong apartment; and (2) Officer Brown's video recording of the interior of the apartment was allegedly taken before a search warrant had been issued. Defendant based his second argument on the time recorded on the videotape. For the following reasons, the trial court's denial of Defendant's motion to suppress was proper.

{35} We review the denial of a motion to suppress for the correct application of the law to the facts, viewing the facts in a manner most favorable to the prevailing party, indulging all reasonable inferences in support of the court's decision, and disregarding all inferences or evidence to the contrary. *State v. Duquette,* 2000–NMCA–006, ¶ 7, 128 N.M. 530, 994 P.2d 776. In the case at hand, the original search warrant was issued for "1016 Glade Lane, Apartment 4." When a police officer noticed a discrepancy in the apartment number, he contacted the issuing judge and received authorization to correct the address on the warrant to Apartment 5. However, the police report mistakenly indicated that permission was requested, and granted, to search Apartment 6.

{36} In *State v. Sero,* 82 N.M. 17, 21, 474 P.2d 503, 507 (Ct.App.1970), our intermediate appellate court concluded that a search warrant description is sufficient if the officer can, with reasonable effort, ascertain and identify the place intended to be searched. The court also held that the description must identify the premises in such a manner as to leave the officer no doubt and no discretion regarding the premises to be searched. *Id.* In *State v. Aragon,* 89 N.M. 91, 93, 547 P.2d 574, 576, (Ct.App.1976), *overruled on other grounds by State v. Rickerson,* 95 N.M. 666, 668, 625 P.2d 1183, 1185 (1981), the color of the residence and the street number were incorrect, but the search was held to be valid because the geographical location and color of the roof were accurate. Here, the street address was correct and it was merely the apartment number that was confused. An affidavit submitted by police officers called to the scene attested to the fact that a person had been burned in a fire at the apartment to be searched. Based on the above, the requirements of *Sero* were met and no error occurred in this instance.

{37} Also, with respect to the evidence resulting from the search warrant, Defendant points out that although the time shown on the recording of the apartment search was just after 7:00 a.m., the search warrant itself was not received until 9:00 a.m. Thus, Defendant argues the officers must have entered the apartment prior to the warrant's issuance and that the trial court therefore erred in denying his suppression motion. Defendant bolsters his argument by alleging that the position of the sun in the video indicated that the time on the video was in fact the correct time. Officer Brown testi-

fied the time on the video recorder was incorrect because he had not set the time. He further maintained that he did not enter the apartment prior to the warrant being issued. The trial court had the opportunity to hear the testimony and observe the demeanor of Officer Brown and found his testimony credible. Viewing the facts in the manner most favorable to the trial court's ruling, we affirm the denial of the motion to suppress. *Duquette,* 2000–NMCA–006, ¶ 7, 128 N.M. 530, 994 P.2d 776.

4) Whether The Trial Court Erred in Admitting Rebuttal Evidence on the Time on the Convenience Store Video

{38} Defendant argues the trial court committed fundamental error in allowing a State's rebuttal witness to provide a reason for the incorrect time on the Thriftway convenience store videotape which recorded Defendant's presence. The time during which Defendant was in the store was important to either corroborate or refute his contention that he returned to the apartment shortly before 5:00 a.m. to find Peek burning. In its case-in-chief, the State presented witnesses who testified that Defendant was in the store around 1:30 a.m. Dickinson had given Defendant a ride to the store when he noticed him walking along the road. According to the store's security camera, Defendant was in the store at 2:52 a.m. Defendant called another store clerk who testified on direct examination that she saw Defendant come into the store around 4:00 a.m. Subsequent to the testimony of this witness, several jurors submitted notes to the court asking if the time on the store's videotape was correct. In response, the trial court allowed the State to call the store manager as a rebuttal witness, since the court believed the defense had "opened the door." The store manager testified that, prior to the day in question, he had set the timer on the video camera ahead one hour for daylight savings time and was then unable to set it back. Hence, the time recorded on the video was incorrect. Prior to trial, Defendant moved to exclude what he argued was hearsay evidence explaining the incorrect time on the store videotape. The trial court did not rule on the motion, but instructed Defendant to raise his hearsay objection during trial, which Defendant did not do.

{39} Initially, we note that since the store manager had set the timer, his testimony was not hearsay. *See* Rule 11–801(c) NMRA 2001. Furthermore, Defendant failed to object to the rebuttal testimony on other grounds or cross-examine the witness. Accordingly, Defendant raises this issue pursuant to the fundamental error doctrine which is resorted to only if there has been a miscarriage of justice, if the question of the accused's guilt is so doubtful that it would shock the conscience of the Court to permit the conviction to stand, or if substantial justice has not been done. *See State v. Orosco,* 113 N.M. 780, 784, 833 P.2d 1146, 1150 (1992). The admission of rebuttal testimony is within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Garcia,* 83 N.M. 794, 795, 498 P.2d 681, 682 (Ct.App.1972). We affirm based on the failure of the ruling to constitute fundamental error, as well as the right of the State to correct false impressions through rebuttal testimony. *State v. Simonson,* 100 N.M. 297, 302, 669 P.2d 1092, 1097 (1983) (holding that the State is entitled to correct through rebuttal testimony false impressions given to jury by defense); *State v. Smith,* 92 N.M. 533, 540, 591 P.2d 664, 671 (1979) (holding that the State is entitled to call police officer to rebut accused's allegation that police officer threatened his life).

5) Whether There Is Sufficient Evidence to Support Defendant's Conviction for First Degree Murder

{40} Despite our reversal of the trial court regarding its exclusion of evidence pertaining to the decedent's suicidal tendencies, we nonetheless review Defendant's sufficiency of the evidence issue since reversal on that claim would grant him the greatest amount of relief on appeal. The sufficiency of the evidence for Defendant's conviction for intimidating a witness was not challenged on appeal and, therefore, we deem it abandoned. *State v. Torres,* 1998–NMSC–052, ¶ 16, 126 N.M. 477, 971 P.2d 1267.

{41} In reviewing the sufficiency of evidence used to support a conviction, we determine whether substantial evidence exists to support a finding of guilt beyond a reasonable doubt for every element essential to the conviction. *State v. Rojo,* 1999–NMSC–001, ¶ 19, 126 N.M. 438, 971 P.2d 829. We resolve all disputed facts in the State's favor, indulge all reasonable inferences in support of the verdict, and disregard all evidence and inferences to the contrary. *Id.* Contrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject Defendant's version of the facts. *Id.*

{42} Evidence was presented showing that on the evening of Peek's death, Defendant was given a ride to the Thriftway convenience store where he purchased two cups of gasoline. The store attendant testified that Defendant stated he was purchasing the gasoline because he had run out of gas. However, Defendant did not own a vehicle. When asked by the person who gave him a ride to the store why he needed to purchase gas at 1:30 a.m., Defendant responded that it was none of his business. Defendant then told the driver that he knew his name and there would be trouble if he testified against Defendant. Later that evening, Montaño arrived at the decedent's apartment with Defendant, who came to Montaño's house stating that he thought Peek was dead. Montaño testified he found the body was already cold and stiff and believed that Peek must have been dead for about three hours. No containers which could have held gasoline were discovered within reach of the decedent. Expert witness Fire Marshal Lewis testified the crime scene failed to reveal any ignition sources for the fire other than the burnt matches discovered around the sofa. A trace evidence expert testified that two of the matches found on the floor of the apartment had been torn from a matchbook that was found in Defendant's pocket. The Fire Chief testified that it was his opinion that liquid gasoline had been poured on the decedent and the vapors from the flammable substance were intentionally ignited by someone. This evidence is sufficient to support Defendant's first degree murder conviction, and, therefore, this issue is affirmed.

6) Whether Cumulative Error Requires Reversal of Defendant's Convictions

{43} Defendant argues that, when considered together, the errors alleged result in cumulative error. Under the cumulative error doctrine, we consider whether the cumulative effect of the errors was so prejudicial that Defendant was deprived of a fair trial. *See Woodward,* 121 N.M. at 12, 908 P.2d at 242. When the impact of the cumulative errors is so prejudicial as to deprive an accused of his fundamental right to a fair trial, we are obliged to reverse the conviction. *State v. Martin,* 101 N.M. 595, 601, 686 P.2d 937, 943 (1984). Viewing the errors together, Defendant was altogether prevented from presenting a meaningful defense, and this was greatly prejudicial to Defendant. Accordingly, we reverse on this issue.

Conclusion

{44} We hold the trial court abused its discretion in excluding expert evidence relating to Peek's suicidal propensities and that Defendant was prejudiced by that error. The trial court did not abuse its discretion in limiting evidence pertaining to Peek's alleged propensity for inhaling flammable liquids to opinion and reputation testimony. However, it was an abuse of discretion to deprive Defendant the opportunity to impeach Montaño concerning his prior inconsistent statements about Peek's inhalant abuse. The trial court did not err either in denying Defendant's motion to suppress evidence or in allowing rebuttal testimony concerning the recorded time on the convenience store videotape. There was sufficient evidence to support Defendant's conviction for first degree murder. The sufficiency of the evidence for Defendant's conviction for intimidating a witness was not challenged on appeal and, therefore, we deem it abandoned. In light of the reversal of the evidentiary issues, we do not review Defendant's ineffective assistance of counsel claim or his issue dealing with the refusal of the trial court to hold a hearing on his motion for a new trial. We reverse and remand for a new trial in accordance with this opinion.

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

WE CONCUR: PATRICIO M. SERNA, Chief Justice, JOSEPH F. BACA, Justice, GENE E. FRANCHINI, Justice, PAMELA B. MINZNER, Justice.

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37 P.3d 100

SANTA FE PUBLIC SCHOOLS,
Respondent–Appellant,

v.

Rodney ROMERO, Petitioner–Appellee.

No. 20,452.

Court of Appeals of New Mexico.

Oct. 18, 2001.

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OPINION

FRY, Judge.

{1} In this opinion we clarify the standard of review employed by an independent arbitrator reviewing a school board's discharge of a certified school employee. Because the arbitrator failed to use the correct standard of review, we remand for a new arbitration. Because the arbitrator was dilatory in his handling of the case, the new arbitration should be before a different arbitrator.

BACKGROUND

{2} This case arises from the Santa Fe School Board's discharge of coach Rodney Romero on grounds of sexual misconduct with a female student. Although the focus of our decision is the procedure employed below, we briefly summarize the evidence in order to provide context.

{3} During the 1995–96 school year, Romero was employed by the Santa Fe Public Schools as the head wrestling coach at Capital High School. Toward the end of the first semester of that school year, tenth grader Nicole S. joined the wrestling team coached by Romero. Although her grades made her ineligible to compete, Nicole participated in practices and attended some tournaments as team manager or in other unofficial capacities.

{4} In April 1996 John Gallegos, a school social worker, became concerned about Nicole's apparent depression, increasing withdrawal, and school failure. He referred Nicole for participation in a study of adolescents at risk for suicide. In the course of being interviewed by a psychologist for this study, Nicole revealed that a teacher had touched her inappropriately. The psychologist encouraged Nicole to discuss the matter with Gallegos, and the psychologist also notified Gallegos that Nicole might be approaching him to discuss an incident of sexual abuse.

{5} Gallegos called Nicole into his office and asked her directly if she had been molested by someone at school. Nicole was extremely angry that the psychologist had violated her confidence. However, in a subsequent discussion with Gallegos and the school's assistant principal, Hoyt Mutz, Ni-

cole made further allegations of sexual misconduct and named Romero as the perpetrator. Mutz then contacted Vickie Sewing, Director of Personnel for Santa Fe Public Schools. Sewing told Mutz to report the matter to Nicole's parents and to the police. Sewing then advised Romero of the allegations against him and placed him on administrative leave pending an investigation.

{6} Sewing conducted an investigation into the matter. She interviewed Gallegos and the officer investigating the incident for the Santa Fe Police Department. She interviewed Nicole and learned more details about the alleged misconduct that occurred in the context of the coach/athlete relationship between Romero and Nicole. She also interviewed Romero.

{7} Sewing considered the matter over the summer and ultimately recommended that Romero be discharged. The Superintendent accepted Sewing's recommendation and served Romero with a notice of intent to discharge. Romero requested a hearing before the School Board. At the hearing, consistent with NMSA 1978, § 22–10–17(H) (1991), the parties presented witness testimony and documentary evidence. The Board found that good cause existed to discharge Romero and terminated him.

{8} Romero timely appealed the discharge. Pursuant to Sections 22–10–17.1(B) and (C), the district court appointed James E. Thomson as an independent arbitrator to hear the appeal. At the arbitration, the parties submitted the record from the Board hearing and presented the live testimony of Romero and Sewing. The arbitration concluded on August 25, 1997, but it was not until twenty months later that the arbitrator issued his decision.

{9} The arbitrator concluded that the charges against Romero should be dismissed. Although the arbitrator's findings supporting his conclusion are ambiguous, we conclude that the transcript of the arbitration hearing establishes that the arbitrator employed an erroneous standard of review. Instead of reviewing the evidence de novo and making his own determination whether there was just cause to discharge Romero, the arbitrator focused on the adequacy of Sewing's investigatory technique. Because we cannot determine from this record how the arbitrator would have decided the case if he had employed the correct standard of review, we reverse and remand for a new arbitration.

DISCUSSION

I. Standard of Review

{10} We interpret statutes de novo. *See Romero Excavation & Trucking, Inc. v. Bradley Constr., Inc.*, 1996–NMSC–010, ¶ 6, 121 N.M. 471, 913 P.2d 659. Our principal objective in interpreting a statute is to determine the intent of the legislature. *Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998–NMSC–020, ¶ 28, 125 N.M. 401, 962 P.2d 1236. We construe the statute as a whole and consider all provisions in relation to one another. *N.M. Pharm. Ass'n, v. State*, 106 N.M. 73, 75, 738 P.2d 1318, 1320 (1987). No part of the statute should be rendered surplusage or superfluous. *In re Rehab. of W. Investors Life Ins. Co.*, 100 N.M. 370, 373, 671 P.2d 31, 34 (1983).

II. Discharge Procedures Under the School Personnel Act

{11} The School Personnel Act, NMSA 1978, §§ 22–10–1 to –27 (1967, as amended through 1998), sets out the procedures governing the termination or discharge of various school employees. The parties do not dispute that Romero was a "certified school employee." Because the Board severed its employment relationship with Romero before his current annual contract had expired, Section 22–10–2(A) makes it clear that the discharge provisions of the Act—Sections 22–10–17 and –17.1—as opposed to the termination provisions—Sections 22–10–14 and –14.1—apply.

{12} A school board may discharge a certified school employee only for just cause. Section 22–10–17(A). " '[J]ust cause' means a reason that is rationally related to an employee's competence or turpitude or the proper performance of his duties and that is not in violation of the employee's civil or constitutional rights." Section 22–10–2(F). Discharge proceedings begin when the superintendent serves the

employee with written notice of the intent to recommend discharge, stating the reasons for the recommendation and advising the employee of the right to a discharge hearing before the school board. Section 22–10–17(A)(1), (2). If the employee exercises his right to a hearing, the parties may undertake discovery and subpoena witnesses and documents. Sections 22–10–17(E) and (F). The local superintendent or administrator "[has] the burden of proving by a preponderance of the evidence that, at the time of the notice of intent to recommend discharge, he had just cause to discharge the certified school employee." Section 22–10–17(G).

{13} If the employee is aggrieved by the decision of the school board, he may appeal the decision to an independent arbitrator. Section 22–10–17.1(A). The statute explicitly requires a de novo hearing, and the parties may conduct discovery prior to the hearing. Sections 22–10–17.1(D), (G). "[T]he independent arbitrator shall permit either party to call and examine witnesses, cross-examine witnesses and introduce exhibits." Section 22–10–17.1(I).

III. Statutory Standard to be Employed by Arbitrator

{14} The error in this case was rooted in the arbitrator's interpretation of the statute governing appeals from a school board's decision to discharge a certified school employee. That statute states:

> Appeals from the decision of the local school board or governing authority shall be decided after a de novo hearing before the independent arbitrator. The local school board or governing authority shall have the burden of proving by a preponderance of the evidence that, *at the time of the notice of intent to recommend discharge, the local superintendent or administrator had just cause to discharge the certified school employee.*

Section 22–10–17.1(D) (emphasis added). It is the emphasized language that proved most troubling to the parties and the arbitrator.

{15} The Board argues that the arbitrator used the wrong standard of review, and that the arbitrator should have asked whether "Sewing's subjective belief that good cause existed to terminate Romero was objectively reasonable." Romero, on the other hand, argues that the arbitrator employed the correct standard of review in concluding that Sewing's investigation was incomplete and biased, and that as a result, "[t]he overwhelming evidence available to Ms. Sewing, at the time she recommended discharge did not support her belief in Nicole's story."

{16} Although the parties claim differing views of the arbitrator's role, it is apparent that they agree on two underlying premises: (1) the arbitrator was to focus his review on the investigation of the administrator who recommended discharge, and (2) the arbitrator was to limit his review to the evidence that was available to the administrator at the time she recommended discharge. Our analysis of the relevant statutes leads us to conclude that both of these basic assumptions are wrong. We hold that the arbitrator must review all the evidence relevant to the charges set forth in the notice of intent to discharge, including relevant evidence discovered after the notice has been served, and decide on that record whether the Board has established by a preponderance of the evidence that the allegations of misconduct had a basis in fact and whether they constitute just cause supporting discharge.

{17} The structure of Section 17.1D argues strongly against the argument that the legislature intended that the focus of the arbitrator's review be solely on the mind of the administrator. Instead, the statute requires the reviewing entity—whether the school board conducting a pre-discharge review or an arbitrator reviewing the board's decision—to determine whether the alleged misconduct actually occurred and constitutes just cause for discharge. The reviewing entity decides whether the acts that led to the decision to discharge happened, *not* whether the employer had reasonable grounds for believing they happened.

{18} This view of the statute is the most reasonable view, given the statute's directive that the employer, after conducting discovery, presenting evidence, and examining and

cross-examining witnesses, Section 22–10–17.1(G), (I), "shall have the burden of proving by a preponderance of the evidence that . . . [the] administrator had just cause to discharge the certified school employee." Section 22–10–17.1(D). *See also* Section 22–10–17(G) (employing the same standard for school board review of an administrator's action). Proving a fact by a preponderance of the evidence "means to establish that something is more likely true than not true." UJI 13–304 NMRA 2001. Thus, the school board must prove to the arbitrator that there was a reason for recommending discharge that amounted to just cause—"a reason that is rationally related to an employee's competence or turpitude or the proper performance of his duties. . . ." Section 22–10–2(F).

{19} The statute's requirement for de novo review supports our conclusion. De novo review means "judicial review which at a minimum: (1) contemplates additional evidentiary presentation beyond the record created in front of the administrative agency, and (2) allows the [reviewing entity] more discretion in its judgment than simply reversal of the agency's decision and remand for further proceedings." *Clayton v. Farmington City Council*, 120 N.M. 448, 453, 902 P.2d 1051, 1056 (Ct.App.1995). Permitting the presentation of additional evidence at the review hearings makes sense only if it is meant to inform the ultimate decision of whether just cause *actually* exists.

{20} This leads us to the second of the parties' erroneous assumptions—that the arbitrator could focus only on the evidence available to the administrator at the time she recommended discharge. If the arbitrator's role were so restricted, the arbitrator could not consider any evidence that came to light after the notice recommending discharge, even if such evidence established that the charges against the employee were baseless. This interpretation of the statute could lead to an unjust result, and it is therefore unsupportable. *United Water N.M., Inc. v. N.M. Pub. Util. Comm'n*, 121 N.M. 272, 276, 910 P.2d 906, 910 (1996) (stating that statutory interpretation "must not render the statute[s'] application absurd, unreasonable, or unjust") (internal quotation marks and citation omitted).

{21} Our interpretation of the statute is consistent with *In re Termination of Kibbe*, 2000–NMSC–006, ¶ 14, 128 N.M. 629, 996 P.2d 419. Although that case focused on a different aspect of just cause, it is clear from the Supreme Court's analysis that the burden of the administrator or school board is to prove the actual existence of just cause. *Id.* ¶ 15. At issue in *Kibbe* was whether the conduct with which the teacher was charged was rationally related to the teacher's competence or turpitude, as required by Section 22–10–2(F). *Id.* ¶¶ 14–15. The Court noted that:

> the school board did not present evidence that Kibbe's arrest actually affected his ability to teach effectively or to serve as a proper role model for students; instead, the school board relied on [the administrator's] testimony about community sentiment and the importance of a teacher and coach providing a good example for students.

Id. ¶ 15. Thus, the relevant factor was "whether the DWI incident had an *actual* effect on Kibbe's ability to properly perform his duties." *Id.* (emphasis added). Similarly, the issue in the present case should have been whether Romero actually engaged in the misconduct with which he was charged, based on evidence relevant to that inquiry, regardless of when the evidence came to light.

{22} One source of the parties' difficulty with the standard of review lies in the statute's placement of the phrase, "at the time of the notice of intent to recommend discharge," in a way that suggests the review inquiry must be limited to the evidence available prior to service of the notice. Section 22–10–17.1(D). However, it is more sensible in the context of the statute as a whole to construe "at the time of the notice of intent to recommend discharge" as limiting the evidence and the review to the original charges leveled against the employee. In other words, at a school board or arbitration hearing following a notice of intent to recommend discharge, the school administrators may not introduce evidence of new reasons for dis-

charge that are different from the charges stated in the notice. This ensures that the employee receives due process through adequate notice. *See Bd. of Educ. of Carlsbad v. Harrell*, 118 N.M. 470, 478, 882 P.2d 511, 519 (1994) (stating that, in proceedings to terminate public school employee, due process requires notice of the charges and an opportunity to present evidence controverting the charges).

{23} The Board argues that its view of the arbitrator's role is supported by the 1991 amendments to Section 22–10–17.1, which it claims were in response to our Supreme Court's decision in *Kestenbaum v. Pennzoil Co.*, 108 N.M. 20, 766 P.2d 280 (1988). We disagree. *Kestenbaum* analyzed the grounds for termination in an implied employment contract. Here we are concerned with a written contract whose terms are governed by statute. Consequently, our focus is to interpret the controlling statutes rather than to give guidance to a fact finder attempting to determine implied terms.

{24} In addition, it is apparent that the 1991 amendments were intended to eliminate inconsistencies between termination and discharge proceedings and to clarify the School Personnel Act's appeal procedures. The amendments (1) defined "just cause"; (2) changed the burden of proof and expanded the arbitrator's role in reviewing termination decisions; and (3) with respect to discharge proceedings, gave the employee the right to a hearing following the recommendation for discharge, imposed on the board or governing authority the burden to prove just cause for discharge, and clarified that the arbitrator's review was de novo. *Compare* 1990 N.M. Laws, ch. 90, §§ 1–5, *with* 1991 N.M. Laws, ch. 187, §§ 1–8.

{25} In making these broad changes, the legislature changed the wording of the question to be decided by the arbitrator reviewing a discharge decision, but we do not ascribe to the change the significance argued by the Board. Before the amendments, "[t]he issue to be decided by the independent arbitrator" was "whether the board's decision to discharge ... was based on good and just cause." 1990 N.M. Laws, ch. 90, § 5(D). After the amendments, the issue was whether, "at the time of the notice of intent to recommend discharge, the local superintendent or administrator had just cause to discharge the certified school employee." 1991 N.M. Laws, ch. 187, § 8(D). As noted previously, the change protects the employee's due process rights: by limiting the grounds for discharge to those known at the time of the notice, the amended statute precludes the administrator or the board from advancing at the arbitration other, more recently identified, reasons for discharge. *See Harrell*, 118 N.M. at 478, 882 P.2d at 519 (stating that Section 22–10–17.1 post-deprivation hearing affords due process by requiring, among other protections, notice of charges against school employee). We see nothing in the amended language suggesting, as the Board asserts, that an administrator's objectively reasonable belief in the existence of just cause can justify the discharge of a certified school employee.

IV. Standard of Review Employed by Arbitrator

{26} We now turn to the question of whether the arbitrator in this case employed the correct standard in reviewing the Board's discharge of Romero. We conclude that he did not. The arbitrator's written decision does not clearly set forth the standard he used. On the one hand, the arbitrator recited the statutory language and found that "[t]he board failed to prove by preponderance of the evidence that at the time of the notice to recommend discharge, there was just cause to discharge Rodney Romero." On the other hand, the arbitrator's findings reflect a focus on the alleged inadequacy of the investigation conducted by the administrator, Sewing. For example, the arbitrator found that "[t]he administrator ... did not attempt to obtain independent corroboration" of Nicole's accusations and "accepted the student's version without engaging in a reasonable further inquiry." This focus was misplaced, given the statute's contemplation of full-blown de novo review with discovery and the presentation of evidence. Because the arbitrator's findings are ambiguous with respect to the standard employed, we turn to other parts of the record for enlightenment.

Cf. State v. Bonilla, 2000-NMSC-037, ¶ 9, 130 N.M. 1, 15 P.3d 491 (noting that trial court's comments may serve as evidence of court's legal rationale).

{27} At the arbitration hearing, the arbitrator specifically asked the parties' counsel to assist him in understanding the standard of review he was to employ. He said,

> So I can ... say, "I will make up my own mind or to hell with [the school board]," or am I going to say, "Is there—did they have what they concede as just cause to discharge him, whether or not they're right or wrong or whether it's true or not." That's what I want.
>
> If I can get a little help on that.

In response to this request from the arbitrator, the following colloquy took place:

> [Board's counsel]: [The statute] gives you exactly the same charge that the school board had, and that is to decide whether at the ... mailing of the notice of intent to discharge ...
>
> [Arbitrator]: There was just cause.
>
> ...
>
> [Arbitrator]: Then why do we have evidence now? ...
>
> ...
>
> [Arbitrator]: [I]f I'm to determine that they had just cause, I am not substituting my judgment for Ms. Sewing's. This is the information she had and she made an administrative decision, was there cause—reasonable cause in her mind to do what she did, or am I going to say she didn't have—make my own decision that [Romero]'s right and Nicole is wrong?
>
> [Board's counsel]: [W]hether just cause existed is all the guidance you get from the statute.
>
> [Arbitrator]: [O]kay. That's a little different than me looking at this completely new it seems.... [I]f I take this completely new, then I'll decide whether he should lose his job or not, which is different than me deciding they had just cause in my mind. There is a difference.
>
> [Board's counsel]: The distinction is not clear to me.... I think you are called upon to look at the information that the school board had—administration, excuse me. And the key piece is that Vickie Sewing believed Nicole and she did not believe [Romero].
>
> ...
>
> [Arbitrator]: I think I see where I am with you two.
>
> ...
>
> [Romero's counsel]: But you have to look at all the facts that Vickie Sewing had, and certainly in doing that you consider whether or not she's biased in any way, which is pretty clear.

{28} It is apparent that all participants were confused about the standard to be used, but both counsel, and ultimately the arbitrator, seemed to think the arbitrator's focus should be on the administrator and the information available to her, rather than on whether just cause for discharge actually existed. We have demonstrated that this view of the review standard was incorrect. Because the arbitrator based his determination on whether Vickie Sewing's subjective belief in the existence of just cause was objectively reasonable, we reverse and remand this case for a new arbitration. Because of the confusion of all parties at the prior arbitration, on remand, the parties will be permitted to conduct discovery and introduce evidence as provided in Section 22-10-17.1. The arbitrator will then decide whether the Board has established by a preponderance of the evidence that the misconduct charged in the notice of intent to recommend discharge actually occurred.

{29} Because we are reversing the arbitrator's decision, we need not address the Board's argument that the arbitrator's assessment of the witnesses' credibility was not supported by substantial evidence.

V. Undue Delay and Procedural Errors by the Arbitrator

{30} The arbitrator's undue delay in rendering his decision and in assisting with the processing of this appeal persuades us that the arbitration on remand should be before a different arbitrator. Section 22-10-17.1(K) requires the arbitrator to render a written decision within thirty days of the conclusion of the arbitration. Here, the arbi-

trator did not issue a decision until twenty months after the arbitration concluded. Over the course of that time the parties were compelled to write to the arbitrator asking for the decision, and twice the Board sought an order from the First Judicial District Court's chief judge requiring the arbitrator to act.

{31} After finally issuing a decision, the arbitrator failed to respond to repeated requests to prepare and submit a record proper for the appeal to this Court. The Board filed a motion to compel the arbitrator to prepare a record proper, but for four months the arbitrator failed to respond. This Court entered an order to show cause, whereupon the arbitrator submitted an envelope of undifferentiated papers which were not in chronological order or paginated.

{32} We are dismayed by the neglect and unprofessional behavior exhibited by the arbitrator, and we are concerned that the arbitrator's delay may have prejudiced one or both parties to this case. Consequently, the arbitration on remand shall be before a new arbitrator selected in accordance with Section 22–10–17.1(C). *Cf.* NMSA 1978, § 44–7A–24(c) (2001) (stating that in arbitrations under the Uniform Arbitration Act, rehearing after vacatur of arbitration award must be before a new arbitrator if vacatur is based on misconduct of the arbitrator that prejudices a party's rights).

CONCLUSION

{33} Because the arbitrator used the wrong standard in reviewing the Board's termination of Romero, we reverse the arbitrator's decision. We remand this case for a new hearing with a different arbitrator selected in accordance with Section 22–10–17.1.

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

WE CONCUR: MICHAEL D. BUSTAMANTE, Judge, and CELIA FOY CASTILLO, Judge.

2001-NMCA-108

37 P.3d 107

STATE of New Mexico, Plaintiff–Appellee,

v.

Leslie Eugene ELLIOTT, Defendant–Appellant.

No. 21,463.

Court of Appeals of New Mexico.

Oct. 26, 2001.

Certiorari Granted, No. 27,207, Dec. 7, 2001.

Patricia A. Madrid, Attorney General, Santa Fe, NM, M. Anne Kelly, Ass't Attorney General, Albuquerque, NM, for Appellee.

Phyllis H. Subin, Chief Public Defender, Trace L. Rabern, Ass't Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

PICKARD, Judge.

{1} Defendant appeals from the judgment and sentence imposed after he was convicted by a jury of felony failure to appear, contrary to NMSA 1978, § 31–3–9 (1973, prior to 1999 amendment). Defendant raises five issues: (1) whether the jury instructions were flawed insofar as they omitted an element of the offense, improperly shifted the burden of proof to Defendant, and confused the jury; (2) whether the original trial judge's testimony that he had not excused Defendant's tardiness, and the prosecutor's use of this testimony during closing arguments, directed the jury to convict Defendant; (3) whether Defendant's conviction violated his right to be free from double jeopardy given that Defendant was held without bond for eight months prior to trial; (4) whether Defendant's nine-and-one-half year sentence constitutes cruel and unusual punishment; and (5) whether the trial court erred in finding that a prior conviction from Arizona was a valid felony conviction for purposes of sentencing Defendant as a habitual offender. We affirm.

BACKGROUND

{2} Defendant was scheduled for a felony jury trial on November 25, 1998. Trial was scheduled for 8 a.m. It was disputed whether Defendant's attorney told Defendant that trial was set for 8 a.m. or whether Defendant was just informed that the trial was set and assumed that it was set for 9 a.m., just as other hearings had been. Defendant, dressed for court, left his house and went to his place of business, which he was running in his father's absence. He had a few things he needed to take care of. He returned home and picked up his wife and family at about 9:15 a.m. At that point, a deputy sheriff was waiting for him, having been dispatched by the judge to see if Defendant could be found or needed a ride to court.

The deputy followed Defendant and his family to the courthouse, where Defendant was arrested for failure to appear. The deputy's affidavit for the arrest warrant states, "Upon arrival at the courthouse ... [D]efendant said that he knew he was late for court but that something came up."

{3} At 8:30 a.m., the trial judge had become aware of Defendant's absence. Defense counsel told the judge that Defendant had notice that trial began at 8 a.m. and that trial counsel expected Defendant to appear. At 8:45 a.m., the judge told the jury that the trial was delayed and that he expected the delay to last as long as forty-five minutes. Around the same time, the judge dispatched the deputy to look for Defendant. The deputy called the judge at approximately 9 a.m. to say that Defendant mistakenly believed that the trial began at 9 a.m. and that Defendant's wife believed that Defendant was en route to the courthouse. The judge decided to give Defendant an extra fifteen minutes to appear before the judge would dismiss the jury. When Defendant failed to appear by 9:17, the judge dismissed the jury and issued a bench warrant for Defendant's arrest. One minute later, the deputy called to say that Defendant had returned home and was now on his way to the courthouse. The judge told the deputy that the jury had been dismissed and instructed the deputy to arrest Defendant upon his arrival at the courthouse.

{4} A jury found Defendant guilty of failure to appear, contrary to Section 31–3–9(A). A supplemental information charging Defendant with three prior felony convictions was filed, and after a hearing, the court found that all three prior convictions had been proved. The court sentenced Defendant to a nine-and-one-half year term, consisting of one and one-half years on the conviction for failure to appear and a mandatory eight-year term on the habitual offender information. The court suspended the one-and-one-half year term on the failure to appear conviction and ordered one year of mandatory parole supervision with a concurrent one-year probation upon completion of the incarceration. Defendant was also given credit for a presentence confinement of eight months.

DISCUSSION

Issue One: The Jury Instructions Were Proper

{5} Defendant raises three challenges to the jury instructions: (1) the instructions given were confusing and improperly shifted the burden of proof to Defendant, (2) the court erred in refusing Defendant's tendered instruction requiring a finding of deliberate will to thwart the judicial process given that the legislature intended that the failure to appear statute apply only to people who abscond from the jurisdiction or who otherwise attempt to deliberately thwart the judicial process, and (3) the instruction defining "willfully" improperly set forth a civil rather than criminal standard, thereby violating *State v. Magby,* 1998–NMSC–042, ¶ 17, 126 N.M. 361, 969 P.2d 965, *overruled on other grounds by State v. Mascareñas,* 2000–NMSC–017, ¶ 27, 129 N.M. 230, 4 P.3d 1221, and *State v. Padilla,* 1997–NMSC–022, ¶¶ 2, 4, 123 N.M. 216, 937 P.2d 492. We conclude that the instructions as given were proper.

{6} The applicable uniform jury instruction sets forth the elements of the crime of failure to appear as follows:

> For you to find the defendant guilty of failure to appear as required by conditions of release ..., the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. _____ (*name of defendant*) was released pending [trial] [an appeal] in a criminal action on the condition that _____ (*name of defendant*) appear as required by the court;
>
> 2. _____ (*name of defendant*) failed to appear as required by the court;
>
> 3. The defendant's failure to appear was willful, without sufficient justification or excuse[.]

UJI 14–2229 NMRA 2001; *see also* § 31–3–9. The jury in the case at bar was instructed as follows:

> INSTRUCTION NO. *4*
>
> For you to find the Defendant guilty of Failure to Appear, the State must prove to your satisfaction beyond a reasonable

doubt each of the following elements of the crime:

1. The Defendant was released pending trial in *State of New Mexico vs. Leslie Elliott,* San Juan County cause No. CR 98–95–1.

2. The Defendant willfully failed to appear before the court as required.

. . . .

INSTRUCTION NO. *5*

"Willfully" denotes the doing of an act without just cause or lawful excuse.

In addition, the jury was given a general intent instruction at Defendant's request, and over the State's objection. *See* UJI 14–141 NMRA 2001.

{7} Defendant argues that the instructions as given were confusing because the definition of willfully was contained in a separate instruction, as opposed to being in the elements instruction. Not only did Defendant fail to make this argument below, but Defendant's proposed instructions likewise included a separate instruction defining willfulness. For this reason, we need not consider Defendant's argument on appeal. *See State v. Varela,* 1999–NMSC–045, ¶ 11, 128 N.M. 454, 993 P.2d 1280 ("Ordinarily a defendant may not base a claim of error on instructions he or she requested or to which he or she made no objection."); *State v. Santillanes,* 2000–NMCA–017, ¶ 17, 128 N.M. 752, 998 P.2d 1203, *rev'd on other grounds,* 2001–NMSC–018, 130 N.M. 464, 27 P.3d 456. Even if we were to consider Defendant's argument, however, we would hold that giving the separate definition instruction was not error on the grounds that the elements instruction did expressly contain the element of willfulness, and the definition immediately followed the elements instruction, such that the jury was properly instructed on the burden of proof. *See State v. Sosa,* 1997–NMSC–032, ¶ 29, 123 N.M. 564, 943 P.2d 1017 (rejecting the defendant's argument that failure to include definition of self defense within elements instruction was error).

{8} Defendant next argues that the jury instructions were confusing in that they required the jury to find a "double negative," namely that Defendant failed to act without excuse or justification, and did not properly inform the jury of the act for which Defendant was being convicted. In our view, the jury instructions were virtually identical in all material respects to the approved UJI, with the exception of the separate definition instruction. The act for which Defendant was convicted was the same act as that required by the statute and the UJI—that Defendant failed to appear as required by the court. In addition, as discussed more fully below, the jury was properly instructed regarding the need to find that Defendant's failure to appear was both intentional and willful.

{9} At this point, it is worth noting our disagreement with the State's position below—that no general intent instruction need be given for failure to appear. Use Note 1 to UJI 14–141 states that the general intent instruction must be given except if the crime contains no intent requirement or if the intent requirement is otherwise specified in the statute or instruction. We acknowledge that willfulness, as set forth in the statute and instruction, is an intent requirement. However, our case involves arguable carelessness. The general intent instruction correctly informs the jurors that to find Defendant guilty of this crime, they must find that Defendant acted intentionally. Defendant could not be convicted for an act of mere carelessness where he had no intent to fail to appear. Thus, an instruction solely on willfulness (defined as the absence of just cause or excuse), without the addition of language on intent, would not adequately apprise the jurors of what they needed to find.

{10} The crux of Defendant's challenge to the jury instructions is his contention that the trial court erred in refusing his tendered instruction defining "willfulness." Defendant argues that his instruction properly informed the jury that it needed to find not only that Defendant acted without lawful excuse or just cause, but also that, in failing to appear as required, Defendant intended to thwart the legal process. We disagree that the jury was required to make such a finding.

{11} Defendant tendered two alternate instructions defining the element of willfulness:

DEFENDANT'S PROPOSED INSTRUCTION NO. *1*

For you to find that the defendant acted "willfully", you must find that he intentionally decided to not go to court as a result of careful thought and planning. Showing up late for court does not constitute a willful failure to appear, if you find that the defendant intended to go to court on the morning in question.

. . . .

DEFENDANT'S PROPOSED INSTRUCTION NO. *1a*

For you to find that the defendant acted "willfully", you must find that he intentionally decided to not go to court as a result of careful thought and planning.

Defendant's two instructions were adaptations of UJI 14–201 NMRA 2001, which sets forth the elements of willful and deliberate murder. *See id.* ("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 action.").

{12} We reject Defendant's contention that the offense of failure to appear requires a finding that a defendant's failure to appear was accompanied by an intent to abscond or to thwart the legal process. Failure to appear contrary to Section 31–3–9 is not a specific intent crime. The hallmark of a specific intent crime is the intent to do a further action or achieve a further consequence. *State v. Baca,* 1997–NMSC–059, ¶ 51, 124 N.M. 333, 950 P.2d 776. The crime of failure to appear does not require any intent to do a further action or achieve a further consequence. In this regard, it is materially different from the crime involved in the case on which Defendant places primary reliance, *State v. Rosaire,* 1997–NMSC–034, ¶¶ 7, 11, 123 N.M. 701, 945 P.2d 66. That case involved escape from an inmate-release program, which requires, in addition to the defendant's acting willfully, that the defendant act "with the intent not to return" to the designated place of confinement. *Id.* ¶ 4 (internal quotation marks and citation omitted). The language "with the intent not to return" is classic specific intent language-the intent to do a further action or achieve a further consequence, that is, not return. Such "with intent to" language is conspicuously absent from the failure to appear statute. Thus, that statute does not define a specific intent offense, and the only intent requirement is that the action be willful, as well as be performed with general criminal intent.

{13} *Rosaire* did adopt the definition of willful from *State v. Masters,* 99 N.M. 58, 60, 653 P.2d 889, 891 (Ct.App.1982), a failure to appear case. *Rosaire,* 1997–NMSC–034, ¶ 7, 123 N.M. 701, 945 P.2d 66. *Rosaire* states, quoting *Masters,* " 'Willfully' denotes the doing of an act without just cause or lawful excuse." *Rosaire,* 1997–NMSC–034, ¶ 7, 123 N.M. 701, 945 P.2d 66 (internal quotation marks and citation omitted). That very language was given to the jury as Instruction 5 in this case.

{14} Insofar as Defendant appears to be suggesting that a requirement analogous to the "intent not to return requirement" found in the escape from inmate-release program statute should be read into the failure to appear statute, we disagree. We do not read words into the statutes, particularly when the legislature has seen fit not to include them. *See State v. Gutierrez,* 102 N.M. 726, 730, 699 P.2d 1078, 1082 (Ct.App.1985) (stating that when statute makes sense as written, this Court does not need to read words into it). It is the role of the legislature to define crimes. *State v. Nuñez,* 2000–NMSC–013, ¶ 49, 129 N.M. 63, 2 P.3d 264. The legislature is presumed to have understood and intended the differences in the language of the failure to appear and the escape statutes. *See, e.g., State v. Sundeen,* 2001–NMSC–006, ¶ 1, 130 N.M. 83, 17 P.3d 1019; *compare* NMSA 1978, § 33–2–46 (1980) ("Any prisoner whose limits of confinement have been extended, or who has been granted a visitation privilege under the inmate-release program, who willfully fails to return to the designated place of confinement within the time prescribed, *with the intent not to return,* is guilty of a . . . felony.") (emphasis

added), *with* § 31-3-9(A) ("Any person released pending trial or appeal in any criminal action who willfully fails to appear before any court or judicial officer as required is guilty of a fourth degree felony, if he was released in connection with a felony charge."). We agree with the State that the legislature's failure to include a further intent, other than general intent and willfulness, evinces its decision not to require the specific intent advocated for by Defendant.

{15} Defendant's last jury instruction argument is that the instructions in this case violated the principles in *Magby* and *Padilla*. *Magby* held that the standard of negligence in child abuse cases is criminal, not civil, negligence. 1998-NMSC-042, ¶¶ 10-11, 126 N.M. 361, 969 P.2d 965. Defendant characterizes *Padilla* as reading into the battery upon a peace officer statute a requirement that the state show a meaningful threat to authority or actual harm from a defendant's conduct. *See Padilla*, 1997-NMSC-022, ¶ 2, 123 N.M. 216, 937 P.2d 492. These cases have no application here. In arguing that a greater mental state is required for felony conduct, Defendant ignores that the legislature has chosen the distinction between misdemeanor failure to appear and felony failure to appear, and that distinction depends on the degree of the crime in the proceedings at which the defendant failed to appear. If a defendant is charged with a felony and he willfully fails to appear, his conduct is deemed to be a felony by the express terms of Section 31-3-9, without any reference to any further heightened mental state.

{16} Our conclusion is supported by New Mexico case law and cases from other jurisdictions, which have upheld convictions for failure to appear where the evidence did not necessarily show a deliberate intent not to appear, but did show that the defendant intended to do the act that caused the nonappearance. *See, e.g., State v. Aranda*, 94 N.M. 784, 786, 617 P.2d 173, 175 (Ct.App. 1980) (upholding conviction where evidence showed that defendant had met with counsel several times prior to trial, counsel informed the defendant that it was absolutely necessary for him to appear, and the day before trial the defendant left for Albuquerque and made no effort to contact his attorney when his car broke down and he was unable to return in time for trial); *People v. Marquez*, 692 P.2d 1089, 1103-04 (Colo.1984) (en banc) (upholding conviction for failure to appear based on defendant's admission that he chose to travel to a funeral instead of appearing in court even though defendant appeared at court the next day), *overruled on other grounds by James v. People*, 727 P.2d 850, 855 (Colo.1986) (en banc); *State v. Hoover*, 54 Conn.App. 773, 738 A.2d 685, 687 (1999) (holding evidence sufficient where defendant claimed he was out of state visiting a friend at time of trial and mistakenly believed that the case had been continued); *Wilson v. State*, 776 So.2d 347, 349-50 (Fla.Dist.Ct. App.2001) (upholding conviction where defendant did not appear at the designated time for his trial and fled from the courthouse after being told that the court had issued a bench warrant despite the fact the defendant returned voluntarily two hours later); *Abdul-Musawwir v. State*, 483 N.E.2d 464, 465-66 (Ind.Ct.App.1985) (upholding conviction where defendant failed to appear at trial scheduled for 9:30 a.m., but arrived at courthouse at 3:30 p.m. on the same day and claimed that he was confused as to what time he was supposed to appear).

{17} In sum, the required mental state is that Defendant acted willfully and intentionally, concepts upon which the jury was expressly instructed. Defendant's tendered instructions were not correct statements of the law in that they told the jury that Defendant had to have carefully thought about not going to court and then have decided not to go to court at all or at least not to go to court on the morning in question. The manner in which the case was presented to the jury, based on the facts in evidence and through the instructions and argument, fairly gave the jury the opportunity to determine that Defendant knew when he was to be in court and chose to willfully and intentionally disregard the requirement to appear. We conclude that the trial court did not err in refusing Defendant's proposed instructions and that the jury was properly instructed.

Issue Two: Testimony of Judge, Closing Arguments, and Jury Instructions Did Not Obligate Jury to Convict

{18} At trial, the State called Judge Thrower, the original trial judge who had ordered Defendant's arrest for failure to appear, as a witness. During direct examination, the judge and the prosecutor engaged in the following colloquy:

> **Prosecutor:** At any time in the process of this case did you excuse the appearance of Mr. Elliott?
>
> **Judge Thrower:** I did not.
>
> **Prosecutor:** At any time in the course of the process of this case were you informed, before or after the warrant, of any just cause for him not appearing.
>
> **Judge Thrower:** I was not.

{19} During closing arguments, the State referred to Judge Thrower's testimony as follows:

> [A]s to willfulness, part of that's really easy. Willfully is defined for you as he does a thing without just cause or lawful excuse. The law in this case, the lawful excuse, would be Judge Thrower.
>
> . . . .
>
> As to willfully, you'll see the instruction, and it says, "without just cause or lawful excuse." [Judge] Thrower was the only one with lawful excuse and he didn't give it to him. Just cause. Even [Judge] Thrower would have accepted that his mother-in-law was something-I didn't quite catch it. We all laughed a little bit. [Judge] Thrower just wanted to hear something.
>
> . . . .
>
> Now, justifiable cause. Just cause. We've all talked about those things. Weather. Car failure. Illness. They're all kinds of justifiable cause. One of them isn't "I decided to go to work." Or one of them isn't "something came up." . . . [Defendant] said to the deputy, "I knew I was . . . I know that I'm late, but something came up." What, I don't know. . . . [T]here's no evidence here that it was anything that would be a justifiable cause other than that he went to the shop. And being at work instead of being here was his willful choice and his willful decision.
>
> . . . .
>
> Judge Thrower . . . was asked if at any time in this process he heard of anything that told him that . . . gave him some reason not to issue the warrant, and not to jail him.

{20} Defendant characterizes Judge Thrower's testimony as an opinion on the ultimate issue of whether Defendant's failure to appear was willful. Defendant argues that not only was this testimony improper, but the harm caused by the testimony was exacerbated by the State's use of the testimony during closing arguments and by the jury instructions. Defendant argues that, taken together, Judge Thrower's testimony, the closing arguments, and the jury instructions directed the jury to find that Defendant's conduct was willful. The State argues that Defendant failed to preserve his challenges to the testimony and the closing argument. We agree with the State.

{21} Defendant alleges that trial counsel made two objections to Judge Thrower's testimony. Our review of the record indicates that although defense counsel did object during the direct examination of Judge Thrower, the objections related to testimony regarding the consequences of Defendant's failure to appear, including both the cost of the jury and the conclusion that the jury members were precluded from sitting on any other case in which Defendant is a party. Our case law is clear that in order to preserve an issue for appeal, a defendant must make a timely objection that specifically apprises the trial court of the nature of the claimed error and invokes an intelligent ruling thereon. *Varela*, 1999–NMSC–045, ¶¶ 25–26, 128 N.M. 454, 993 P.2d 1280. "In order to preserve an issue for appeal, 'it is essential that the ground or grounds of the objection or motion be made with sufficient specificity to alert the mind of the trial court to the claimed error or errors, and that a ruling thereon then be invoked.' " *Id.* ¶ 25 (quoting *State v. Lopez*, 84 N.M. 805, 809, 508 P.2d 1292, 1296 (1973)). There is nothing in the record to indicate that Defendant alerted the trial court to his allegations that Judge Thrower's testimony took an element of fact

away from the jury. Finally, Defendant concedes that he failed to object to the State's closing argument. As such, this argument is not properly before us. *See State v. Lucero,* 118 N.M. 696, 701, 884 P.2d 1175, 1180 (Ct. App.1994) (holding that a defendant bears the burden of objecting to an allegedly improper closing argument at the time the improper argument is made). In addition, we note that during Defendant's own closing argument, defense counsel referred to the challenged testimony to argue that Defendant's failure to appear was the fault of Judge Thrower, given that Judge Thrower testified that he would have accepted any excuse had he received one prior to dismissing the jury. Based on this testimony, defense counsel argued that had Judge Thrower waited an additional fifteen minutes before dismissing the jury, Defendant's tardiness would have been excused.

{22} Even if Defendant had properly preserved this issue, we would nonetheless affirm his conviction. While we agree that opinion testimony that seeks to state a legal conclusion is inadmissible, *State v. Clifford,* 117 N.M. 508, 513, 873 P.2d 254, 259 (1994), we disagree with Defendant's characterization of Judge Thrower's testimony as giving an opinion on the ultimate issue of Defendant's willfulness. Instead, Judge Thrower merely testified that he had not excused, and had not received an explanation for, Defendant's absence. Although Judge Thrower's testimony tended to establish the willfulness of Defendant's conduct, it did not rise to the level of removing an issue from the jury.

{23} In addition, the facts of this case are readily distinguishable from *Lytle v. Jordan,* 2001–NMSC–016, 130 N.M. 198, 22 P.3d 666, the case on which Defendant relies. In *Lytle,* the expert witness blatantly assumed the role of judge by advising the court on the proper application of the law to the specific facts of the case. *Id.* ¶ 49. The expert had been called solely for this purpose, to advise on the distinction between effective and ineffective assistance of counsel, which is a mixed question of fact and law, and to give her opinion that the facts of the case met the standard of ineffectiveness. *Id.* Under these circumstances, our Supreme Court rejected the expert's testimony. By contrast, Judge Thrower never gave an opinion as to whether Defendant's conduct was willful, but rather testified as to his interactions with Defendant and defense counsel on the day of trial. This testimony was proper.

{24} Similarly, we conclude that the State did not direct the jury to convict Defendant during closing arguments. The State's argument that Judge Thrower was the proper person to excuse Defendant's tardiness was legally accurate. Even if it was error for the State to argue that Judge Thrower was the only person authorized to excuse Defendant, the State also acknowledged its burden to prove that Defendant did not act with just cause and that Defendant intentionally and purposefully chose to deal with whatever came up at work rather than appear in court as required. *See State v. Bonham,* 1998–NMCA–178, ¶ 23, 126 N.M. 382, 970 P.2d 154 ("For error to be reversible, it must be prejudicial."). As such, we conclude that the testimony and closing argument did not constitute fundamental error.

{25} Finally, we agree with the State that the jury instructions, particularly the definition of willfulness, did not combine with the testimony and closing argument to direct the jury to convict Defendant. As discussed above, the jury was properly instructed that it needed to find that Defendant acted without just cause or lawful excuse and that Defendant's actions were intentional as well. *Cf. State v. Montaño,* 1999–NMCA–023, ¶ 18, 126 N.M. 609, 973 P.2d 861 (reversing conviction when instructions would not have informed jury that it was required to determine whether brick wall was a deadly weapon); *Bonham,* 1998–NMCA–178, ¶ 28, 126 N.M. 382, 970 P.2d 154.

Issue Three: Defendant Was Not Subjected to Multiple Punishments

{26} Defendant contends that he was twice put in jeopardy for the same crime when his bond was revoked in the underlying case and he was required to spend the next eight months in jail awaiting trial on the failure to appear charge and then when he was punished separately for the offense of failure to

appear. He attempts to analogize his claim of bond revocation and pre-trial detention to civil forfeiture pursuant to *Nuñez*, 2000-NMSC-013, ¶ 117, 129 N.M. 63, 2 P.3d 264. We are not persuaded.

{27} The purpose of bail is to insure that a defendant appear for proceedings and sentence. *See State v. Cotton Belt Ins. Co.*, 97 N.M. 152, 154, 637 P.2d 834, 836 (1981). If a defendant released on bond fails to appear "at the time and place fixed by the terms of [the] bail bond," a court may issue a warrant for the defendant's arrest and may declare a forfeiture of the bond. NMSA 1978, § 31-3-2(B) (1993). In this case, there is no evidence that the trial court ordered a forfeiture of Defendant's bond. As such, the record is inadequate for us to consider Defendant's argument that the forfeiture of a bond under Section 31-3-2 raises double jeopardy concerns similar to those addressed in *Nuñez*. Instead, we discuss only whether revocation of Defendant's bond on the underlying charge and the subsequent pre-trial incarceration precluded the prosecution.

{28} The revocation of a bond in response to a violation of bond conditions is not punishment, but is a regulatory or administrative action that insures the appearance of a defendant. *See United States v. Grisanti*, 4 F.3d 173, 175 (2d Cir.1993); *Wilcox v. State*, 748 N.E.2d 906, 911-12 (Ind.Ct. App.2001) (holding that bail revocation serves to "maintain[ ] the integrity of the judicial process and the authority of the courts, and protect[ ] the public from potentially dangerous persons"). The record indicates that Defendant was held without bond not only because of his failure to appear for trial, but also because of the severity of the three pending charges, and the possibility that, if convicted, Defendant would face an extensive prison term based on the habitual offender statute, combined to make Defendant a flight risk. The purpose of the revocation, therefore, was not to punish Defendant, but to insure his appearance at later hearings and trials. *See Nuñez*, 2000-NMSC-013, ¶ 62, 129 N.M. 63, 2 P.3d 264 (stating that whether a sanction is punitive or remedial is determined by looking at the purposes behind the statute authorizing the sanction). Because the revocation served an administrative rather than punitive goal, we conclude that *Nuñez*, which was concerned with a decidedly punitive forfeiture statute, does not apply. *See id.* ¶ 94.

{29} Our conclusion is supported by decisions from other jurisdictions, which have consistently held that conduct that is the basis for revocation of bail may also be the subject of prosecution without violating the double jeopardy clause. *See Grisanti*, 4 F.3d at 175-76 (listing cases); *Wilcox*, 748 N.E.2d at 911-12; *Dorsey v. Commonwealth*, 32 Va. App. 154, 526 S.E.2d 787, 792 (2000). In addition, insofar as Defendant is asserting that he was subjected to multiple punishments, we note that Defendant was given credit for his pre-trial confinement. As such, even if the pre-sentence confinement in this case could be viewed as punitive, Defendant has failed to show that he was subjected to multiple punishments.

Issue Four: Defendant's Sentence Does Not Violate the Prohibition Against Cruel and Unusual Punishment

{30} Defendant claims that his sentence, which totaled nine and one-half years due to the felony nature of his failure to appear and his four felony convictions, amounted to cruel and unusual punishment. The State asserts that Defendant failed to preserve this issue by raising it below, and Defendant counters that his claim is excepted from the preservation requirement insofar as we are required to review de novo whether a sentence constitutes cruel and unusual punishment. We conclude that Defendant failed to preserve this issue. However, had Defendant properly challenged his sentence below, we would nonetheless hold that the sentence does not constitute cruel and unusual punishment.

{31} In *State v. Burdex*, 100 N.M. 197, 201, 668 P.2d 313, 317 (Ct.App.1983), we noted that constitutional claims of cruel and unusual punishment must be raised below to be reviewed on appeal. None of the cases cited by Defendant contradict this proposition. In *State v. Rueda*, 1999-NMCA-033, ¶ 8, 126 N.M. 738, 975 P.2d 351, the defendant preserved her challenge by arguing to the trial court that the mandatory habitual

offender enhancement violated both State and Federal constitutional law. *See also State v. Arrington,* 115 N.M. 559, 561, 855 P.2d 133, 135 (Ct.App.1993) (holding that a sentence of incarceration would constitute deliberate indifference to defendant's medical needs). Because Defendant has not indicated that he challenged the constitutionality of his sentence in the trial court, we conclude the issue is not preserved for our review. *See* Rule 12-216(A) NMRA 2001; *Burdex,* 100 N.M. at 201, 668 P.2d at 317.

{32} Were we to reach the issue, we would affirm on the grounds that our opinion in *Rueda,* 1999-NMCA-033, ¶ 6, 126 N.M. 738, 975 P.2d 351, is controlling and that Defendant has failed to point us to evidence of particular circumstances which would render imposition of the habitual offender enhancement cruel and unusual. *Cf. Arrington,* 115 N.M. at 561-62, 855 P.2d at 135-36 (holding that evidence of the defendant's medical condition and inability of correctional facility to provide necessary care sufficient to support finding that incarceration would be cruel and unusual).

{33} Nor are we persuaded by Defendant's argument that his nine-and-one-half-year sentence is grossly disproportionate to the sanctions imposed in civil cases involving litigants and attorneys who are late for court or who fail to attend depositions. *See, e.g., Sandoval v. United Nuclear Corp.,* 105 N.M. 105, 108, 729 P.2d 503, 506 (Ct.App. 1986). None of the attorneys or litigants sanctioned in the cases cited by Defendant were charged with crimes and therefore were not under the restrictions of a bond or court order to appear at dates and times under the penalty of the New Mexico statute governing failure to appear. Defendant in this case was.

Issue Five: Trial Court's Finding, by a Preponderance of the Evidence, That Arizona Conviction Was a Felony Conviction Was Not Error

{34} Defendant challenges the State's proof of one of his prior convictions, contending that it must be proved beyond a reasonable doubt under *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and asserting that there was insufficient evidence under any standard to show a prior felony conviction. *Apprendi,* by its express terms, does not apply to prior convictions. *See id.* at 490, 120 S.Ct. 2348 (indicating that holding applies to facts "[o]ther than the fact of a prior conviction"); *see also United States v. Pacheco-Zepeda,* 234 F.3d 411, 414-15 (9th Cir.2001) (holding that *Almendarez-Torres v. United States,* 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), in which Supreme Court held it unnecessary to prove prior convictions beyond a reasonable doubt, is narrow exception to *Apprendi*).

{35} The standard of proof applicable to the establishment of a prior felony conviction for the purpose of a habitual offender enhancement under NMSA 1978, § 31-18-17(D) (1993), is preponderance of the evidence. *State v. Smith,* 2000-NMSC-005, ¶ 9, 128 N.M. 588, 995 P.2d 1030. At sentencing, the State bore the burden of making a prima facie case showing prior valid felony convictions, and Defendant then had the right to offer contrary evidence. *State v. Gaede,* 2000-NMCA-004, ¶ 8, 128 N.M. 559, 994 P.2d 1177.

{36} In assessing a claim of evidentiary insufficiency, this Court asks whether substantial evidence supports the court's decision. *See In re Ernesto M.,* 1996-NMCA-039, ¶ 15, 121 N.M. 562, 915 P.2d 318. Substantial evidence "is relevant evidence that a reasonable mind would accept as adequate to support a conclusion." *State v. Laguna,* 1999-NMCA-152, ¶ 7, 128 N.M. 345, 992 P.2d 896. This Court views the evidence in the light most favorable to the trial court's decision, resolves all conflicts, indulges all permissible inferences to uphold the court's decision, and disregards all evidence and inferences to the contrary. *Id.* We do not reweigh the evidence and will not substitute our judgment for that of the trial court. *Ernesto M.,* 1996-NMCA-039, ¶ 15, 121 N.M. 562, 915 P.2d 318.

{37} Defendant bases his challenge on the fact that possession of a dangerous drug is an "undesignated" offense under Arizona law. The relevant statute reads:

Possession, use, administration, acquisition, sale, manufacture or transportation of dangerous drugs; classification

A. A person shall not knowingly:

1. Possess or use a dangerous drug.

. . . .

B. A person who violates:

1. Subsection A, paragraph 1 of this section is guilty of a class 4 felony. Unless the drug involved is lysergic acid diethylamide, methamphetamine, amphetamine or phencyclidine or the person was previously convicted of a felony offense or a violation of this section or § 13–3408, the court . . ., considering the nature and circumstances of the offense, for a person not previously convicted of any felony offense or a violation of this section or § 13–3408 may enter judgment of conviction for a class 1 misdemeanor and make disposition accordingly or may place the defendant on probation in accordance with chapter 9 of this title and refrain from designating the offense as a felony or misdemeanor until the probation is successfully terminated. *The offense shall be treated as a felony for all purposes until the court enters an order designating the offense a misdemeanor.*

Ariz.Rev.Stat. § 13–3407 (1997) (footnote omitted and emphasis added).

{38} In this case, the State made its prima facie case by showing a prior conviction of a drug offense in Arizona that would be a felony if committed in New Mexico. Defendant's probation officer testified that the paperwork presented by the State showed that the offense for which Defendant was convicted was undesignated. In addition, the probation officer testified that Defendant had successfully completed probation. However, Defendant did not present an order designating the offense as a misdemeanor, nor did the State offer evidence that it searched the records and did not find such an order. Because there was conflicting evidence on the matter, it was for the trial court to resolve. *See Gaede,* 2000–NMCA–004, ¶¶ 8–9, 128 N.M. 559, 994 P.2d 1177. Based on the language of the applicable Arizona statute, *see* Ariz.Rev.Stat. § 13–3407(B)(1) ("The offense shall be treated as a felony for all purposes until the court enters an order designating the offense a misdemeanor."), and the fact that neither the State nor Defendant presented an order designating the offense, we conclude that the evidence was sufficient to support the trial court's finding that the prior Arizona conviction was a felony for the purposes of the habitual offender enhancement.

CONCLUSION

{39} For the foregoing reasons, we affirm the judgment and sentence.

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

I CONCUR: M. CHRISTINA ARMIJO, Judge.

JONATHAN B. SUTIN, Judge (dissenting).

SUTIN, Judge (dissenting).

{41} I respectfully dissent in regard to Issue One. I would reverse Defendant's conviction.

{42} The trial court has age-old powers of contempt and bond revocation and concurrent powers to issue bench arrest warrants and to order incarceration when a defendant fails to appear on time for arraignment, trial, or sentencing. The Legislature did not likely intend Section 31–3–9 to be used to convict as a felon a defendant who fails to appear on time for and thereby delays or disrupts his arraignment, trial, or sentence hearing without substantial evidence beyond a reasonable doubt that the defendant intended to delay, disrupt, or thwart the proceeding.

{43} That intent was not required in this case. The majority correctly notes that Section 31–3–9 does not expressly set out that specific intent. The majority also correctly notes that the trial court gave the general intent instruction. Further, the majority correctly cites *Masters,* 99 N.M. at 60, 653 P.2d at 891, a failure to appear case, which defined the Section 31–3–9 element, "willfully," as denoting "the doing of an act without just cause or lawful excuse."

{44} But intent to delay, disrupt, or thwart ought to be required. It can and is to be found in an appropriate definition of "willful-

ly fails to appear." "Willfully" is not defined in Section 31–3–9. The *Masters* definition, while appropriate under the facts of that case, is too limiting and insufficient to apply to a case like the one before us now where a defendant may have carelessly failed to appear on time and disrupted a proceeding as a result. Unless "willfully" is defined in cases such as this to include an intent to delay, disrupt, or thwart, a defendant can be convicted for carelessness.

BACKGROUND

{45} The facts are important. Defendant was released from custody on bond. He had a job. Working with his attorney, he spent many hours assisting in the preparation of his own defense. Defendant's wife Dorothy, a paralegal, together with his stepdaughter, participated also.

{46} Dorothy testified that she and Defendant believed that trial began at 9 a.m. That morning, Defendant went to his father's shop at 8 a.m. to set up the work assignments of the mechanics, to ensure that enough work was accomplished before his father's return from California after Thanksgiving. Showered and dressed in a white button-down shirt, a black tie, black boots, and a black vest, Defendant's appearance was much different than on a normal workday. Usually he went to work without showering in the morning and wore a blue coverall uniform, because he got very dirty at work.

{47} Dorothy began to be concerned at about 8:40 a.m. that Defendant had not yet returned from the shop to go to trial. Just before 9 a.m., Deputy Sheriff Waybourn arrived. Dorothy told the deputy that Defendant had gone to court or gone by the shop on the way to court.

{48} Deputy Waybourn called Judge Thrower at about 9:05 a.m. to say that Defendant was not at home and was presumably on his way to court. Then he sat in his car down the street to watch for Defendant's arrival. At some point, Dorothy's son warmed up their pickup truck so she could go to the nearest phone at Walmart, to check on Defendant, because their house had no telephone service.

{49} In the meantime, Defendant drove up. He was dressed for court and, according to Deputy Waybourn, "seemed to be in a hurry, to make it to court." Dorothy and her son joined Defendant in his car, calling out to the deputy as they left that they were on their way to court. The deputy followed them. On the way, he called Judge Thrower at 9:18 a.m. to say that Defendant was on his way to court.

{50} Unfortunately for Defendant, although Judge Thrower had informed the jury at 8:45 a.m. that they could expect another 45 minutes of waiting, the judge released the jury at 9:17, and issued a bench warrant for Defendant's arrest. Defendant and his family arrived at court between 9:18 and 9:26 a.m. As he was being arrested, Defendant told Deputy Waybourn that he thought the trial was set for 9 a.m. He knew he was a few minutes late, but "something came up." Dorothy testified "it was never [Defendant's] intention" to miss his day in court.

{51} Defendant was held without bail. He spent the next eight months in jail until he again was released on bond pending trial on the charge of failure to appear. He was convicted at trial of felony failure to appear under Section 31–3–9 and given a suspended sentence of 18 months and a mandatory eight-year habitual offender sentence. At some point (the reasons are not in the record on appeal), the original felony charge was dismissed.

DISCUSSION

{52} No evidence was presented that Defendant was a flight risk. No evidence was presented that Defendant had a deliberate, conscious intent to be late to court in order to affect the court proceeding in any way.

{53} Defendant may have intentionally placed his work obligation ahead of his punctuality. He may well have acted recklessly. In fact, the jury might have believed Defendant had a deliberate, conscious intent to be late and thereby affect the proceeding. But the defect here is that, under the jury instructions, the jury was allowed to convict Defendant if his tardiness was due simply to bad judgment or carelessness.

{54} A trial court has unquestioned authority to command adherence by criminal defendants to its lawful orders through its contempt, bond revocation, and concomitant incarceration powers. The trial court has historically invoked those powers when a criminal defendant fails to appear on time for a scheduled arraignment, trial, or sentencing, particularly when the failure to appear on time disrupts the proceeding. The use of these powers is not conditioned upon a willful or even an intentionally defiant act; however, as a general proposition, the powers should not be invoked when a defendant can show "just cause" or a "lawful excuse" for the tardiness.

{55} A felony attribution raises tardiness to a different level of " 'moral condemnation and social opprobrium [for which] the crime should ... reflect a mental state warranting such contempt.' " *Magby,* 1998–NMSC–042, ¶ 10, 126 N.M. 361, 969 P.2d 965 (quoting *Santillanes v. State,* 115 N.M. 215, 222, 849 P.2d 358, 365 (1993)). I think the Legislature attached to Section 31–3–9 a much more significant role than to be a substitute for contempt or bond revocation. Section 31–3–9 requires a more serious level of behavior, a more specific level of intent.

A. The Contempt Power

{56} Defendant's tardiness made him subject to contempt sanctions. *See* NMSA 1978, § 34–1–2 (1851); Rule 5–902 NMRA 2001. The contempt power derives from common law and is an inherent power of the court. *See State v. Clark,* 56 N.M. 123, 125, 241 P.2d 328, 329 (1952); *Purpura v. Purpura,* 115 N.M. 80, 82, 847 P.2d 314, 316 (Ct.App.1993). A court may impose a criminal contempt sanction for violation of a court order. *State v. Wisniewski,* 103 N.M. 430, 435, 708 P.2d 1031, 1036 (1985) (holding two district attorneys and two police officers in contempt for negligently failing to abide by discovery order in criminal case); *State v. Klempt,* 1996–NMCA–004, ¶ 1, 121 N.M. 250, 910 P.2d 326 (affirming criminal contempt against police officer for failure to comply with subpoena). The contempt power is "reserved to [the court] under N.M. Const. art. VI, Section 13," and "[the] sanction is intended to preserve the authority of and respect for the courts." *Wisniewski,* 103 N.M. at 434, 708 P.2d at 1035. Willfulness is not required. *Id.* A trial court can impose a jail term for contempt. Section 34–1–2.

B. The Power to Revoke Bond

{57} "A trial judge indisputably has broad powers to ensure the orderly and expeditious progress of a trial. For this purpose, he has the power to revoke bail and to remit the defendant to custody." *Bitter v. United States,* 389 U.S. 15, 16, 88 S.Ct. 6, 19 L.Ed.2d 15 (1967). "The court on its own motion ... may at any time have the defendant arrested to review conditions of release." Rule 5–403(A) NMRA 2001; *Tijerina v. Baker,* 78 N.M. 770, 773, 438 P.2d 514, 517 (1968) ("[T]he court has inherent power to revoke bail of a defendant during trial and pending final disposition of the criminal case in order to prevent interference with ... the proper administration of justice[.]"); *accord State v. David,* 102 N.M. 138, 142, 692 P.2d 524, 528 (Ct.App.1984) ("[B]ail decisions may be reviewed at any time and for a variety of reasons."). Rule 5–403 gives broad latitude to the trial court to revoke and review the conditions of release of an accused "if circumstances arising after the initial release indicate the release should not be continued." *State v. Corneau,* 109 N.M. 81, 91, 781 P.2d 1159, 1169 (Ct.App.1989); *see, e.g.,* Crim. Form 9–212 NMRA 2001 (Bench Warrant); *State v. Dean,* 105 N.M. 5, 7, 727 P.2d 944, 946 (Ct.App.1986).

{58} The court may issue a bench warrant for the arrest of a defendant who violates its order. Rule 5–209(B) NMRA 2001; *see, e.g., Dean,* 105 N.M. at 7, 727 P.2d at 946. Revocation is proper even when the defendant "has not been charged, arrested, indicted or bound over for any crime allegedly committed while he was released." *David* 102 N.M. at 142, 692 P.2d at 528.

C. "Willfully" Must Include the Element of a Specific Intent

{59} *Masters* states that " 'willfully,' as used in [Section 31–3–9] concerns [the] defendant's state of mind." *Masters,* 99 N.M. at 60, 653 P.2d at 891. Clearly, a defendant's

state of mind is material. Intent is a state of mind. The terms "just cause" and "lawful excuse" do not necessarily require a look into a person's state of mind.[1] That is why the definition in *Masters* is insufficient for a case such as that before us. That Defendant here had no just cause or lawful excuse for carelessly tending to his father's shop while the clock was ticking toward 9 a.m., and no just cause or lawful excuse for mistakenly believing that trial was at 9 a.m. rather than 8 a.m., does not mean that he intended at the same time to delay, disrupt, or thwart the criminal trial by being late.

{60} To say that this more specific intent is not an element to be proven is to read out of *Masters* the highly significant statement that "willfully ... concerns a defendant's state of mind." To disregard Defendant's state of mind, and thereby make irrelevant an intent to delay, disrupt, or thwart the criminal process by his failure to appear, and to depend solely on the "just cause" and "lawful excuse" elements of the *Masters* definition, is to place at felony risk every defendant in every criminal case who is minutes late for an arraignment, or sentencing hearing, much less for a trial because the defendant used bad judgment or was careless in failing to appear on time. That cannot be what the Legislature intended in enacting Section 31–3–9.

D. The General Intent Instruction Did not Fulfill the Missing Element of Specific Intent

{61} The trial court gave the general intent instruction, UJI 14–141, over the State's objection. This instruction requires only an intent to do an act, where the doing of the act ends up causing harm, even if there is no specific intent to cause harm. This causal connection does not necessarily involve an intent not to appear or even be late. The causal connection need be simply being at work knowing that a certain time deadline is required. Here, Defendant's decision to go to work, be at work, and return home before going to court caused Defendant not to be in court on time. The general intent instruction permitted the jury to convict on this basis.

CONCLUSION

{62} The instruction defining "willfully," even with the general intent instruction, permitted the jury to convict Defendant for bad judgment or carelessness. These instructions would have permitted Defendant's felony conviction under Section 31–3–9 if the proceeding for which he failed to timely appear had been an arraignment. The Legislature could not have intended such a result, or have intended the result here, without proof of an intent to delay, disrupt, or to thwart the criminal process. Section 31–3–9 ought to be strictly construed, "requiring that both the letter and the spirit of the statute must be violated to eliminate the spectre of criminal laws subjectively applied or unwittingly violated." *Abdul–Musawwir*, 483 N.E.2d at 466 (referring to the application of a failure to appear criminal statute by the Indiana Supreme Court where the defendant was not advised by the court of his duty to appear at a specified time and place.).

{63} As stated in *Masters*, the state of mind of a defendant late for arraignment, trial, or sentencing is important. Willfully means more than doing an act without just cause or lawful excuse. For a felony failure to appear, willfully must also mean and require intent to delay, disrupt, or thwart the criminal process. That is when the conduct amounts to a felony. Being tardy due to carelessness or bad judgment should be punished, if at all, through the contempt sanction and revocation of bond. Defendant's failure

1. Note NMSA 1978, § 30–6–1 (2001) and UJI 14–602 NMRA 2001, construed in *Magby*, 1998–NMSC–042, 126 N.M. 361, 969 P.2d 965. Section 30–6–1(D)(1) outlaws a person "knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be ... placed in a situation that may endanger the child's life or health." The Legislature placed "intentionally" along side "without justifiable cause." In the present case, the *Masters* definition of "without just cause or lawful excuse" should be placed aside "willfully," or should be included within a fuller definition of "willfully," rather than be substituted for or constitute a complete definition of "willfully." "Willfully" should be construed as requiring a deliberate, conscious, and purposeful action to, at the very least, cause delay or disrupt the proceeding by not appearing on time.

to appear felony conviction and his habitual criminal mandatory sentence should be reversed because the jury may have convicted Defendant for carelessness or bad judgment.

2001-NMCA-107

37 P.3d 122

Alan GOULD, Tonia Gould, Melissa Eppel, Dwight Nibbelink, Carl Friedrichs, Debra Friedrichs, Carl Gerz, Beth Gerz, Ed Knop, Sheila Knop, Bill Litzenberg, Marcie Litzenberg, Carl Livingston, Leslie Livingston, Jack Mouchette, Mary Mouchette, and Reinhard Sprenger, Petitioners–Appellants,

v.

SANTA FE COUNTY and Municipality of Santa Fe Extraterritorial Zoning Authority, The Municipality of Santa Fe, Albert Rivera, and Teresita Rivera, Respondents–Appellees.

No. 20,799.

Court of Appeals of New Mexico.

Oct. 31, 2001.

Ronald J. VanAmberg, Roth, VanAmberg, Rogers, Ortiz, Fairbanks & Yepa, LLP, Santa Fe, NM, for Appellants.

Lidia Garza Morales, Assistant City Attorney, City of Santa Fe, Santa Fe, NM, for Appellees Santa Fe County and Municipality of Santa Fe, Extraterritorial Zoning Authority and The Municipality of Santa Fe.

M.J. Keefe, Albuquerque, NM, for Appellees Albert Rivera and Teresita Rivera.

OPINION

BUSTAMANTE, Judge.

{1} We granted Petitioners' petition for writ of certiorari seeking review of a district court order upholding the decision of the Santa Fe County Extraterritorial Zoning Authority (EZA). For the reasons discussed in this opinion, we reverse the district court's decision, as well as the decision of the EZA.

BACKGROUND

{2} Respondents in this case are Mr. and Mrs. Rivera (Respondents), the EZA, and the City of Santa Fe. Respondents own a five-acre parcel of land in the metro-mountain area known as the Mountain Special Review District, an extraterritorial zone that requires minimum twenty-acre parcels due to concerns about the availability of water. Respondents wanted to divide their five-acre parcel into five, individual, one-acre parcels in order to give a parcel to each of their five children. Respondents applied to the Extraterritorial Zoning Commission (EZC) for a "variance request on density" and sent a letter outlining their request.

EZC Recommendation/EZA Determination

{3} The EZC is an advisory body to the EZA, which is a joint City and County body having jurisdiction over planning and zoning matters in the extraterritorial zone. After reviewing Respondents' application, the EZC recommended against granting the variance, and stated that "the requested variance does not constitute a minimum easing of the Ordinance requirements." In particular, the City Planner, Mr. Smith, concluded that an amendment to the ordinance would be necessary in order to grant Respondents' request because a variance is not to be used to permit densities that are prohibited by ordinance. In coming to that conclusion, Mr. Smith referred to the section in the zoning ordinance discussing variances. The County Development Review Specialist, Mr. Abeyta,

also recommended that the variance request be denied. Mr. Abeyta stated that, even if a hydrology study showed there was an abundance of water in the area, the smallest possible lot size would be 2.5 acres. The matter went before the EZC for decision in August 1998 but was twice tabled. On October 8, 1998, a hearing was held on Respondents' application.

{4} Respondents stated they had purchased the property twenty-seven years prior to the application date, and they had intended to transfer one acre of the property to each of their children. Respondents also stated that availability of a water supply was a primary land-use concern, but claimed that, since they had first drilled a well in 1973, the well had provided ample and consistent water and water pressure. Respondents stated that "it is a reliable and infinite source." Respondents did not provide any other evidence of available water sources in the area. Respondents explained they intended to retain the property within the family and would drill only one additional well and one septic tank on the property.

{5} Other witnesses spoke on behalf of Respondents, discussing their long history in the community and the high property prices in Santa Fe. The president of the neighborhood association presented a contrary view. He stated that there is no water table in the area, and the density and water problems in the area are factors that demonstrate the variance would be inappropriate. He asserted that there had been 100 to 130 septic system failures in the area in the previous ten years. Other witnesses testified they had experienced problems with water quality and quantity on their property. Numerous residents of the area wrote letters to the EZC urging it to deny the application. The letters speak of serious water shortages; difficulties with water pressure; failure of septic systems; diminished recovery time in refilling wells; percolation of sewage resulting in disposal fields up to eight feet high; concerns about water contamination and water quality; and concerns about noise and congestion resulting from concentrated living. The residents detailed the history that led to the changes in family transfer regulations designed to protect the area from overdevelopment. Following the presentation to the EZC, the variance request was approved.

{6} The matter next went to the EZA. At the hearing, Respondents explained they were life-long residents of Santa Fe who have only land to leave to their children, and their children were raised on the property, and grew up believing they were entitled to establish their own families on the land. In addition, there was testimony from other witnesses claiming it was difficult to own a home in Santa Fe; a neighbor, Mr. Salazar, had no problems with water on his divided property; the Respondents were an old Santa Fe family who had helped neighbors and the community and were "rich in their hearts"; the Respondents' request "furthers the tradition of living in Santa Fe" and furthered the preservation of the family compound concept; and denial of the request "would be an endorsement of the re-gentrification" of Santa Fe.

{7} In addition to Mr. Smith's and Mr. Abeyta's recommendations on the requested variance, others presented opposition to the Respondents' application similar to those presented to the EZC. Residents wrote a letter to the EZA detailing the problems they had experienced with respect to water in the area, the history and problems that led to the changes in family transfer requirements, and the criteria for granting variances under the ordinance. After considering the information presented by Respondents and the opponents to the variance application, the EZA commissioners discussed the possibility of set-backs to minimize impact of building on Respondents' property. Councilor Moore remarked that the EZC "continues to recommend against density variances directing the applicant to seek an amendment to the ordinance." After noting that a denial of the variance would prohibit Respondents from obtaining the value of their land, Councilor Moore moved to approve the variance. The variance was approved by a unanimous vote. Petitioners appealed that decision to the district court. The district court affirmed. Here, Petitioners appeal that affirmance.

DISCUSSION

A. Standard of Review

{8} After the briefs in this case were filed, this Court determined the scope of our review in certiorari cases. *See C.F.T. Dev., LLC v. Bd. of County Comm'rs*, 2001-NMCA-069 130 N.M. 775, 32 P.3d 784. We apply that standard to this case. Under *C.F.T. Dev., LLC*, while the district court reviews an administrative body's decision based on such standards as abuse of discretion or substantial evidence, our review is limited to the grounds listed in Rule 12-505(D)(5) NMRA 2001. Particular to this case, we review the trial court's decision under Rule 12-505(D)(5)(b), to determine whether there exists a conflict between the trial court's order and the ordinance applicable to this case.

B. Ordinance Provisions

Zoning Ordinance-Variance Provision

{9} Section 3.7 of the zoning ordinance outlines the purpose of variances:

> Variances are intended to afford relief from the strict letter of the Ordinance requirements to protect against individual hardships related to unique circumstances of a particular property. Each case of a variance therefore depends on its own facts. The purpose of variances is not to effect amendments to what are perceived to be flaws in the zoning ordinance, nor to effect rezonings, nor to alleviate personal problems or inconveniences for property owners. Variances are not to be used to permit buildings, businesses, densities or intensities, or uses prohibited by ordinance nor to authorize zoning violations. Application for a rezoning or special exception or ordinance amendment may be the appropriate mechanism in these circumstances.

The ordinance allows a variance from its standards if it is "authorized by the EZA, upon recommendation of the EZC, in cases where a literal enforcement of the Ordinance provisions would result in unnecessary hardship for a particular property." The ordinance lists ten factors as criteria for review by the EZA. In order to grant a variance, the EZA must make a positive finding of fact with respect to each of the ten factors. The ten factors are:

1. That special conditions and circumstances exist which are peculiar to the land, structure or building involved and which are not applicable to other lands, structures or buildings in the same district; and

2. A literal interpretation of the provisions of the Ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of the Ordinance; and

3. There are special conditions and circumstances which are not the result of actions by the applicant, and that the hardship is not self-imposed or self[-]created; and

4. Granting the variance requested will not confer on the applicant any special privilege that is denied by the Ordinance to owners of other lands, structures or buildings in the same district; and

5. The applicant demonstrates that the request is a minimum easing of the Ordinance requirements, making possible the reasonable use of the land, building or structure; and

6. The granting of the variance is in harmony with the general interest, the general purpose and intent of the Ordinance, and is not injurious to the neighborhood or otherwise detrimental to the public welfare; and

7. That the variance will not set a precedent which conflicts with the policies of the Extraterritorial Plan and this Ordinance; and

8. The proposed variance will not permit a use not generally or by special exception permitted in the district involved or any use expressly or by implication prohibited by the terms of this Ordinance; and

9. No nonconforming use of neighboring lands, structures or buildings in the same district and no permitted use of lands, structures or buildings in other districts has been or shall be considered grounds for the issuance of a variance; and

10. The applicant would suffer an unnecessary hardship if the variance requested were [sic] denied.

Zoning Ordinance–Family Transfer Provision

{10} Respondents assert that, in applying for the variance, they relied on the family transfer provision under Section 5.2C of the ordinance. The family transfer provision is included under the portion of the ordinance addressing use of the land and such considerations as density and lot size. The provision states:

> After obtaining an approved development permit, dwellings and customary accessory structures may be erected on a lot which does not meet the lot size requirement of this Ordinance if the lot has been created by *Inheritance* or *Family Transfer* provided that the restrictions and standards of this Section 5.2 C are met.

A lot is created by family transfer if it is transferred by a father or mother to their children or grandchildren. The purposes of the family transfer provision are to maintain local cultural values, to assure family transfers are not being used to circumvent zoning requirements, to set minimum environmental standards for family transfers to protect families and the community, and to permit transfers of lots that do not meet lot size requirements as a one-time gift to a child to provide a more affordable homesite for the children. Lots may be created by family transfer that do not meet the minimum twenty-acre lot size requirement. However, the ordinance specifies that no lot, "shall be smaller than one[-]half (½) of the standard minimum lot size allowed in the particular location [or] hydro-logic zone[.]"

C. Case Law Applicable to Variances

{11} A property owner may challenge the constitutionality of a zoning ordinance in court, pursue a change in the zoning ordinance by making a request to the legislative body, or request a variance to use property in a manner that is prohibited by the zoning ordinance. *Downtown Neighborhoods Ass'n v. City of Albuquerque,* 109 N.M. 186, 189, 783 P.2d 962, 965 (Ct.App.1989). Variances are extraordinary exceptions and are granted only under peculiar and exceptional circumstances. *Id.* "The authority for an administrative ... body to grant [a variance] is limited by the terms of the relevant ... ordinance." *Id.*

{12} Other courts have placed variances into two general categories: use variances and area variances. *State v. Outagamie County Bd. of Adjustment,* 244 Wis.2d 613, 628 N.W.2d 376, 384 (2001); *Dsuban v. Union Township Bd. of Zoning Appeals,* 140 Ohio App.3d 602, 748 N.E.2d 597, 599–600 (2000); *Ivancovich v. City of Tucson Bd. of Adjustment,* 22 Ariz.App. 530, 529 P.2d 242, 248 (1974). A use variance allows a landowner to use existing property in a manner not permitted by the zoning ordinance. *Id.* at 248. An example of a use variance is a commercial establishment, such as a garage used to repair vehicles that is located in a residential zone. *See, e.g., Craig v. City Council of Kent,* 1991 WL 147437, at 1 (No. 90–P–2247, Ohio Ct.App.1991). An area variance allows exceptions from restrictions on such matters as setback, height limitation, lot size restrictions, and density requirements. *Ivancovich,* 529 P.2d at 248.

D. Respondent's Arguments

{13} Respondents claim their application was for an area variance and, citing to *Ivancovich,* argue that less stringent standards should apply to their application. The court in *Ivancovich* noted that less strict standards might apply to area variances but held that, even if less stringent standards were applied in that case, the applicable ordinance was more restrictive than ordinances involved in cases where area variances were granted more freely. *Id.* at 249–50. The *Ivancovich* court reversed the grant of the variance, and held that there was no showing in the record "to support the jurisdictional prerequisite for the granting of the variance," as outlined in the ordinance. *Id.* at 250.

{14} There are no New Mexico cases that categorize variances as use or area or that distinguish between the two, and we have no cases applying a rule that area variances are subject to less stringent standards

than other variances. However, we find it unnecessary to make such a distinction in this case for reasons similar to those discussed in *Ivancovich.* Even if we agreed that the variance in this case should be considered an area variance and, in general, that less stringent standards are applied to area variances, it is nevertheless necessary to examine the administrative body's authority to grant a variance and necessary to review the conditions that must be met before a variance is granted. *See id.* (demonstrating that even though court considered idea that lower standards apply to area variances, court proceeded to consider wording of the more restrictive ordinance that was applicable in that community in deciding whether the variance should have been granted). Therefore, we proceed to conduct such a review.

E. EZA Requirements for Variances

{15} The authority for the EZA to grant variances is limited by the terms of the relevant ordinance. *Downtown Neighborhoods Ass'n,* 109 N.M. at 189, 783 P.2d at 965; Kenneth H. Young, *Anderson's Am. Law of Zoning* § 20.72 (4th ed.1996) (stating that power to grant variances is necessarily restricted by standards set by municipality); *see also Miller v. City of Albuquerque,* 89 N.M. 503, 506–07, 554 P.2d 665, 668–69 (1976) (holding that failure by municipal legislative body to follow regulations for accepting zone change applications imposed on others that were adopted by exercise of its legislative power was fatal to its decision on the application). The particular ordinance in this case very clearly sets out the requirements for reviewing and granting a variance application. The ordinance specifically disallows a variance to "effect rezonings, nor to alleviate personal problems or inconveniences" of property owners. *See also Anderson's Am. Law of Zoning* § 20.55 (stating that an area variance should not be affirmed if granted solely to relieve a problem personal to the applicant rather than one affecting the lot in question). In addition, the ordinance prohibits the grant of variances that permit densities prohibited by the ordinance. Both of these prohibitions were arguably violated in this case, though the density variation is dispositive. The variance granted would allow a marked increase in density that is specifically prohibited in the area covered by the ordinance.

F. Ordinance Factors

Family Transfer

{16} Respondents remind us that their variance application was brought under the family transfer provision of the ordinance. As noted above, the ordinance includes a specific provision with respect to family transfers and provides for transfer of a specific lot size. In the case of a family transfer in the area covered by the ordinance, the lot size transferred can be no smaller than one-half of the minimum lot size, or ten acres. Respondents own only five acres. In other words, their lot size is already below the minimum lot size for family transfers under the ordinance. Therefore, if Respondents' application was filed under the family transfer provision, it could not have been granted under the requirements of that provision. Moreover, grant of the variance would result in a density that is specifically not permitted by the ordinance. As discussed above, the authority to grant a variance is limited by the terms of the ordinance. Since the family transfer provision of the ordinance does not allow the variance requested in this case, that cannot be the sole basis for the variance.

EZA Authorized to Grant Variances by Statute

{17} Apparently recognizing that the ordinance presents a severe obstacle to their position, Respondents argue that NMSA 1978, § 3–21–8 (1983), rather than the zoning ordinance, controls in this case and that it allows the EZA to grant variances based on the factors listed in that section. Essentially, therefore, Respondents contend the statute overrides the provisions of the local ordinance. Section 3–21–8(C) provides:

> When an appeal alleges that there is error in any order, requirement, decision or determination by an administrative official, commission or committee in the enforcement of Sections 3–21–1 through 3–21–14 NMSA 1978 or any ordinance, reso-

lution, rule or regulation adopted pursuant to these sections, the zoning authority by a majority vote of all its members may:

(1) authorize, in appropriate cases and subject to appropriate conditions and safeguards[,] variances from the terms of the zoning ordinance or resolution:

(a) which are not contrary to the public interest;

(b) where, owing to special conditions, a literal enforcement of the zoning ordinance will result in unnecessary hardship; and

(c) so that the spirit of the zoning ordinance is observed and substantial justice done; or

(2) in conformity with Sections 3-21-1 through 3-21-14 NMSA 1978:

(a) reverse any order, requirement, decision or determination of an administrative official, commission or committee;

(b) decide in favor of the appellant; or

(c) make any change in any order, requirement, decision or determination of an administrative official, commission or committee.

Respondents argue that, under the statute, the EZA was authorized to grant a variance from the zoning ordinance if: the variance was not contrary to the public interest, enforcement of the ordinance would result in unnecessary hardship, the spirit of the ordinance is observed, and substantial justice is done.

{18} If we accept Respondents' interpretation of the statute as listing requirements for the EZA to authorize variances, it is clear the requirements are less detailed and less restrictive than those under the ordinance. The general rule in such situations is that if an ordinance is more restrictive, it is effective, unless it conflicts with the statute. *Nat'l Adver. Co. v. Missouri State Highway & Transp. Comm'n,* 862 S.W.2d 953, 955 (Mo.Ct.App.1993) (holding ordinance may supplement a statute by requiring more; no preemption exists unless there is a conflict); *Von Lubken v. Hood River County,* 104 Or.App. 683, 803 P.2d 750, 752 (1990) (holding "counties may enact more restrictive standards for permitting uses ... than the statute requires"); *Cherokee Water & Sanitation Dist. v. El Paso County,* 770 P.2d 1339, 1341 (Colo.Ct.App.1988) (holding where neither purpose or effect of statute and regulation are inconsistent, regulation is not preempted by statute). In New Mexico, it is clear "[a]n ordinance may duplicate or complement statutory regulations." *City of Hobbs v. Biswell,* 81 N.M. 778, 781, 473 P.2d 917, 920 (Ct.App.1970). The zoning ordinance in this case is not necessarily invalid because it provides for greater restrictions than the statute. *Inc. County of Los Alamos v. Montoya,* 108 N.M. 361, 365, 772 P.2d 891, 895 (Ct.App.1989) (citing *Biswell*). The analysis to apply is "whether the stricter requirements of the ordinance conflict with state law, and whether the ordinance permits an act the general law prohibits, or prohibits an act the general law permits." *Id.*

{19} We find no conflict between the statute governing appeals of decisions enforcing ordinances and the ordinance in this case. The requirements in the ordinance do not permit an act the statute prohibits and do not prohibit an act the statute allows. *Id.* Section 3-21-8 takes into consideration unnecessary hardship to the applicant, public interest, substantial justice, and the spirit of the ordinance. The factors in the ordinance specifically address unnecessary hardship to the applicant, as well as the policies, purpose, and intent of the ordinance. In addition, the ordinance addresses the general welfare of the landowners and of the property. The statute sets out general goals to be achieved in granting variances, and the ordinance sets out more specific requirements for meeting those goals. We conclude that the ordinance and the statute do not conflict.

CONCLUSION

{20} We recognize the ordinance places some emphasis on values, such as culture and family continuity, discussed by Respondents

in their briefs. However, the EZA decision did not comply with the requirements of the ordinance. We reverse the decision to grant the variance. We reverse the EZA's decision to grant the variance and the district court's order affirming that decision.

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

WE CONCUR: M. CHRISTINA ARMIJO, Judge, JONATHAN B. SUTIN, Judge.

2002-NMCA-002

38 P.3d 181

Larry BACA, Worker–Appellant,

v.

COMPLETE DRYWALL COMPANY and USF & G Insurance Company, Employer/Insurer–Appellees.

No. 21,527.

Court of Appeals of New Mexico.

Nov. 8, 2001.

Certiorari Denied, No. 27,244, Jan. 7, 2002.

Luis Quintana, Albuquerque, NM, for Appellant.

Thomas R. Mack, Miller, Stratvert & Torgerson, P.A., Albuquerque, NM, for Appellees.

OPINION

FRY, Judge.

{1} In this appeal we address an issue of first impression: how long a worker can receive compensation benefits when one on-the-job injury gives rise to both (1) a disability resulting from an injury to a scheduled member pursuant to NMSA 1978, § 52–1–43 (1987), and (2) benefits paid for a permanent partial disability caused by an injury to a part of the body not covered by Section 52–1–43, *see* NMSA 1978, § 52–1–42 (1990). It is undisputed that all the disabilities are causally connected to the original on-the-job accidental injury. We hold that the number of weeks Worker received benefits for the disabilities caused by the scheduled injuries cannot be deducted from the number of weeks he is entitled to receive benefits for his permanent partial disability. Accordingly, we reverse.

BACKGROUND

{2} The facts are not in dispute. Larry Baca (Worker) was employed as a drywaller for Complete Drywall Company. Complete Drywall's workers' compensation carrier is USF & G. We refer to Complete Drywall and USF & G collectively as Respondents.

{3} In November 1992, Worker fell from a scaffold and fractured his left knee joint. He underwent three separate surgeries for this injury. The leg below the hip is a scheduled member. Section 52–1–43(A)(30). Respondents paid 108.85 weeks of temporary total disability (TTD) benefits as a result of the injury to the left knee. Once Worker reached maximum medical improvement (MMI), he became entitled to an additional 150 weeks of benefits based on a 50% impairment of his left knee. *See* Section 52–1–43(D). The parties agree that these benefits have been fully paid.

{4} The injury to Worker's left knee caused him to shift his weight to his right leg. Eventually, his right knee became symptomatic and required surgery. Respondents paid TTD benefits for the disability to the right knee for a total of 43.14 weeks. Following a formal hearing, the WCJ assessed a 20% loss of use of the right knee and awarded Worker scheduled injury benefits at the rate of 20% impairment for 150 weeks.

{5} Worker's knee problems required him to use crutches and canes while walking. As a result, in December 1997 he began to develop problems with his hands, arms, and shoulders as a result. The shoulders are not scheduled members. Respondents initially denied compensation for these complaints. However, following a mediation, Respondents began paying TTD benefits retroactive to April 24, 1998, the date of Worker's surgery

on his torn right rotator cuff. When Respondents began paying these TTD benefits, they ceased paying the scheduled injury benefits for the right knee. Consequently, for the right knee, Worker has received a total of 78.71 weeks of scheduled injury benefits at the rate of 20%.

{6} Worker eventually had surgery on his left shoulder as well and reached MMI from that surgery on March 23, 1999. At that point, his treating physician assessed an impairment to Worker's whole body. However, neither party was aware of the MMI date until December 1999. Thus, Respondents paid TTD benefits for the shoulder injuries from April 24, 1998, to December 20, 1999. On December 20, 1999, Respondents stopped paying disability benefits. Worker filed a claim for further benefits.

{7} Prior to the formal hearing, the parties stipulated that Worker had received the following benefits:

TTD for the left knee	108.85	weeks
Scheduled injury benefits for the left knee	150	weeks
TTD for the right knee	43.14	weeks
Scheduled injury benefits for the right knee	78.71	weeks

Thus, Worker had received benefits for the disability caused by the scheduled injuries for a total of 380.7 weeks. The parties also stipulated that Worker's percentage of permanent partial disability was 51%. This percentage was based on the disability to both shoulders and to the right knee.

{8} At the formal hearing, Worker argued that he had sustained four separate injuries: an injury to the left knee, an injury to the right knee, an injury to the left shoulder and an injury to the right shoulder. Worker argued that benefits had been fully paid for the left knee, except to the extent that Worker might become entitled to additional periods of TTD when it became necessary to completely replace that knee joint at some time in the future.

{9} Worker further argued that he first became entitled to benefits for a permanent partial disability (PPD) under Section 52–1–42 when he had the first shoulder surgery in April 1998. At that point, according to Worker, he became entitled to a maximum of 500 weeks of temporary total and permanent partial disability benefits for the whole body impairment. *See* Section 52–1–42(A)(2) (providing that a worker is entitled to receive permanent partial disability benefits for a maximum of 500 weeks if the permanent partial disability is less than 80%); Section 52–1–42(B) (providing that the 500 weeks includes the weeks for which TTD benefits were paid prior to a determination of permanent partial disability). However, Worker agreed that because the right knee was included in determining the 51% PPD percentage, Respondents should receive a week for week credit for all the weeks that benefits were paid for the right knee. In addition, Worker acknowledged that the TTD payments that began at the time of his first shoulder surgery were also included in the 500 weeks of maximum benefits. Thus, Worker agreed that Respondents had, in effect, already paid 249 out of the total 500 weeks of benefits. However, according to Worker's calculations, he was still owed an additional 251 weeks of PPD benefits at the rate of 51%.

{10} Worker argued that Section 52–1–42, the permanent partial disability section, excluded benefits paid under Section 52–1–43, the scheduled injury section. Respondents took the position that scheduled injuries were simply a "type" or "subset" of the benefits payable for permanent partial disability. Respondents argued that because there was no second on-the-job injury in this case, there was only one period during which benefits were owed and that was the 500 week period that applied to benefits for a permanent partial disability of less than 80%. According to Respondents, the period to which Worker was entitled to benefits began on the date he fell and fractured his knee and ran for 500 weeks. Respondents recognized that NMSA 1978, § 52–1–56 (1989), allowed reopening of the case when the Worker's condition changed, but argued that reopening did not "restart" the 500 week benefit period. Respondents also acknowledged that Section 52–1–43(D) provided a 700 week maximum period of benefits for a scheduled injury, but argued that this was only an authorization of additional TTD benefits for a scheduled injury.

{11} The WCJ agreed with Respondents' reading of the statutes. He added up the weeks during which Worker had received benefits and subtracted that figure from the 500 weeks available for PPD. According to the WCJ's calculations, Worker was only entitled to receive an additional 71.59 weeks of PPD benefits for the bilateral shoulder condition. In addition, after considering the dollar amount of the compensation that had been paid and was payable for all three disabilities, the WCJ determined that the inadvertent overpayment of TTD benefits had created an overpayment in a specific amount. This appeal followed.

DISCUSSION

{12} The issues in this case are essentially issues of statutory construction. The meaning and construction of a statute is an issue of law that is reviewed de novo on appeal. *Romero Excavation & Trucking, Inc. v. Bradley Constr., Inc.*, 1996–NMSC–010, ¶ 5, 121 N.M. 471, 913 P.2d 659. This Court is not required to defer to the WCJ's interpretation of Sections 52–1–42 and 52–1–43. *Chavez v. Mountain States Constructors*, 1996–NMSC–070, ¶ 21, 122 N.M. 579, 929 P.2d 971.

{13} The critical question is the application of Sections 52–1–42 and 52–1–43 to the facts of this case. The rules of statutory construction are well-settled. "[The] primary goal is to give effect to the intent of the legislature." *Draper v. Mountain States Mut. Cas. Co.*, 116 N.M. 775, 777, 867 P.2d 1157, 1159 (1994). Initially, we examine the language of the statute, giving the words their ordinary meanings. *Id.* When the sections are part of a larger act, like the Workers' Compensation Act, "[w]e examine the act in its entirety, construing each section in connection with every other section." *Id.* We have previously held that the provisions of the Workers' Compensation Act dealing with permanent total disability, permanent partial disability, and scheduled injuries should be considered together to produce a harmonious whole. *Witcher v. Capitan Drilling Co.*, 84 N.M. 369, 372, 503 P.2d 652, 655 (Ct.App. 1972). However, in considering them together, we are required to give effect to all the language in each of those sections. *Id.; see also Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998–NMSC–020, ¶ 28, 125 N.M. 401, 962 P.2d 1236 ("Statutes must be construed so that no part of the statute is rendered surplusage or superfluous." (internal quotation marks and citation omitted)).

{14} On appeal, Worker contends that the disabilities caused by the two scheduled injuries are separate and distinct from the permanent partial disability caused by the bilateral shoulder conditions. Thus, he argues that the weeks he received benefits pursuant to the scheduled injury section were not part of the 500 weeks of benefits he is entitled to receive for his permanent partial disability. Respondents counter that it is the accident that triggers the entitlement to benefits. They argue that scheduled injuries are simply a special kind of permanent partial disability; therefore, the weeks that Worker received benefits for the disabilities caused by the injuries to his knees should be deducted from the 500 weeks that Worker would be entitled to receive PPD benefits for the disability resulting from his bilateral shoulder condition.

{15} We disagree with Respondents. It is the disability caused by the accident—not the accident itself—that triggers liability for compensation benefits. *Salinas–Kendrick v. Mario Esparza Law Office*, 118 N.M. 164, 165–66, 879 P.2d 796, 797–98 (Ct.App.1994); *Strickland v. Coca–Cola Bottling Co.*, 107 N.M. 500, 502, 760 P.2d 793, 795 (Ct.App.1988). Generally, a worker becomes disabled on the day the accident occurs. That was the case with the disability to Worker's left knee. However, when there is a delay between the accident and the resulting disability, as occurred with Worker's right knee and the bilateral shoulder condition, entitlement to compensation begins on the date of the disability rather than the date of the accident. *Salinas–Kendrick*, 118 N.M. at 165–66, 879 P.2d at 797–98; *Strickland*, 107 N.M. at 502, 760 P.2d at 795. This conclusion is consistent with the statutory requirement that, in order to establish a right to compensation, a worker must show "(1) . . . the worker has sustained an accidental injury arising out of and in the course of his employment; (2) . . . the accident was

reasonably incident to his employment; and (3) ... *[the] disability is a natural and direct result of the accident.*" NMSA 1978, § 52-1-28(A) (1987) (emphasis added).

{16} Respondents argued below that because there was only one work-related accident—the fall from the scaffold—there was only one benefit period. Respondents confuse the concepts of a work-related accidental injury, an injury in general, and a disability. We agree with Respondents that in order to be entitled to compensation, a worker must prove that he suffered an on-the-job accidental injury. Frequently, the injury will occur suddenly like Worker's fall from the scaffold. However, an injury may also be a gradual breakdown of a part of the body. *Lyon v. Catron County Comm'rs,* 81 N.M. 120, 125, 464 P.2d 410, 415 (Ct.App. 1969). Worker's right knee and his shoulders appear to have gradually broken down. Worker does not have to show that these delayed injuries occurred while he was working. Instead, he must show that the resulting disability is causally connected to the original accidental injury-the fall that fractured his left knee.

{17} The distinction is illustrated by *Aragon v. State of N.M. Corr. Dep't,* 113 N.M. 176, 824 P.2d 316 (Ct.App.1991). The worker in that case suffered a herniated L5 S1 disk as a result of an on-the-job accident for which he received benefits. He ultimately recovered and returned to work without restrictions. Five years later, the worker injured his back a second time while working on his personal vehicle in his garage. He argued that this was an aggravation of his original back injury. However, the WCJ found that the disability caused by the worker's second back injury was not a natural or direct progression of the original injury. We affirmed the ruling on appeal, holding:

> Under our interpretation of the statute, a worker is entitled to benefits for disability arising immediately from a work-related accident and for disability that develops later as a result of the normal activities of life.

Id., at 179, 824 P.2d at 319.

{18} Similarly, in *Gomez v. Bernalillo County Clerk's Office,* 118 N.M. 449, 882 P.2d 40 (Ct.App.1994), the worker fell at work, fracturing her left wrist and shattering her right elbow. About three months later, she fell at home and injured her shoulder. She sought additional benefits for the disabilities caused by the shoulder injury. The WCJ denied benefits, finding that disabilities arising out of the second fall were not compensable. We affirmed, holding that the shoulder condition was the result of an accidental fall at home that was not caused by the disability to the left wrist and right elbow.

{19} In contrast to *Aragon* and *Gomez,* there is no dispute in the present case that Worker's subsequent bilateral shoulder condition resulted from the progression of Worker's original injury. Therefore, Worker suffered multiple disabilities from one on-the-job accidental injury.

{20} Respondents also argued below that benefits for disabilities resulting from scheduled injuries are simply a special form of benefits for permanent partial disabilities. This argument ignores case law concerning the difference between the two concepts. Although many of the cases on the issue were decided under the law as it existed prior to 1990, their discussions of the scheduled injury section remain viable today. Under the law at that time:

> The scheduled injury section does not take into consideration the occupation of the worker and how the loss of the specific member of the body may affect his or her ability to perform the duties of his or her job. The schedule, for example, awards the same benefit to a piano player as to a night watchman for the loss of a finger, hand or arm.

Hise Constr. v. Candelaria, 98 N.M. 759, 760, 652 P.2d 1210, 1211 (1982). Thus, a worker could receive scheduled injury benefits even if he was not "disabled," as that term was defined under prior law.

{21} On the other hand, a worker was entitled to permanent partial disability benefits instead of scheduled injury benefits if the worker could show that the injury to the scheduled member caused a separate and distinct injury to a non-scheduled body part. *Id.; see also Jurado v. Levi Strauss & Co.,*

120 N.M. 801, 804, 907 P.2d 205, 208 (Ct.App. 1995). Moreover, if the injury to the scheduled member left the worker totally disabled as defined by the Act, he was entitled to benefits for total disability even though he could not show that the injury to the scheduled member caused a separate and distinct injury to a non-scheduled body part. *Witcher,* 84 N.M. at 371–73, 503 P.2d at 654–56; *Hise Constr.,* 98 N.M. at 760, 652 P.2d at 1211. Thus, we agree with Worker that disabilities caused by scheduled injuries and disabilities caused by injuries to non-scheduled members are separate and distinct concepts.

{22} We now examine the statutes defining each type of disability. Permanent partial disability is defined and the degree of disability is calculated pursuant to NMSA 1978, §§ 52–1–26 (1987, as amended through 1990), –26.1 (1990), –26.2 (1990, as amended through 2001), –26.3 (1990, as amended through 2001) and –26.4 (1990). The amount and duration of benefits payable for permanent partial disability is defined by Section 52–1–42:

> A. For permanent partial disability, the workers' compensation benefits not specifically provided for in Section 52–1–43 NMSA 1978 shall be a percentage of the weekly benefit payable for total disability as provided in Section 52–1–41 NMSA 1978. The percentage of permanent partial disability shall be determined pursuant to the provisions of Sections 52–1–26 through 52–1–26.4 NMSA 1978.

Subsection A then goes on to provide a different duration of benefits for each of the following: (1) permanent partial disability of 80% or more; (2) permanent partial disability of less than 80%; (3) permanent partial disability as the result of a primary mental impairment; and (4) permanent partial disability as the result of a secondary mental impairment. In this case, Worker is 51% permanently partially disabled and therefore is entitled to a maximum benefit period of 500 weeks. In addition, Section 52–1–42(B) explicitly provides for the treatment of temporary total disability benefits as follows:

> B. If an injured worker receives temporary total disability benefits prior to an award of partial disability benefits, the maximum period for partial disability benefits shall be reduced by the number of weeks the worker actually receives temporary total disability benefits.

{23} Benefits for disabilities caused by injuries to specific body members, commonly referred to as scheduled injuries, and the amount and duration of those benefits are set out in Section 52–1–43:

> A. For disability resulting from an accidental injury to specific body members, including the loss or loss of use thereof, the worker shall receive the weekly maximum and minimum compensation for disability as provided in Section 52–1–41 NMSA 1978....

Subsection 52–1–43(A) goes on to list forty-three distinct injuries to specific body members or functions and states the number of weeks that compensation shall be paid for each. The statute also provides that benefits for partial loss of use "shall [be] computed on the basis of the degree of such partial loss of use." Section 52–1–43(B). In addition, Section 52–1–43(D) provides that temporary total disability benefits may be paid for a disability caused by injury to a scheduled member *in addition to* the weeks for which benefits are to be paid for under Subsections 52–1–43(A) and (B), up to a maximum of 700 weeks. The longest duration of benefits for a scheduled injury contemplated by Subsections 52–1–43(A) and (B) is 200 weeks. Therefore, a worker could conceivably receive 500 or more weeks of TTD benefits in addition to his scheduled injury benefits for disability resulting from injury to a scheduled member.

{24} It is clear that the Act treats scheduled injury benefits and PPD benefits differently. Contrary to Respondents' contention, the statutes do not define the duration and amount of benefits for a particular accident; they define the duration and amount of benefits for a particular type of disability that is causally connected to a work-related accident. Section 52–1–42 provides the amount and duration of benefits for a partial disability as defined in Sections 52–1–26 through 26.4. It explicitly excepts from its purview disabilities covered by Section 52–1–43. Sec-

tion 52–1–43 provides the amount and duration of benefits for disabilities caused by injuries to specific body members or functions. Each section addresses the effect of temporary total disability payments for such disabilities on the duration of the benefits provided for that disability. Nothing in the language of either statute indicates that benefits under Section 52–1–43 are somehow part of the benefits payable under Section 52–1–42. On the contrary, each section provides for the duration of benefits for the type of disability covered by that section.

{25} Respondents argue that the weeks of TTD benefits paid in connection with both of Worker's scheduled injuries ought to be deducted from the weeks of PPD benefits payable for the disability caused by the bilateral shoulder condition. Respondents base this argument on the language in Section 52–1–42(B) which provides that payments of temporary total disability "prior to" an award of permanent partial disability shall be included in the 500 weeks of benefits for a permanent partial disability. However, the scheduled injuries section and the permanent partial disability section each address separately the extent to which TTD benefits are to be included in determining the duration of the respective benefits. We see no reason to include the weeks of TTD received in connection with a scheduled injury in calculating the weeks that a worker may receive permanent partial disability benefits.

{26} Respondents argued below that the interpretation we adopt today will, in effect, restart the period during which benefits are to be paid every time a condition is aggravated. We emphasize that this is not the intended effect of our ruling. This case does not involve an aggravation of the condition of Worker's left knee; it involves a disability to the left knee that subsequently caused a disability to the right knee and later a permanent partial disability based on injuries to the shoulders.

CONCLUSION

{27} In summary, we reverse the compensation order. We remand for entry of an order awarding Worker an additional 251 weeks of permanent partial disability benefits at the rate of 51%. In addition, on remand, the WCJ shall determine the amount of fees to be awarded to Worker for the services of his attorney in connection with this appeal.

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

WE CONCUR: A. JOSEPH ALARID, Judge, JAMES J. WECHSLER, Judge.

2002-NMCA-001

38 P.3d 187

Frieda PADILLA, Plaintiff–Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant–Appellee.

No. 21,222.

Court of Appeals of New Mexico.

Nov. 16, 2001.

Certiorari Granted, No. 27,258, Jan. 7, 2002.

Dennis P. Murphy, Montoya, Murphy & Garcia, LLP, Santa Fe, NM, for Appellant.

Katherine W. Hall, Miller, Stratvert & Torgerson, P.A., Santa Fe, NM, for Appellee.

OPINION

ALARID, Judge.

{1} This case presents the issue of whether the public policy of New Mexico precludes the enforcement of an "escape hatch" arbitration provision found in an uninsured motorist endorsement. The district court viewed the Supreme Court's decision in *Bruch v. CNA Ins. Co.,* 117 N.M. 211, 213, 870 P.2d 749, 751 (1994), as controlling; and, applying *Bruch,* upheld the provision. We find *Bruch* to be distinguishable. We conclude that on the facts of this case the public policies underlying the uninsured motorist statute and the Uniform Arbitration Act collectively outweigh the public policy favoring freedom of contract; accordingly, we hold that the escape hatch arbitration provision at issue is unenforceable.

BACKGROUND

{2} Plaintiff Frieda Padilla, (Padilla) is insured under four automobile insurance policies issued by Defendant, State Farm Mutual Automobile Insurance Company (State Farm). Padilla was injured in an automobile accident on April 26, 1996. Padilla sued the tortfeasor. With State Farm's consent, Padilla settled the suit against the tortfeasor for $25,000, the limits of the tortfeasor's liability policy. Padilla then filed a claim under her under-insured motorist policies.

{3} Padilla's policies with State Farm covered four vehicles and provided uninsured/under-insured motorist coverage of $25,000 per person, $50,000 per collision.

Padilla paid separate premiums for each vehicle for uninsured/under-insured motorist coverage. Padilla sought $70,000 in under-insured motorist benefits from State Farm. Padilla calculated the $70,000 figure by stacking the four $25,000 coverages and then setting off the $25,000 recovered from the tortfeasor and the $5,000 in medical benefits paid by State Farm.

{4} The uninsured motorist endorsement to State Farm's policy contains the following arbitration clause:

> If there is no agreement [as to the insured's entitlement to damages and the amount of damages], these questions shall be decided by arbitration upon written request of the insured or us. Each party shall select a competent and impartial arbitrator. These two shall select a third one.... The written decision of any two arbitrators shall be binding on each party *when the amount of an award for damages does not exceed the limits of the Financial Responsibility law of New Mexico. When any award for damages exceeds these limits, either party has a right to trial on all issues in the proper court.*

(Emphasis in original omitted; emphasis added).

{5} Padilla filed a complaint in the Santa Fe County District Court seeking a declaration that the arbitration clause in State Farm's policy is unenforceable to the extent it provides for non-binding arbitration of awards in excess of the minimum statutory limits of uninsured/under-insured coverage. Padilla asserted that State Farm's arbitration clause conflicted with the following arbitration clause promulgated by the superintendent of insurance.

> **Arbitration.** If any person making a claim [under this endorsement] and the company do not agree that [the] person is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle ... or do not agree as to the amount payable [under the endorsement], then each party shall, upon written demand of either, select a competent and disinterested arbitrator. The two arbitrators so named shall select a third arbitrator.... The arbitrators shall then hear and determine the question or questions so in dispute, and the decision in writing of any two arbitrators *shall be binding upon the insured and the company.*

13 NMAC 12.3.17.8.1 (1997) (emphasis added). In addition to declaratory relief, Padilla requested that her policies be reformed to provide for binding arbitration.

{6} Padilla and State Farm filed cross-motions for summary judgment. State Farm argued that, in *Bruch,* the Supreme Court had validated the type of arbitration clause contained in State Farm's policy. Padilla distinguished *Bruch* on the grounds that the effect of the superintendent's mandatory binding arbitration clause had not been briefed in *Bruch.* Padilla also argued that State Farm's arbitration clause conflicted with a provision of the Unfair Claims Practices Act, NMSA 1978, § 59A–16–20(K) (1997). Padilla argued that this issue also had not been briefed in *Bruch.*

{7} The district court denied Padilla's motion and granted summary judgment in favor of State Farm. The district court explained that it felt itself bound by *Bruch:*

> Our Supreme Court has already had occasion to pass upon the validity of an identical provision in the matter of *Bruch v. CNA,* 117 N.M. 211, 870 P.2d 749 (1994). There, the court held that the clause allowing for a trial de novo did not violate public policy.
>
> Plaintiff argues that the Supreme Court, in deciding *Bruch,* did not take into account regulations issued by the Superintendent of Insurance. But such regulations are accorded the force of law. *Romero v. Dairyland Ins. Co.,* 111 N.M. 154, 803 P.2d 243 (1990). It is not at all likely that the Supreme Court somehow forgot that legislatively authorized rules and regulations have the force of law when it stated, in *Bruch,* that the provision at issue was not repugnant to public policy "as manifest in positive law." The only reasonable reading of *Bruch* is to assume that the Supreme Court knew what it was talking about. Any other view would be heresy, at least for a district court.

DISCUSSION

{8} Although this case came before the district court on cross-motions for summary judgment, we do not view this as a "genuine issues" case. Rather, this is a case in which the operative facts are not in dispute. In this type of case, "the district court determines as a matter of law which movant is entitled to summary judgment." (internal citation and quotation marks omitted). *Gunaji v. Macias,* 2001–NMSC–028, ¶ 8, 130 N.M. 734, 31 P.3d 1008. We therefore review the district court's ruling under a de novo standard. *Id.*

{9} Padilla argues that, contrary to the district court's reasoning, *Bruch* is not authority for propositions that were not considered by the Supreme Court. We agree. *Bruch* held that the public policies manifested in the Uniform Arbitration Act are not offended by an arbitration provision providing for a trial de novo in a court of law if an arbitration award exceeds a certain amount. *Bruch* recognized that, because arbitration is a matter of contract, the parties to a contract providing for arbitration ordinarily may define for themselves the circumstances under which arbitration will be binding. The Supreme Court made absolutely no mention of the arguments, now asserted by Padilla, that an arbitration provision providing for nonbinding arbitration where the insured recovers more than the minimum limit of uninsured motorist coverage violates the superintendent's regulations or the Unfair Claims Practices Act, or is otherwise contrary to the public policy manifested in the uninsured motorist statute. The Supreme Court did not discuss any of the cases to which Padilla refers us, such as *Mendes v. Auto. Ins. Co. of Hartford,* 212 Conn. 652, 563 A.2d 695, 699 (1989), which have held escape hatch arbitration provisions to be unenforceable.

{10} State Farm argues that we should presume that, in *Bruch,* the Supreme Court canvassed every conceivable source of public policy bearing upon the arbitration provision at issue in that case, regardless of whether the source of public policy was called to the Supreme Court's attention. We find no indication that the Supreme Court considered the arguments now presented by Padilla. We therefore apply the established rule that "cases are not authority for propositions not considered," and hold that *Bruch* does not necessarily control the outcome of the present case. *Fernandez v. Farmers Ins. Co.,* 115 N.M. 622, 627, 857 P.2d 22, 27 (1993); *Ramirez v. Dawson Prod. Partners, Inc.,* 2000–NMCA–011, ¶ 10, 128 N.M. 601, 995 P.2d 1043.

{11} Arbitration was adopted as a means of dispute resolution early on in the development of uninsured motorist coverage in large part as a response to the inherent conflict of interest created by the coupling of liability coverage with uninsured motorist coverage:

> Uninsured motorist insurance is sold as a package with liability insurance. Although arbitration has not been universally accepted for disputes between insurer and insured in the liability insurance area, the unique nature of uninsured motorist coverage may best explain why arbitration is used in uninsured motorist cases and not elsewhere.
>
> The basic reason why arbitration is appropriate in uninsured motorist disputes involves the inherent conflicts between insurer and insured. Contrary to the liability insurance situation, in which the insurer defends its own insured against allegations of negligence in order to avoid making payment to a third party, the insurer in this situation is trying to avoid liability to its own insured. This can be accomplished by showing ... that ... the uninsured motorist was not negligent or that the insured was negligent. In other words, in an uninsured motorist situation, the insurance company is placed in the position of defending the uninsured motorist against its own insured.

3 Eileen Swarbrick, *No–Fault and Uninsured Motorist Automobile Insurance,* § 28.00 at 28–3 to –5 (1997). The solution chosen by the insurance industry was to separate the forums in which the respective disputes between insured and insurer and insured and third-party are heard: the dispute between insured and insurer was relegated by contract to binding arbitration, leaving the dispute between the insured and the third-party subject to judicial resolution.

Id.; see also Charles A. Shaw, Comment, *Uninsured Motorist Arbitration,* 3 N.M.L.Rev. 220, 221–22 (1973) (hereafter "Shaw"); Gerald Aksen, *Arbitration of Automobile Accident Cases,* 1 Conn. L.Rev. 70, 78 (1968); 2 Alan I. Widiss, *Uninsured and Underinsured Motorist Insurance,* § 22.3 at 143–44 (2d ed.1987).

{12} Shortly after the enactment of the uninsured motorist statute in 1967, the superintendent of insurance promulgated regulations governing uninsured motorist endorsements. N.M. Dept. of Ins. Regulations Governing Insurance against Uninsured and Unknown Motorists, Art. 24, ch. 64, Rule I (Filed with the New Mexico Records Center as ID 67–2, December 1, 1967). These regulations required every endorsement to include a standard arbitration provision providing for binding arbitration of the issues of liability and damages. *Id.,* § 24–1–2, ¶ 8. The superintendent's regulations governing uninsured and unknown motorist coverage were re-promulgated on July 1, 1997,[1] and are now codified at 13 NMAC §§ 12.3.1 through 17.11 (1997).

{13} In 1969, the Legislature enacted NMSA 1953, § 64–24–107 (1969), which provided for de novo appeals from arbitration awards. We do not understand this statute as reflecting legislative disapproval of binding arbitration; rather, as the Supreme Court explained in *Dairyland Ins. Co. v. Rose,* Section 64–24–107 was enacted at a time when

> [i]t was generally assumed that an arbitration clause in an uninsured motorist policy [providing for binding arbitration] would be held unenforceable [under the general arbitration statute, NMSA 1953, §§ 22–3–1 through 22–3–8 (1859)] because the disputes which would arise would not be present or existing controversies at the time of the signing of the policy, but would instead be future disputes.

92 N.M. 527, 530, 591 P.2d 281, 284 (1979). *See also* Shaw, *supra,* at 223; Alan I. Widiss, *A Guide to Uninsured Motorist Coverage* §§ 6.1 to 6.16 (1969). The de novo review statute was thought to remove any public policy objection to arbitration of uninsured motorist disputes. Shaw, *supra,* at 225.

{14} In *Dairyland,* the Supreme Court held that Section 64–24–107 was repealed by implication by the Legislature's enactment of the Uniform Arbitration Act. *Dairyland,* 92 N.M. at 530, 591 P.2d at 284. State Farm argues that "[i]f the statutory arbitration provision was superceded by the Uniform Arbitration Act, then surely any Department of Insurance regulation promulgated pursuant to the [uninsured motorist] statute was also superceded by the Uniform Arbitration Act." State Farm's argument is sufficient to direct our attention to the controlling legal principle: the repeal of a law repealing an even earlier law does not revive the first law. NMSA 1978, § 12–2–6 (1912). Although Section 12–2–6 expressly applies to "acts," we have recognized that rules of construction applicable to statutes may be applied to rules having the force and effect of law. *Costain v. Regulation & Licensing Dep't,* 1999–NMCA–119, ¶ 7, 128 N.M. 68, 989 P.2d 443. The superintendent's regulation requiring uninsured motorist endorsements to provide for binding arbitration was invalidated by the 1969 act providing for de novo appeals from arbitration awards. Even though the 1969 act was impliedly repealed by the enactment of the Uniform Arbitration Act, the implied repeal of the 1969 act did not revive the superintendent's regulation. Thus, from the effective date of the 1969 act until July 1, 1997, when the regulation was once again promulgated, New Mexico law did not require uninsured motorist endorsements to include a provision for binding arbitration. It appears from the record on appeal that all four of Padilla's policies were issued subsequent to the enactment of Section 64–24–107, but prior to the 1997 re-promulgation of the superintendent's regulations. At the time that Padilla's policies were issued, no regulation mandating binding arbitration was in effect. We therefore reject Padilla's argument that her policies incorporated the superintendent's regulation requiring binding

1. Pursuant to NMSA 1978, § 14–4–7.2(B) (1995), all rule-making agencies were required to "revise, restate and re-promulgate their existing rules as needed to expedite publication of the New Mexico Administrative Code."

arbitration, rendering State Farm's escape hatch arbitration provision void, unenforceable, and subject to reformation.

{15} As we have noted above, the Supreme Court held in *Bruch* that the public policy favoring arbitration does not preclude parties from contracting for non-binding arbitration, even though such provisions inevitably sacrifice many of the benefits of arbitration in order to further freedom of contract. The Supreme Court in its opinion in *Bruch* did not discuss the public policy underlying the uninsured motorist insurance statute and whether the remedial goals of the uninsured motorist statute would be undermined by non-binding arbitration, nor did the Supreme Court discuss the policies underlying Section 59A-16-20(K), which makes it unlawful for an insurer to engage in a practice of appealing from arbitration awards favorable to insureds for the purpose of compelling insureds to accept settlements in an amount less than awarded in arbitration. The present case requires us to address these issues.

{16} We interpret our uninsured motorist statute to protect the insured and to effectuate the remedial purpose of the statute. *Romero v. Dairyland Ins. Co.*, 111 N.M. 154, 156, 803 P.2d 243, 245 (1990). In *Sandoval v. Valdez*, 91 N.M. 705, 707, 580 P.2d 131, 133 (Ct.App.1978), we held that as a matter of public policy a contractual one-year time-to-sue provision in an uninsured motorist endorsement could not be enforced to deny the insured the benefit of a longer statute of limitations. We rejected the insurer's argument that the time-to-sue provision was "a purely contractual matter," noting that "contractual restrictions are void where they ... conflict with a statute granting uninsured motorist coverage." *Id.* at 708, 580 P.2d at 134.

{17} To the extent an insured incurs litigation costs in order to obtain the benefits of uninsured motorist coverage, the value of such coverage is diluted. *Huizar v. Allstate Ins. Co.*, 952 P.2d 342, 348 (Colo.1998). Escape hatch provisions such as that adopted by State Farm subject the insured to costly sequential litigation in order to obtain benefits over the minimum limits required by the Financial Responsibility law. If the insured does not engage in all-out litigation in the arbitration, the insured runs the risk of an award at or below the minimum statutory limit, which under State Farm's endorsement binds the insured. If the insured succeeds, and recovers an amount over the minimum statutory limit, he or she faces a trial de novo on all issues, including the issues of the tortfeasor's liability and the insured's entitlement to damages *within* the limits of the Financial Responsibility law of New Mexico. Even if the insured prevails at both stages, State Farm's arbitration provision delays the receipt of benefits.

{18} State Farm's escape hatch arbitration provision exacerbates the conflict of interest between the insurer and insured created by the statutory coupling of liability insurance with uninsured motorist coverage. In *Silva v. State*, 106 N.M. 472, 476, 745 P.2d 380, 384 (1987), the Supreme Court abandoned mutuality as a prerequisite to application of collateral estoppel. In view of *Silva's* abandonment of mutuality, an unfavorable decision in the dispute with the insurer may support collateral estoppel against the insured in subsequent litigation with the uninsured motorist. State Farm's escape hatch arbitration provision forces its insured to run the gauntlet of collateral estoppel, not once, but twice.

{19} Further, the Supreme Court's freedom of contract analysis in *Bruch* proceeded on the assumption that the inclusion of an escape hatch arbitration provision is the result of a mutual agreement between insureds and insurers. *Bruch*, 117 N.M. at 213, 870 P.2d at 751. Subsequent to *Bruch*, this Court has considered escape hatch provisions in two decisions: *Allstate Ins. Co. v. Perea*, 2000-NMCA-070, ¶ 11, 129 N.M. 364, 8 P.3d 166, and the present case. It now appears that at least three insurance companies doing business in New Mexico—CNA, Allstate, and State Farm—are employing escape hatch provisions in their uninsured motorist endorsements. Cases from other jurisdictions indicate that escape hatch arbitration provisions have become widespread throughout the United States. *See generally* 15 *Couch on Ins.* § 214:17 (3d. ed.) (collecting cases). Thus, these provisions have taken on aspects of contracts of adhesion in which the insured

has no meaningful choice if she wishes to exercise her statutory right to purchase uninsured motorist coverage. *See Estep v. State Farm Mut. Auto. Ins. Co.*, 103 N.M. 105, 109, 703 P.2d 882, 886 (1985) (suggesting that in consumer insurance transactions "to say there is freedom of contract 'is to ignore reality' "). *Bruch's* freedom of contract analysis depended on assumptions about choices available to insureds whose validity can no longer be accepted without question.[2]

{20} *Bruch* held that the policies underlying the Uniform Arbitration Act did not, *of themselves*, outweigh the interest in freedom of contract. We conclude that public policy, as manifested in our uninsured motorist statute, distinguishes the present case from *Bruch*. Here, public policy as manifested in *both* our uninsured motorist statute *and* the Uniform Arbitration Act must be balanced against the insurer's interest in enforcing its non-binding arbitration provision. We conclude that the interests of insureds discussed above outweigh any interest State Farm may have in enforcing its non-binding arbitration provision as written. We hold, therefore, that notwithstanding the policy provision providing for de novo judicial review, an insured may enforce an arbitration award of uninsured/under-insured motorist benefits to the extent of the

> minimum limits for bodily injury or death and for injury to or destruction of property as set forth in [the Mandatory Financial Responsibility Act] and such higher limits as may be desired by the insured, but up to the limits of liability specified in bodily injury and property damage liability provisions of the insured's policy.

NMSA 1978, § 66–5–301(A) (1983). This reformation of the arbitration provision of State Farm's uninsured/under-insured motorist endorsement is necessary to avoid dilution of the benefits conferred by our uninsured motorist statute.

{21} In the present case, Padilla claims entitlement to benefits in excess of the "limits of the Financial Responsibility law of New Mexico," pursuant to the judicial doctrine of stacking, not because she purchased higher limits on any single policy. *See Perea*, 2000–NMCA–070, ¶ 11, 129 N.M. 364, 8 P.3d 166. Under *Perea*, the term "the limits of the Financial Responsibility law of New Mexico" employed in State Farm's arbitration provision refers to $25,000, the minimum amount of liability coverage required by NMSA 1978, § 66–5–208(A) (1978), rather than the amount available by stacking the limits of the uninsured motorist coverages of Padilla's four policies. *Perea*, 2000–NMCA–070, ¶ 19, 129 N.M. 364, 8 P.3d 166. Should the arbitrators award Padilla damages in excess of $25,000, State Farm may exercise its contractual right to "trial on all issues." However, pursuant to NMSA 1978, § 44–7–11 (1971), Padilla may apply for judicial confirmation of the award to the extent of $25,000, together with such costs and fees as may be allowable, regardless of State Farm's decision to seek a trial de novo. Upon confirmation of the award, Padilla may enforce the judgment and may assert the judgment to collaterally estop State Farm from relitigating the uninsured/under-insured motorist's liability and Padilla's entitlement to $25,000 in damages. *See* NMSA 1978, § 44–7–14 (1971) (judgment upon order confirming arbitration award "shall ... be enforced as any other judgment").

{22} We reject Padilla's argument that we should invalidate State Farm's arbitration provision as violative of Section 59A–16–20(K). Section 59A–16–20(K) prohibits insurers from engaging in a general business practice of "making known to insureds or claimants a practice ... of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration." The Superior Court of Pennsylvania has noted in the context of a statute similar to Section 59A–16–20(K) and an arbitration provision similar to State Farm's that:

2. *Bruch* itself is to some extent responsible for this change in circumstances. *Bruch* was decided on February 23, 1994. The record contains an October 14, 1994, letter from State Farm to the superintendent of insurance stating "[i]n response to the Supreme Court Case [sic] of *Bruch v. CNA Insurance Company*, we revised our arbitration provision to state that there is a right to a trial when an award exceeds the Financial Responsibility limits."

> By including the relevant clause in their policies, appellee has created a standardized threat. Any time a claimant or insured obtains any type of substantial arbitration award, he is faced with re-litigating all the issues at a trial.... The clause can be used to intimidate claimants and insureds into accepting less than the amount awarded in arbitration by confronting them with a possible trial.

Zak v. Prudential Prop. & Cas. Ins. Co., 713 A.2d 681, 684–85 (Pa.Super.Ct.1998). While we agree with the Pennsylvania Superior Court that this type of escape hatch arbitration provision has considerable potential for abuse, we have not been provided with any information as to how it is being employed by State Farm, and, therefore, we are unwilling to hold that the mere inclusion of such a provision in a policy violates the public policy manifested by Section 59A–16–20(K) as a matter of law.

CONCLUSION

{23} The district court's order granting summary judgment in State Farm's favor is reversed and this case is remanded for entry of a decree granting Padilla relief consistent with this opinion.

{24} We deny Padilla's request for attorney's fees pursuant to NMSA 1978, § 39–2–1 (1977). Costs of this appeal shall be taxed as provided in Rule 12–403 NMRA 2001.

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

WE CONCUR: MICHAEL D. BUSTAMANTE, Judge, and CYNTHIA A. FRY, Judge.

2002-NMCA-006

38 P.3d 194

STATE of New Mexico, Plaintiff–Appellee,

v.

Kristi LIHOSIT, Defendant–Appellant.

No. 21,996.

Court of Appeals of New Mexico.

Nov. 29, 2001.

Certiorari Denied, No. 27,273, Jan. 15, 2002.

Patricia A. Madrid, Attorney General, Joel Jacobsen, Assistant Attorney General, Santa Fe, NM, for Appellee.

Todd Hotchkiss, Frechette & Associates, P.C., Albuquerque, NM, for Appellant.

OPINION

BUSTAMANTE, Judge.

{1} Defendant appeals her conviction on 133 counts of embezzlement. Her sole issue on appeal is the propriety of the trial court's approval of the jury's request for a calculator for use during deliberations. She contends that the use of the calculator injected extraneous material into the jury's deliberations. We disagree. We conclude that the trial court properly allowed the jury to have access to a calculator in this case.

BACKGROUND AND FACTS

{2} Defendant was employed in the office of Ballard Bus Company, a business which contracted with the schools in Carlsbad to transport students, both locally and out of town. Defendant was given authority to write and sign checks and make deposits for the company, along with the owners, Harley and Debby Ballard. In 1994 Defendant assumed responsibility for keeping the check registry and giving money to the drivers for out-of-town trips. Defendant also kept the trip logs. Sometime in 1999 Defendant left the company to care for her sick father. Shortly thereafter, Mr. Ballard discovered that the company had a zero balance in its checking account and was bouncing checks.

{3} Mr. Ballard testified that he visited Defendant in order to discuss the money situation, and that she admitted taking money from the company for "a very, very long time." A Carlsbad police detective investigated the matter. In so doing, he collected all the original checks, check registers, check stubs, and trip documents from the company. He also collected financial information, including deposit slips, from Defendant. With this information he constructed several spread sheets. Those spread sheets document the instances where Defendant wrote a check, indicating that it was for an owner's withdrawal, but where that amount of money was deposited in her own checking account; where she wrote checks for trips that were either never taken or for which reimbursement was much less than the check; where she wrote checks for cash and then deposited the money in her own account; and where she made deposits for the company less cash received by her. Evidence was also presented that Defendant wrote her own payroll checks and that she paid herself $1000 every two weeks. Mr. Ballard testified that her salary was supposed to be $1300 per month.

{4} Defendant was charged with 148 counts of embezzlement, some for amounts between $100 and $250, and some for amounts between $250 and $2500. Through the testimony of the detective, the State presented evidence showing the manner of Defendant's embezzlement. Defendant wrote checks for money for out-of-town trips, but

only part of the money was given to the drivers and the rest was deposited in Defendant's checking account. She made deposits for the company less cash for herself. She wrote checks for cash and deposited the money in her own account. For each count of embezzlement, evidence was presented in the form of the check written by Defendant. In the instances of the bus trips, the amount of the check was compared with the trip logs. In many instances, evidence was also presented of a deposit made into Defendant's checking account, either on the same day or the one following the check writing. Each count related to a particular check written by Defendant on a particular day. On many of the charges, in order to determine the amount embezzled, mathematical calculations were required to be made.

{5} Shortly after the jury began its deliberations, it requested a calculator from the court. Defendant objected on the basis that the jury should be able to come to its decision based on the evidence presented and that any outside help would necessarily contaminate that process. Defendant recognized that an adding machine does nothing but add, but argued that that could be done by hand. The State responded that the calculator would not give the jury any additional information, but would simply assist the jury in organizing it. The State pointed out that courts have traditionally provided paper and markers to a jury to assist it in organizing the evidence. The trial court allowed the calculator, stating that he believed that with the number of figures and counts of embezzlement involved, it was a "courtesy to the jury."

{6} Defendant was convicted of 133 of the 148 counts presented. She appeals arguing only that the jury should not have been allowed to have a calculator during its deliberations.

DISCUSSION

{7} This is not a case involving juror misconduct. Thus we do not review the case under the standards set forth in *State v. Mann*, 2000–NMCA–088, 129 N.M. 600, 11 P.3d 564. Instead, we review the trial court's determination upon the jury request for an abuse of discretion. *See State v. Valles*, 83 N.M. 541, 543, 494 P.2d 619, 621 (Ct.App.1972) (holding that the trial court is given discretion in handling requests from the jury); *see also Zenda Grain & Supply Co. v. Farmland Indus., Inc.*, 20 Kan.App.2d 728, 894 P.2d 881, 897 (1995) (holding that allowing jury to use calculator is within the discretion of the trial). " 'We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason.' " *State v. Apodaca*, 118 N.M. 762, 770, 887 P.2d 756, 764 (1994) (quoting *State v. Litteral*, 110 N.M. 138, 141, 793 P.2d 268, 271 (1990)).

{8} Here, we cannot say under the facts and circumstances of this case, which involved 148 counts of embezzlement supported by a number of pieces of evidence and a variety of numbers relating to each count, that it was an abuse of discretion to allow the jury to have a calculator for use during its deliberations. A calculator is nothing more than a machine used to do mathematical calculations quickly and accurately. As early as 1963, the Tenth Circuit allowed the jury the use of an adding machine during its deliberations. *Imperial Meat Co. v. United States*, 316 F.2d 435 (10th Cir.1963). In so doing, the court stated that it was "only a machine which accomplished the same result that the jury would have with pens and pencils which it can be safely assumed they had in their possession." *Id.* at 439. We believe the same holds true for a calculator. It was not a device that allowed the jury to perform tests or experiments or create evidence that was not already before them. It was nothing more than a modern substitute for pencil and paper, making calculations from the numbers input.

{9} Contrary to Defendant's argument, the jury was not creating evidence by its use of the calculator. Rather, it was taking the evidence, the numbers presented by the State, and testing it to see if the State had proved the amount charged. There is no suggestion that anything other than numbers taken from the evidence presented were used by the jury. Defendant appears to be arguing that it was the State's burden to present the final calculations to the jury. We dis-

agree. The State's burden was to present evidence that Defendant had taken money that did not belong to her in an amount either over $250 or under $250 for each count. There is no suggestion in the record that the State did not present such evidence. As we pointed out above, for each count, the State presented the check written and the evidence showing that either all or a part of it ended up in Defendant's possession. It was for the jury to determine whether the evidence established the Defendant had taken the amount alleged in the State's charge. That is not the creation of additional evidence.

{10} Further, the jury may organize and analyze the evidence presented in any way it wants to. *See State v. Chamberlain,* 112 N.M. 723, 732–33, 819 P.2d 673, 682–83 (1991). This includes testing the calculations made by the State in order to confirm that Defendant took the amount of money alleged in the charges. Defendant acknowledged below that the jury could properly do such calculations by hand, with pencil and paper. We see no reason why the same calculations could not be done with a calculator, which would do the same faster and more accurately. We are unpersuaded by Defendant's argument that calculations done by hand are done by the jurors and calculations with the use of the calculator are done by the calculator. The calculator depends on the input of the numbers by the jurors. We see no difference in calculations done by hand with pencil and paper, and calculations done with the use of a calculator, except that the calculator makes the job easier and the result more accurate. *Cf. State v. Robinson,* 79 Hawai'i 468, 903 P.2d 1289, 1293 (1995) (allowing videotape of defendant's voluntary confession as merely a modern substitute for a written statement finding it accomplished the same purpose, but more expeditiously and more correctly).

{11} Defendant also argues that the calculator was "extrinsic" to the jury deliberations, that it was evidence considered by the jury that had not been presented at trial. We do not believe that the calculator itself was evidence that was considered by the jury. It did not by its mere presence have an extraneous influence on the jury's deliberations. Defendant posits that the calculator interjected mathematical formulae that were never presented as evidence. There is no indication in the record, however, that such was the case. Rather, it appears that the jury simply used the calculator to do arithmetic functions, which all acknowledge could have been done by hand.

{12} Defendant relies on a case from Hawaii to support her claim that the use of calculator was error here. In *State v. Pichay,* 72 Haw. 475, 823 P.2d 152 (1992), defendant was charged with joy riding and two firearm offenses. On the second day of jury deliberations, the jury requested permission to use two dolls and a calculator, which one of the jurors had brought into the jury room. The judge allowed it over the objections of the defendant and the state. However, there was never a determination regarding whether and how the dolls and calculator were used. The Hawaii Supreme Court reversed for a new trial on the State's concession of error and the failure of the trial court to inquire into the jury's use of the objects to determine whether the defendant was prejudiced by their use.

{13} The present case is both factually and procedurally different than the Hawaii case. While there was no apparent reason for the use of the calculator in *Pichay,* the reason for the jury's request here is readily apparent. Further, in *Pichay* it is possible that the dolls were the real problem as they could have been used in some manner to reenact the crime. Further, the jury in *Pichay* had already taken the dolls and the calculator into the room before requesting permission. Both the defendant and the state objected. Here, the jury requested permission before getting use of the calculator. We do not find *Pichay* persuasive here as there is little similarity between the cases.

{14} Defendant also relies on *State v. Thacker,* 95 Nev. 500, 596 P.2d 508 (1979), a cattle rustling case where the defense was that the calves confiscated from defendants were not the stolen calves, as they were larger than the ones reported stolen. One of the jurors was the foreman on the ranch where the confiscated calves were impound-

ed. Drawing on his own knowledge of cattle and feed, the juror computed an estimate of what he thought the calves weighed at the time that they were impounded and gave that information to the other jurors. Because no evidence had been presented at the trial concerning the weight of the animals or what they had been fed during the impoundment, the appellate court determined that reversal was required because additional evidence was presented to the jury during deliberations, evidence that influenced the jury's verdict.

{15} Thus, *Thacker* is a jury misconduct case like *Mann* and not like this case at all. In both those cases, a juror, using his expert knowledge, performed calculations and discussed the results of those calculations with the other jurors. In *Thacker*, the calculations were based on evidence not presented at trial. In *Mann*, the calculations were based on evidence that had been presented. Thus, this Court distinguished *Thacker* and allowed the calculations in *Mann*.

{16} We do not believe that this case is at all similar to *Mann*. Rather, there is no suggestion here of a juror using specialized knowledge to do calculations. Instead, the jurors simply sought mechanical assistance in doing mathematical calculations, which could have been done with pencil and paper. The jurors did not create any additional evidence for consideration, but simply organized and tested the evidence that had been presented by the State. *See Solana v. Hill*, 348 S.W.2d 481, 483–84 (Tex.Civ.App.1961) (allowing juror's use of slide rule to analyze the evidence and reconstruct the collision therefrom); *see also State v. Griffin*, 116 N.M. 689, 696, 866 P.2d 1156, 1163 (1993) (allowing jury to use magnifying glass to examine photos already in evidence). The jury's verdict was based solely on the evidence presented, not on any knowledge obtained from an extraneous source.

CONCLUSION

{17} We hold that under the circumstances of this case, the trial court did not abuse its discretion in acquiescing to the jury's request for the use of a calculator during its deliberations. We affirm Defendant's convictions.

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

WE CONCUR: LYNN PICKARD, Judge, and CELIA FOY CASTILLO, Judge.

2002-NMCA-004

38 P.3d 198

In the Matter of the ESTATE OF Paul E. DELARA, Deceased.

Application for Formal Appointment of Personal Representative,

and

Jonathan Niles Kesterson, a minor, and Sarah Ashley Kesterson, a minor, Represented by their Mother, Margaret Kesterson, Plaintiff–Appellant,

v.

Rosemary M. DELARA, Personal Representative of the Estate of Paul E. DeLara, Deceased, Defendant–Appellee.

No. 21,592.

Court of Appeals of New Mexico.

Nov. 30, 2001.

Certiorari Denied, No. 27,278, Jan. 8, 2002.

Kim E. Kaufman, Albuquerque, NM, for Appellant.

Alan R. Rackstraw, Placitas, NM, for Appellee.

OPINION

BOSSON, Chief Judge.

{1} In this appeal we determine whether the Uniform Parentage Act (UPA), NMSA 1978, §§ 40–11–1 to –23 (1986, as amended through 2001), allows children born outside of marriage to obtain past and future child support from their father's estate. The district court ruled against that claim because no action for paternity or child support had been filed before their father's death. We reverse. We hold that the UPA authorizes children born outside of marriage to file suit against their father's estate for child support.

BACKGROUND

{2} Paul DeLara died intestate on January 30, 1999. At the time of his death, Mr. DeLara and his wife, Rosemary DeLara, had been married for thirty-six years, and had two children. Sometime during the marriage, Mr. DeLara had two other children, Jonathan and Sarah, with another woman, Margaret Kesterson. During his lifetime, Mr. DeLara apparently provided some sup-

port to Jonathan and Sarah and maintained a relationship with them.

{3} In April 1999, three months after Mr. DeLara's death, Ms. Kesterson filed a petition to establish parentage under the UPA, seeking to establish that Mr. DeLara was the father of Jonathan, born January 10, 1986, and Sarah, born August 3, 1989. Ms. Kesterson's petition was filed within the statute of limitations established in the UPA, which required her to file suit within three years of her children reaching their age of majority. Section 40–11–23(A). The petition named Ms. DeLara as Defendant acting in her capacity as personal representative of Mr. DeLara's estate.

{4} Ms. Kesterson's petition also sought an award of past and future child support and discovery pertaining to Mr. DeLara's assets. In the course of the proceedings, paternity testing established that Mr. DeLara was the father. The district court entered an order establishing paternity, but deferred ruling on Ms. Kesterson's other claims. The order establishing paternity was not appealed.

{5} Ms. DeLara filed a motion to dismiss that portion of Ms. Kesterson's petition regarding child support. She raised several arguments: (1) that the children could not receive child support if no court order requiring child support had been entered before the father died, (2) that Ms. Kesterson's claim was barred by laches and waiver, and (3) that all community property owned by Mr. DeLara and Ms. DeLara at the time of death passed directly to Ms. DeLara by operation of law which left no community assets from which to pay child support for Jonathan and Sarah.

{6} The district court ruled that, after paternity was established, the children had received all of the relief to which they were entitled under the UPA. The court authorized the children to share in Mr. DeLara's separate property under the laws of intestate succession. However, the court ruled that the children had no claim for child support against Mr. DeLara's estate because they had not filed such an action before his death. Any such claim on behalf of the children was described as "not supported by statute or case law and ... in derogation of the common law." The district court then dismissed Ms. Kesterson's petition with prejudice.

DISCUSSION

{7} This case presents a matter of statutory construction which is a question of law reviewed de novo. *Bajart v. Univ. of N.M.*, 1999–NMCA–064, ¶ 7, 127 N.M. 311, 980 P.2d 94.

Ms. Kesterson's Right to Child Support Under the UPA

{8} The UPA deals with establishing paternity. Sections 40–11–4, –7, –10, –11. It provides for recovering child support and other costs from the father. Section 40–11–15(C) to (F). The UPA also allows suits against the father's estate. Section 40–11–8(C) provides: "The action may be brought in the county in which any party resides or is found or, *if the father is deceased, in which proceedings for probate of his estate have been* or could be commenced." (Emphasis added.)

{9} Thus, Section 40–11–8(C) clearly envisions a suit under the UPA after the death of the father. It does not express whether, as a condition precedent to a suit against the father's estate, an action to establish paternity and obtain child support must have been filed prior to the father's death. Consequently, in interpreting the UPA we must determine legislative intent, reading the statute as a whole and considering its purposes. *D'Avignon v. Graham*, 113 N.M. 129, 131, 823 P.2d 929, 931 (Ct.App.1991) (holding the cardinal rule of statutory construction is to determine legislative intent); *City of Las Cruces v. Davis*, 87 N.M. 425, 426, 535 P.2d 68, 69 (Ct.App.1975) (recognizing parts of an act must be considered as a whole); *Mutz v. Mun. Boundary Comm'n*, 101 N.M. 694, 698, 688 P.2d 12, 16 (1984) ("We interpret statutes in order to facilitate their operation and the achievement of their goals.").

{10} This Court has previously stated that "[t]he primary purpose of a paternity proceeding is to compel the father to support his child." *State ex rel. Human Servs. Dep't v. Aguirre*, 110 N.M. 528, 531, 797 P.2d 317, 320 (Ct.App.1990); *see also Aldridge v. Mims*, 118 N.M. 661, 665, 884

P.2d 817, 821 (Ct.App.1994). Our Supreme Court has characterized child support as a parent's "most important single obligation." *Niemyjski v. Niemyjski*, 98 N.M. 176, 177, 646 P.2d 1240, 1241 (1982) (emphasis omitted). Children born outside of marriage are entitled to support from their parents, just as children who are born to married parents. *Tedford v. Gregory*, 1998-NMCA-067, ¶ 24, 125 N.M. 206, 959 P.2d 540. The state also has an interest in children being supported by their father. *Aguirre*, 110 N.M. at 531, 797 P.2d at 320 (by establishing paternity the state ensures that the child is financially cared for by the father and that "such responsibility does not needlessly fall on the state"). Our law reflects a strong public policy in favor of support. *Wallis v. Smith*, 2001-NMCA-017, ¶¶ 9-11, 130 N.M. 214, 22 P.3d 682 (holding that a father could not rely on a theory of contraceptive fraud to avoid his child support obligation); *D'Avignon*, 113 N.M. at 130-37, 823 P.2d at 930-37 (holding that father could not use personal exemptions to defeat a claim for back child support). We interpret the UPA against this backdrop.

{11} Although the UPA is silent as to whether a support order must have been entered before the father's death, Ms. DeLara argues that this condition is implicit in existing New Mexico case law. She relies primarily on two cases in which the children were allowed to make claims against their father's estate based on prior child support orders that had been entered while the fathers were still alive. *See Hill v. Matthews*, 76 N.M. 474, 476, 416 P.2d 144, 145 (1966); *D'Avignon*, 113 N.M. at 130-37, 823 P.2d at 930-37. Ms. DeLara cites these opinions for the proposition that, without a prior legal action or support order, no claim against the estate is allowed under the UPA.

{12} We do not find either of these two opinions persuasive for the proposition asserted. While it is true in both cases that prior support orders were enforced against the father's estate or the father's property, it is also true that neither case addresses the statutory language of the UPA or the precise issue under consideration here. *Hill* was decided in 1966, twenty years before the enactment of the UPA. In *D'Avignon*, the child support claim was brought against the father, not the father's estate, and the opinion does not address the UPA at all. *Hill* and *D'Avignon* provide relevant context, but they cannot be expanded to support a proposition never considered by either court. *See Fernandez v. Farmers Ins. Co.*, 115 N.M. 622, 627, 857 P.2d 22, 27 (1993) (stating the general rule that cases are not authority for propositions not considered).

{13} The legislature clearly intended the UPA to have broad application. An action may be brought by "[a]ny interested party," §§ 40-11-7 and -21, against an estate, § 40-11-8(C), and under an extraordinary statute of limitations, § 40-11-23 (allowing up to 21 years to bring a UPA action). The importance of child support, both to the child and to the state, cannot be questioned. *Niemyjski*, 98 N.M. at 177, 646 P.2d at 1241; *Aguirre*, 110 N.M. at 531, 797 P.2d at 320. The UPA's only express limitation on a paternity and support action depends on the age of the child, not on the death of the father, nor on whether suit was filed before the father died. *See* § 40-11-23(A). Given the lack of any statutory language in the UPA imposing such a condition, and our strong public policy favoring support, we are not persuaded that the legislature intended to require any such action prior to the father's death as a prerequisite to filing a claim against the father's estate. We will not read into the UPA language that is not there. *See Perez v. Health & Soc. Servs. Dep't*, 91 N.M. 334, 336, 573 P.2d 689, 691 (Ct.App.1977) ("We will not read into a statute language that is not there if [the statute] makes sense as written.").

{14} Ms. DeLara's additional arguments are equally unpersuasive. She argues that NMSA 1978, Section 40-4A-2(H), (L) (1997) of the Child Support Enforcement Act, NMSA 1978, §§ 40-4A-1 to -19 (1985, as amended through 1997), preclude an action against the estate because an "obligor" is defined therein as a "person," which does not include an "estate." Section 40-4A-2(L) (defining "person" as "an individual, corporation, partnership, governmental agency, public office, or other entity"). We reject this argu-

ment. The definition of "obligor" from a statute other than the UPA is not dispositive when the UPA expressly provides for suits against the father's estate. Moreover, we are not persuaded that "other entity," as used in Section 40–4A–2(L), would necessarily exclude an estate.

{15} Finally, relying on *Hill,* Ms. DeLara argues that allowing Ms. Kesterson's children to pursue a claim against Mr. DeLara's estate would place children born outside of marriage in a position superior to children born within marriage. We disagree. The Supreme Court in *Hill* was persuaded that children who were the beneficiaries of a divorce-related child support order should be able to make claims against their father's estate on an equal plane with general creditors of the estate. *Hill,* 76 N.M. at 476, 416 P.2d at 145. If we allow Ms. Kesterson's support action against Mr. DeLara's estate, her children will be in a position, relative to general creditors, comparable to the children in *Hill.* If we were to reject Ms. Kesterson's argument, her children would be in a position inferior to both general creditors of the estate and to other children of the deceased born within marriage. In promulgating the UPA, the legislature intended to place children born outside of marriage on a roughly equal footing with children born within marriage, no better and no worse.

{16} Ms. DeLara also argues that there are "practical obstacles" to allowing this kind of suit, because Mr. DeLara is a "necessary party" and the only one who could testify as to the support arrangements he agreed to and apparently honored during his lifetime. This argument is equally unpersuasive. Mr. DeLara is not the only witness. Ms. Kesterson and perhaps her children can testify to these facts; there may be documentary evidence as well. While Mr. DeLara's death may create evidentiary issues, it is no reason to read language into the UPA that conflicts with legislative intent and overriding public policy.

Laches and Waiver

{17} Ms. DeLara argued below that Ms. Kesterson's suit was barred by laches and waiver. The district court did not base its ruling on laches or waiver. It ruled instead, as a matter of law, that the children had no claim because they did not file suit before their father's death. We have reversed that decision. On remand, if Ms. DeLara decides to pursue her theories of laches and waiver, the district court may consider any factual issues concerning those theories. However, we note that New Mexico law does not favor laches or waiver in this context. *See Sisneroz v. Polanco,* 1999–NMCA–039, ¶¶ 11–18, 126 N.M. 779, 975 P.2d 392 (waiver); *Bustos v. Bustos,* 2000–NMCA–040, ¶ 18, 128 N.M. 842, 999 P.2d 1074 (laches).

Mr. DeLara's One-half Community Property Interest

{18} Ms. DeLara argued below that even if Ms. Kesterson could bring her claim under the UPA without first filing suit before Mr. DeLara's death, her claim for child support against the estate could only be satisfied from Mr. DeLara's separate property and not from his undivided one-half interest in the community. Ms. DeLara also argued that certain property passed to her automatically upon her husband's death, and by operation of law is not available to satisfy Ms. Kesterson's claim against the estate. Because the district court ruled against Ms. Kesterson's claim altogether, it had no reason to decide how such a claim could be satisfied. Therefore, these issues as well are best left to the district court on remand.

CONCLUSION

{19} We reverse the district court's dismissal of Ms. Kesterson's claims against the estate for child support. We remand to the district court for further proceedings.

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

WE CONCUR: LYNN PICKARD, Judge and IRA ROBINSON, Judge.

2002-NMCA-008
38 P.3d 203

Judith QUINTANA, Petitioner–Appellee,

v.

Owens EDDINS, Jr., Respondent–Appellant.

No. 21,882.

Court of Appeals of New Mexico.

Dec. 12, 2001.

Rachel A. Brown, Hubert & Hernandez, P.A., Las Cruces, NM, for Appellee.

Mary W. Rosner, Las Cruces, NM, for Appellant.

OPINION

PICKARD, Judge.

{1} In this appeal, we consider whether a parent is underemployed for the purpose of imputing income in determining child support when the parent is working full time in his area of expertise, but is earning less than he had made previously when employed in a different state and less than he could make if he had accepted a position with a private company rather than with a state institution. In addition, we determine whether dividend and interest income earned on a self-employed pension, individual retirement account (SEP–IRA) may be treated as income in calculating child support.

{2} We hold that as long as a parent is working full time in his area of expertise, earning an amount of money within the range presented by the evidence, and in a location reasonably accessible to his child, the trial court may not find that he is underemployed without making a specific finding of bad faith. We accordingly reverse the trial court's finding that Father is currently underemployed to the extent found by the trial court, and we instruct the trial court to recalculate child support based on an annual salary of $50,000. We affirm the trial court's inclusion of the income generated by Father's SEP–IRA in the determination of Father's child support obligation. Finally, although we conclude that the trial court did not abuse its discretion in awarding Mother attorney fees given the disparity in resources available to the parties, we remand to the trial court for reconsideration of the award in light of the fact that Father's actual income is not substantially greater than Mother's income and in light of the parties' relative successes on appeal.

FACTS AND PROCEDURAL HISTORY

{3} Appellant Owen Eddins (Father) met Appellee Judith Quintana (Mother) in 1997. Father was employed as an independent computer programmer in the San Francisco Bay area, and Mother worked as a school counselor in Las Cruces, New Mexico. In March 1998, Father ceased working as a computer programmer. Two months later, Mother learned that she was pregnant. Father moved to Las Cruces in October 1998, to pursue his relationship with Mother and to enroll in graduate school. From October 1998 until June 1999, Father and Mother lived together in Mother's home in Las Cruces. Father attended classes and Mother continued to work as a counselor. Child was born on December 13, 1998.

{4} Mother and Father separated on June 24, 1999. Two weeks later, Mother filed a petition to establish paternity, custody, and child support. At the time that the petition was filed, Father remained unemployed. In November 1999, Mother filed a motion for interim child support, and a hearing was held in January 2000. At the time of the hearing, Father had secured a telecommuting position in which he worked 30 hours per week and which paid $20,000 per year. Father testified that he accepted the position because it allowed him to work at home and did not require him to work during the day time, when he had visitations with his daughter. He further stated that it was his intention not to seek full-time employment so that he could be a stay-at-home parent. Mother introduced evidence that, while employed full time as an independent computer consultant in California, Father earned approximately $155,000 per year. The hearing officer found that Father was underemployed and imputed to Father a yearly earnings of $155,065.00. Father appealed the hearing officer's decision to the district court, which considered the matter de novo at a hearing held on custody and support issues in June 2000.

{5} After the interim award of child support was entered, Father's employer offered Father a full-time position at a salary of $40,000 per year. Father declined the offer. However, prior to trial, Father accepted a full-time position at the University of New Mexico (UNM) in Albuquerque. The position requires Father to work 40 hours per week and pays approximately $46,000 per year.

{6} Despite the fact that Father had since obtained full-time employment, Mother continued to argue at trial that Father was underemployed and requested that the trial court award child support based on Father's earning potential rather than his actual income. In support of her argument, Mother introduced evidence, through two witnesses and the cross-examination of Father, that Father had earned substantially more income while employed in California and had the potential to earn more income either in California or in New Mexico. Based on this testimony, the trial court affirmed the hearing officer's finding that Father was underemployed and imputed to Father income of $90,000 per year.

{7} In addition to imputing income based on Father's alleged earning potential, the trial court found that Father owned a SEP–IRA worth approximately $160,000. Father testified that the value of the SEP–IRA in-

creased by $7,589 in the first three-quarters of 1999. An exhibit, Father's 1999 Form 1099 for the SEP–IRA, indicated $7,589 in dividends and capital gains of $689. Father's reply brief concedes that the $7,589 is accurately characterized as interest. The trial court included $7,000 of interest as income when it calculated Father's child support obligation. Finally, based on its finding of a disparity in income and financial resources between the parties, the trial court awarded Mother $15,000 in attorney fees, pursuant to NMSA 1978, § 40–4–7(A) (1997).

{8} Father appeals, arguing that the trial court abused its discretion in three ways: (1) in finding that Father was underemployed and in imputing to Father an annual income of $90,000, (2) in including as income for child support purposes $7,000 per year of the interest earned on Father's SEP–IRA and in stating that Father's SEP–IRA should be considered a reserve fund available to meet his child support obligation in case Father chooses not to earn more money by changing jobs, and (3) in awarding Mother $15,000 in attorney fees.

DISCUSSION

Standard of Review

{9} The setting of child support is left to the sound discretion of the trial court as long as that discretion is exercised in accordance with the child support guidelines. *See Styka v. Styka*, 1999–NMCA–002, ¶ 8, 126 N.M. 515, 972 P.2d 16. The guidelines require the trial court to make findings regarding the income of both parents and to calculate support obligations based on these findings. NMSA 1978, § 40–4–11.1(E) (1995); *see also Major v. Major*, 1998–NMCA–001, ¶ 4, 124 N.M. 436, 952 P.2d 37. We review the trial court's factual findings to determine whether they are supported by substantial evidence. *See Styka*, 126 N.M. 515, 972 P.2d 16, 1999–NMCA–002, ¶ 8. In conducting this review, we view the evidence in the light most favorable to the prevailing party and indulge all reasonable inferences in support of the findings. *See Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997–NMCA–044, ¶ 12, 123 N.M. 329, 940 P.2d 177. Finally, to the extent that Father's appeal requires us to consider questions of law, we review these questions de novo. *See Styka*, 126 N.M. 515, 972 P.2d 16, 1999–NMCA–002, ¶ 8.

Imputation of Income

{10} Section 40–4–11.1(C)(1) defines income as "actual gross income of a parent if employed to full capacity or potential income if unemployed or underemployed." At trial, Mother and Father both introduced evidence regarding Father's actual and potential income. This evidence is best characterized as falling into two general categories: (1) Father's actual and potential income in California and (2) Father's actual and potential income in New Mexico. The evidence regarding California is as follows. While employed as an independent consultant in 1997 and 1998, Father earned approximately $155,000 per year. Gail Sherman, a senior technical recruiter from the San Francisco Bay area, testified regarding Father's current earning potential in California. Ms. Sherman testified that an individual with Father's skills could expect to make $90,000 per year in the Bay area. Although she acknowledged a lack of familiarity with the New Mexico job market and of the average wage of computer programmers in New Mexico, Ms. Sherman testified that it was possible that Father could telecommute from New Mexico to California. Ms. Sherman did not testify regarding the salary range for such positions, but opined that Father was underpaid at $46,000.

{11} With respect to Father's income while living in New Mexico, the evidence showed that, at the time of the hearing on Mother's motion for interim child support, Father was employed 30 hours per week at a salary of $20,000 per year. After the hearing but before trial, Father's employer offered Father a full-time job with a salary of $40,000 per year. Father declined this offer and later accepted a full-time position with UNM at a salary of $46,000 per year.

{12} At trial, Tom Herndon, who had programming experience similar to Father's and who had spoken with Father regarding the possibility of telecommuting between California and New Mexico, testified that he worked in the same field as Father, had been em-

ployed in Arizona for three years, and, at the time of trial, earned $64,200 per year. He further testified that Father had told him that he could earn more money by telecommuting. Finally, Mr. Herndon testified that, although he was not allowed to telecommute in his current position, his supervisor was considering allowing employees to telecommute in the future.

{13} While testifying, Father acknowledged that he could earn $60,000 per year in New Mexico if he accepted a position with a private business, such as Intel. He testified that he had not accepted such a position because he did not wish to work more than 40 hours per week because he wanted time to be with his child. During cross-examination, Mother's attorney showed Father two advertisements for positions in his field, one of which offered a position in Albuquerque, the other of which offered national opportunities. The advertisement for the local position indicated a salary range of $50,000—$80,000 per year. The advertisement offering positions in "all U.S. geographical areas" indicated a salary range of $70,000—$100,000 per year with the potential for bonuses up to $140,000. Father testified that he had not applied for either position. He offered no excuse for failing to apply for the former position, but said that he expected to earn $50,000 from UNM within a year. He would not apply for the second position because it would require substantial time away from his child.

{14} The trial court made two findings related to its conclusion that Father was underemployed:

> [10]d. The Hearing Officer made a finding that the Respondent is voluntarily under employed, and the Respondent has admitted that he could earn more money if he were to return to the Bay Area of California, but that he has chosen to remain in the State of New Mexico to be near his child and participate in her upbringing.
>
> [10]e. Based upon the circumstances of this case, particularly including the foregoing, and the testimony offered at trial in this matter, including that of Gail Sherman, a recruiter for senior technical employees [in the Bay area], the Court finds that a salary of at least $90,000.00 per year is to be reasonably imputed to the Respondent, due to his under employment.

{15} Father challenges the trial court's imputation of potential income to him on three grounds: (1) the fact that Father had secured a full-time position in his field of expertise precluded a finding that he is voluntarily underemployed; (2) if such a determination was not precluded, the trial court nonetheless abused its discretion in allowing the recruitment executive from California to testify regarding the availability of telecommuting positions in New Mexico and the average salary of a person with Father's skills and in considering evidence regarding employment opportunities in California; and (3) if the appropriate community of reference for determining Father's employment capacity is New Mexico, the court abused its discretion insofar as its finding of underemployment would require Father to work more than 40 hours per week and the evidence was insufficient to support the court's finding that Father could earn $90,000 in New Mexico.

{16} When evaluating a claim of parental underemployment, trial courts must determine whether the parent has "acted in good faith to earn and preserve as much money to support her [or his] children as could reasonably be expected under the circumstances." *Boutz v. Donaldson*, 1999-NMCA-131, ¶ 6, 128 N.M. 232, 991 P.2d 517. The purposes of allowing a trial court to impute income to an underemployed parent are to discourage the parent from shirking the obligation to support one's children and to encourage the underemployed parent to work at full capacity for the benefit of the children. *See, e.g., Beaudoin v. Beaudoin*, 24 P.3d 523, 530 (Alaska 2001) ("An important reason—if not the chief reason—for imputing income to a voluntarily underemployed parent is to goad the parent into full employment by attaching an unpleasant consequence (a mounting child support debt or, in certain cases of shared custody, a reduced child support payment) to continued inaction."). In fulfilling these purposes, courts must balance the right of the children to the parents' support and the right of the parents to make decisions regarding their lifestyle

and employment. *See Pugil v. Cogar*, 811 P.2d 1062, 1066 (Alaska 1991) (discussing the tension between locking a parent into a career or job and the burden that a parent's career change may place on the child).

{17} Although not defined by our cases or the child support guidelines, "good faith" in the context of underemployment typically means acting for a purpose other than to reduce or avoid a child support obligation. *See generally* Lewis Becker, *Spousal and Child Support and the "Voluntary Reduction of Income" Doctrine*, 29 Conn. Law Rev. 647, 658 (1997). In cases in which a parent does not act primarily to affect a child support obligation, the relevant inquiry is whether the parent's career choices are reasonable under the circumstances. *See Boutz*, 128 N.M. 232, 991 P.2d 517, 1999-NMCA-131, ¶ 6. In the case at bar, the primary issue is whether the trial court considered the correct circumstances in reaching its conclusion that Father's decision to work at UNM rather than to seek employment in California or elsewhere was unreasonable and justified the imputation of income.

{18} Mother makes much of the fact that Father voluntarily left his career in California to move to New Mexico. Mother infers that this decision was unreasonable and serves as a basis for finding that Father is voluntarily underemployed. Mother asks us to evaluate Father's decision to leave California in light of the many opinions refusing to make a downward modification in a parent's child support obligation when the parent has voluntarily chosen to leave a lucrative position for a position paying substantially less money. *See, e.g., Wall v. Wall*, 611 So.2d 1107, 1108–09 (Ala.Civ.App.1992) (affirming finding that father was underemployed where evidence showed that father's position as a salesperson paid significantly less than father's former position as a pilot and that reason father was no longer employed as a pilot was father's unjustified failure to take an annual physical). The significant factor distinguishing the case at bar from the cases cited by Mother is that, in this case, Father was unaware that Child had been conceived at the time Father left his employment in California. As such, the question before us is not whether Father's decision to leave California was reasonable in light of his support obligation, which was nonexistent at the time of the move, but whether the potential for Father to make more money in California is an appropriate factor for the trial court to consider in determining whether Father is currently underemployed. We conclude that it is not. *See Marsh v. Marsh*, 105 Ohio App.3d 747, 664 N.E.2d 1353, 1354–55 (1995) (holding that trial court abused discretion by imputing income to parent based on what parent had earned in prior employment in foreign country absent evidence that parent could earn comparable salary in county in which parent currently resided; decided under statute which directed court to consider employment opportunities in community in which parent resides).

{19} For the purpose of determining a parent's earning potential, we determine that the community of reference is the community chosen by the obligor parent, unless the evidence shows the parent chose that community for the purpose of avoiding the child support obligation. *See* Becker, *supra*, at 658 (noting unanimity among jurisdictions regarding finding of underemployment when parent acts primarily to avoid or reduce a child support obligation). Particularly when parents live in the same state or community as their children, it is inappropriate to consider job market information from areas that would require parents to relocate. As we noted above, one of the reasons for imputing income to an underemployed parent is to encourage the parent to become fully employed to meet the child support obligation. If the amount of income imputed can be earned only if the parent moves, imputation puts the parent in the untenable position of choosing between playing an active role in the child's upbringing and leaving to earn enough money to meet the support obligation. We believe that this choice is contrary to the public policy of our state. *See* NMSA 1978, § 40–4–9.1(A) (1999) (establishing a presumption that joint custody is in the best interests of a child and defining joint custody to allow both parents to play a significant role in a child's upbringing). Because

there is no evidence that Father left California for the purpose of reducing or avoiding his child support obligation, the trial court was limited to evaluating Father's earning capacity in New Mexico or by telecommuting from New Mexico.

{20} Limiting our inquiry to New Mexico, the evidence showed that Father could earn between $40,000 and $80,000 per year working as a computer programmer. However, there was no showing that Father would qualify for the $80,000 in the job advertised at $50,000 to $80,000 and all of the other possibilities required work in excess of 40 hours per week. The salary currently earned by Father is $46,000 per year. Father inexplicably did not apply for the job advertised at $50,000 at the low end of the range. Because Father's current salary is within only $4,000 of the range of salaries proved by Mother to be appropriate for someone with Father's job skills in New Mexico, we conclude that the trial court erred in finding that Father is underemployed by any more than $4,000. In addition, Father conceded at trial that he fully anticipated his salary to be $50,000 in the very near future.

{21} We recognize that the evidence introduced at trial appeared to support the trial court's findings insofar as the recruiter from California testified that Father could telecommute from New Mexico to California and that Father could earn $90,000 working in California. However, after reviewing the trial tapes, it is clear that the recruiter did not make the necessary connection between the $90,000 salary and telecommuting opportunities in New Mexico and did not consider the necessity of extensive travel requirements or work over 40 hours per week. The recruiter did not offer a professional opinion that Father could earn $90,000 telecommuting from New Mexico while working no more than 40 hours per week.

{22} We are aware of cases that require parents to work in excess of 40 hours per week, especially if they have histories of so doing. *See* Becker, *supra*, at 660–61 ns. 34–35, 667 n. 59. The issue raised by these cases is one of balancing competing interests. On the one hand, there is the parents' interest in legitimate freedom of career choices and legitimate need for time to be parents. On the other hand, there is the requirement that parents maximize income to support their children. We believe that the proper balance tips in favor of freedom of choice and non-monetary parental responsibilities, at least in the absence of findings of bad faith or other special circumstances. *See* Becker, *supra*, at 687. As such, the recruiter's evidence does not withstand careful scrutiny and is otherwise insufficient to support the findings.

{23} We further recognize that, except for excluding custodial parents actively caring for children under the age of six from the concept of underemployment, the child support statute offers little guidance to trial courts in evaluating the significance of a discrepancy between actual income and earning potential for the purpose of imputing income. *See* § 40–4–11.1(C)(1). Accordingly, we reaffirm the test described in *Boutz*, namely that the trial court must determine whether a parent's career choice is made in good faith and is reasonable under the circumstances, but with some additional guidance. *See Boutz*, 128 N.M. 232, 991 P.2d 517, 1999–NMCA–131, ¶ 6. Should the legislature wish to provide greater guidance to the trial courts in making this determination, we note that jurisdictions such as North Dakota have defined underemployment as actual earnings that are less than 60% of the average wage for a given profession, *see Nelson v. Nelson*, 547 N.W.2d 741, 745 (N.D.1996) (discussing regulation defining underemployment as earning less than "six-tenths of prevailing amounts earned in the community by persons with similar work history and occupational qualifications"), or have limited the court's discretion in imputing income when a parent is employed full-time and the evidence does not support a finding of bad faith, *see Schumacher v. Watson*, 100 Wash.App. 208, 997 P.2d 399, 403 (2000) (discussing statute that a court may not impute income to a parent with gainful employment on a full-time basis).

{24} Unless the legislature decides to amend our child support statute to provide

clearer guidance for making a determination of underemployment when a parent is gainfully employed on a full-time basis, this determination will be left to the sound discretion of the trial court, to be made after considering whether the parent has acted in good faith and whether the parent's actions are reasonable under the totality of the circumstances. *See Boutz,* 128 N.M. 232, 991 P.2d 517, 1999–NMCA–131, ¶¶ 5–6. In this case, however, where Father's actual earnings are within the general salary range proved by the evidence, and where there was no evidence that Father chose to work at UNM to avoid or reduce his child support obligation, we conclude that the evidence was insufficient to sustain the trial court's finding that Father is underemployed by any amount in excess of $4,000.

SEP–IRA

{25} As noted above, a trial court must determine both parents' gross income prior to setting child support. *See* § 40–4–11.1(E). The child support guidelines define "gross income" as including

> income from any source and includes but is not limited to income from salaries, wages, tips, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, significant in-kind benefits that reduce personal living expenses, prizes and alimony or maintenance received[.]

Section 40–4–11.1(C)(2).

The trial court made the following findings with respect to Father's SEP–IRA account:

> [10] c . . . . the Respondent receives dividends and interest income of approximately $7,000.00 per year.
>
> . . . .
>
> 11. Each of the parties earn[s] interest income and the Court finds that the amount to be included in connection with calculation of child support should be as follows:
>
> a. The sum of $144.00 per month by way of interest income to the Petitioner; and
>
> b. The sum of $583.33 per month by way of interest income to the Respondent.
>
> 12. The Court finds that the Hearing Officer's determination that the statutory definition of gross income permits the consideration of income even if it is retirement related, and to the extent that the Respondent has access to funds he has deposited in an IRA, the Court may require that he use these funds, if necessary, to comply with his child support obligation, particularly when there has been an imputation of income, is correct and to be affirmed by the Court. In connection therewith, the Court elects not to make a determination of the monthly amount to be included in the child support calculation in connection with the SEP IRA, but instead, such should be considered as a reserve enabling the Respondent to pay his child support obligation even under circumstances where additional income is imputed to him.

{26} Father asserts three points of error with respect to the court's findings: (1) the inclusion of the annual income earned on the SEP–IRA was error insofar as this income is not available to Father; (2) the rate of return on the IRA is not fixed and therefore the evidence was insufficient for the trial court to set a value of $7,000 per year; and (3) the trial court lacked the authority to require him to liquidate his SEP–IRA to meet his support obligation. We are not persuaded by Father's arguments and conclude that the trial court did not abuse its discretion in its treatment of Father's SEP–IRA.

{27} Father argues that retirement-related income, such as his SEP IRA, is not income for the purpose of child support calculations because the income is not readily available and is not explicitly included in the list of sources of income set forth in Section 40–4–11.1(C)(2). Father argues that the income generated by his SEP IRA is unavailable insofar as a tax penalty would be incurred if he withdrew the funds early. We disagree that the potential tax penalties render the income unavailable for child support calculation purposes. The majority of cases

addressing this issue have held that interest or dividends earned on an IRA may be considered as income when calculating child support. *See Dunn v. Dunn*, 952 P.2d 268, 272 (Alaska 1998) (rejecting argument that tax consequences of early withdrawal from an IRA preclude consideration of income earned on IRA for child support purposes); *In re Marriage of Tessmer*, 903 P.2d 1194, 1196 (Colo.Ct.App.1995) (holding that gross income can include interest or dividends earned on an IRA). The fact that Father would pay a penalty for withdrawing money from the SEP–IRA prior to reaching the age of retirement does not render the money unavailable. *See Nelson v. Nelson*, 651 So.2d 1252, 1253–54 (Fla.Dist.Ct.App.1995) (distinguishing voluntary contributions to a SEP IRA from mandatory retirement payments and reversing trial court's exclusion of former as income for purposes of support calculations). A penalty or taxes may impact the amount of money available, but Father raised no such issue either below or on appeal. *See Dunn*, 952 P.2d at 272.

{28} We further reject Father's argument that retirement-related income cannot be used for child support because such income is not explicitly included in the list set forth in Section 40–4–11.1(C)(2). As the Alaska Supreme Court recognized in *Dunn*, 952 P.2d at 272, income earned on an IRA is similar to many of the benefits included in the list of income sources to be considered for child support purposes. For example, Section 40–4–11.1(C)(2) specifically includes both interest and dividends as income. In addition, the list includes income from pensions, trusts, capital gains, and social security. *See id.* Finally, in describing the types of income to be used to determine a child support obligation, the legislature explicitly stated that the list of income sources was not exclusive. *See id.* Because the statute does not exclude income related to retirement from other types of income and the income earned on the SEP–IRA, namely interest and dividends, is included in the list devised by the legislature, we conclude that the trial court was justified in including this income in its calculations of Father's child support obligation.

{29} In addition to arguing that the income generated by the SEP–IRA was excluded under state law, Father argues that the same result is required under federal law because a SEP–IRA is protected under the Employee Retirement Income Security Act. Father concedes that this argument was not raised below. Because Father failed to raise this argument below, we will not address it on appeal. *See* Rule 12–216(A) NMRA 2001; *Woolwine v. Furr's, Inc.*, 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct.App.1987).

{30} Father challenges the sufficiency of the evidence underlying the trial court's decision to include $7,000 from his SEP–IRA earnings. Father testified that he earned more than $7,000 in interest and dividends on his SEP–IRA during the first three-quarters of 1999. The record indicates that he made a similar amount in 1997. Based on this evidence, the trial court did not abuse its discretion in finding that Father earns $7,000 per year in interests and dividends. We note that if the income earned on Father's SEP–IRA should change sufficiently, Father may seek a modification of his child support obligation under NMSA 1978, § 40–4–11.4 (1991).

{31} Finally, we reject Father's argument that the trial court erred in requiring him to liquidate his SEP–IRA to meet his child support obligation. After reviewing the court's order and the record in this case, we can find nothing to substantiate Father's claim that he was required to do so. Instead, it appears that the trial court merely recognized Father's SEP–IRA as an alternative source of income for meeting his child support obligation should Father's other sources of income prove insufficient. Again contrary to Father's assertions, the trial court appears to have treated Father's SEP–IRA and Mother's savings account equally in setting the parties' respective child support obligations. Although the trial court did not make any findings with respect to the $17,000 remaining in Mother's savings account, clearly that account is an alternative source of income for meeting Mother's child support obligations should her other sources of income prove insufficient. Finally, we note that the trial court considered the annual interest earned

on Mother's savings account as income when calculating Mother's own obligation.

{32} In sum, we find nothing in the language of the child support guidelines to support Father's argument that retirement-related income cannot be considered as income in calculating a parent's child support obligation. Because the trial court's findings with respect to Father's SEP–IRA were supported by substantial evidence, we hold that the trial court did not abuse its discretion in its treatment of the retirement account.

Attorney Fees

{33} The award of attorney fees is left to the sound discretion of the trial court. *See Bustos v. Bustos,* 2000–NMCA–040, ¶ 24, 128 N.M. 842, 999 P.2d 1074. In determining whether to award attorney fees, "a showing of economic disparity, the need of one party, and the ability of the other to pay, has been characterized as the primary test in New Mexico." *Id.* ¶ 27 (citation, internal quotation marks, and emphasis omitted). The purpose of allowing an award of attorney fees in a domestic relations proceeding is to insure that both parties are able to make "an efficient preparation and presentation" of their respective cases. Section 40–4–7(A).

{34} In this case, the evidence showed that, prior to the initiation of the child support proceedings, Mother's savings totaled approximately $34,000, while Father's SEP–IRA totaled approximately $160,000. By the time of the trial, Mother had spent approximately $17,000 in attorney fees, leaving her with savings of $17,000. The evidence shows that Mother's attorney fees totaled over $31,000, of which she paid $17,000 from her savings. The trial court's award of $15,000 to Mother appears to have taken into account the disparity in the parties' savings, acknowledged that Mother had the resources to pay the initial $17,000 from her savings, and required Father to pay Mother's remaining attorney fees to insure Mother an adequate presentation of her case. *See* § 40–4–7(A). Under these circumstances, we conclude that the trial court did not abuse its discretion in ordering Father to pay the remaining $15,000 owed for Mother's attorney fees.

{35} Nonetheless, the trial court's award of attorney fees to Mother was based in part on its erroneous imputation of $90,000 per year of income to Father and its determination that Father's imputed income was nearly twice Mother's actual income. In addition, we note that Mother has challenged her award on appeal and has asked this Court to reevaluate the award in light of her relative success on appeal. For these reasons, and because we are remanding for other purposes, we remand for the trial court to reassess its attorney fees award in light of this opinion and institute any modifications the court may wish in its discretion.

CONCLUSION

{36} For the foregoing reasons, we hold that the trial court abused its discretion in finding that Father was underemployed and imputing more than $4,000 in income to him on that basis. We remand with instructions to recalculate child support using $50,000 for Father's salary. We affirm the inclusion of the annual income generated by Father's SEP–IRA. We remand for reconsideration of the issue of appropriate attorney fees. We decline to award Mother attorney fees on appeal.

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

WE CONCUR: RICHARD C. BOSSON, Chief Judge, CELIA FOY CASTILLO, Judge.

2002-NMCA-005

38 P.3d 886

STATE of New Mexico ex rel. SHELL WESTERN E & P, INC., Petitioners–Appellants,

v.

John J. CHAVEZ, Secretary of the Department of Taxation and Revenue, Respondent–Appellee.

No. 21,225.

Court of Appeals of New Mexico.

Nov. 21, 2001.

Certiorari Denied, No. 27,262, Jan. 9, 2002.

Harold L. Hensley, Jr., Richard E. Olson, Andrew J. Cloutier, Joel M. Carson, III, Hinkle, Hensley, Shanor & Martin, L.L.P., Roswell, NM, for Appellants.

Patricia A. Madrid, Attorney General, Gail MacQuesten, Special Assistant Attorney General, Santa Fe, NM, for Appellee.

OPINION

CASTILLO, Judge.

{1} Shell Western E & P, Inc. (Shell) appeals from the order of the district court quashing an alternative writ of mandamus. The question before us is whether the Secretary of the Department of Taxation and Revenue properly excluded Shell from participation in a tax amnesty program enacted by the legislature. We hold that Shell should have been allowed to participate in the program and therefore reverse.

FACTS AND PROCEDURE

{2} Shell explores for and produces crude oil, natural gas, and natural gas condensate in New Mexico. Late in 1998 the Department of Taxation and Revenue (the Department) determined that Shell had underpaid severance taxes by undervaluing its crude oil and natural gas condensate, and assessed it tax of $989,778.40 and interest then accrued of $660,052.56. Believing that Shell had deliberately undervalued these products, the Department also assessed a civil fraud penalty of $498,406.79, pursuant to NMSA 1978, § 7-1-69(C) (2001). Shell filed a formal protest with the Department.

{3} During the pendency of the protest, the legislature passed the Amnesty Act (the Act), providing for a temporary amnesty for certain taxpayers. 1999 N.M. Laws, ch. 10. We set forth the full text of the Act since it does not appear in the New Mexico Statutes Annotated:

AN ACT

DIRECTING THE TAXATION AND REVENUE DEPARTMENT TO CONDUCT A TEMPORARY TAX AMNESTY PROGRAM; EARMARKING CERTAIN TAX AMNESTY REVENUES FOR THE TAXATION AND REVENUE INFORMATION MANAGEMENT SYSTEMS PROJECT; MAKING APPROPRIATIONS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. TEMPORARY TAX AMNESTY PROGRAM—DISTRIBUTION OF REVENUES—APPROPRIATIONS.—

A. Two hundred thousand dollars ($200,000) is appropriated from the general fund to the taxation and revenue department for expenditure in fiscal year 2000

for the purpose of conducting a tax amnesty program as provided in Subsection B of this section. Any unexpended or unencumbered balance remaining at the end of fiscal year 2000 shall revert to the general fund.

B. For the taxes and tax acts administered under the Tax Administration Act, the secretary of taxation and revenue, with the concurrence of the governor, is authorized to declare an amnesty period of no more than ninety days, provided that any amnesty period occur within fiscal year 2000. All revenue collected as a result of the tax amnesty shall be identified specifically and reported to the first session of the forty-fifth legislature.

C. The secretary of taxation and revenue is authorized to waive, during the amnesty period only, the interest and penalty provisions under Sections 7–1–67 and 7–1–69 NMSA 1978 on taxes that are:

(1) due and not assessed prior to the day the amnesty period begins; and

(2) due, assessed and not paid on the day the amnesty period begins, but that are paid by the taxpayer or that the taxpayer agrees to pay pursuant to an installment payment agreement entered into with the taxation and revenue department on or before the last day of the amnesty period.

D. Upon deposit into the tax administration suspense fund of tax revenue identified specifically as revenue from taxes paid during the amnesty period attributable to the provisions of this section, and after all necessary distributions and transfers as provided by law, except to the general fund, have been made pursuant to Section 7–1–6.1 NMSA 1978, the first two hundred thousand dollars ($200,000) of the remaining amount shall be distributed to the general fund and the remainder, notwithstanding the provisions of Section 7–1–6.1 NMSA 1978, shall be transferred to the taxation and revenue department and is appropriated for expenditure by the department for the taxation and revenue information management systems project; provided that when the total amount transferred pursuant to this subsection reaches fifteen million dollars ($15,000,000), the remaining revenue from taxes paid during the amnesty period attributable to the provisions of this section shall be distributed pursuant to the provisions of Section 7–1–6.1 NMSA 1978.

Section 2. DELAYED REPEAL.—The provisions of this act are repealed effective July 1, 2001.

{4} After the Governor signed the legislation, the Secretary announced that a tax amnesty program would be in effect from August 16, 1999, through November 12, 1999. The Secretary then issued guidelines for the program which included certain eligibility requirements eliminating participation by taxpayers who had been assessed a civil fraud penalty or who had "formally filed a protest" but did not withdraw "the protest during the tax amnesty period."

{5} Shell disagreed with the Secretary's interpretation of the Act allowing him to limit eligibility. Accordingly, on November 11, 1999, Shell delivered a check to the Department in the amount of $989,778.40, the full principal assessment against it. Shell admitted no fraud or wrongdoing, but offered to dismiss its protest if the Department accepted its payment and accorded its participation in the amnesty program. On December 1, 1999, the Department returned Shell's check and stated that Shell did not qualify for amnesty.

{6} Shell sought an alternative writ of mandamus in the district court compelling the Secretary to accept its tender under the amnesty program. The district court granted the writ, ordering the Secretary to grant amnesty or to show cause why he should not do so. After considering the Secretary's answer to the writ and briefs filed by both parties, and after a hearing, the court quashed the alternative writ and dismissed the proceedings. Shell appeals.

STANDARD OF REVIEW

{7} The interpretation of a statute is a question of law which an appellate court reviews de novo. *State v. Cleve,* 1999–NMSC–017, ¶ 7, 127 N.M. 240, 980 P.2d 23. Our primary concern is to implement the intent of the legislature. *Unisys Corp. v.*

N.M. Taxation & Revenue Dep't, 117 N.M. 609, 611, 874 P.2d 1273, 1275 (Ct.App.1994). "In determining this intent, we look primarily to the language of the act and the meaning of the words, and when they are free from ambiguity, we will not resort to any other means of interpretation." *Sec. Escrow Corp. v. State Taxation & Revenue Dep't*, 107 N.M. 540, 543, 760 P.2d 1306, 1309 (Ct.App.1988).

THE SECRETARY'S DISCRETION

{8} We must first determine whether the legislature gave the Secretary discretion to determine which classes of taxpayers were eligible for the program. "Mandamus is a drastic remedy to be invoked only in extraordinary circumstances." *Brantley Farms v. Carlsbad Irrigation Dist.*, 1998-NMCA-023, ¶ 12, 124 N.M. 698, 954 P.2d 763. It "lies only to force a clear legal right against one having a clear legal duty to perform an act and where there is no other plain, speedy and adequate remedy in the ordinary course of law." *Id.* ¶ 16. The issue before us is whether the Secretary had a statutory duty to include Shell in the amnesty program. "Mandamus is appropriate to compel the performance of a statutory duty only when that duty is clear and indisputable." *Id.* If the legislature gave the Secretary the discretion to further define taxpayer eligibility or the power to choose between alternatives, mandamus will not lie. *See Perea v. Baca*, 94 N.M. 624, 626-27, 614 P.2d 541, 543-44 (1980) (stating that when transferor meets the requirements of a statute regarding transfer of liquor license, director's duty becomes ministerial and subject to enforcement by mandamus) *El Dorado at Santa Fe, Inc. v. Bd. of County Comm'rs*, 89 N.M. 313, 317, 551 P.2d 1360, 1364 (1976) (holding that mandamus is not appropriate to "direct the performance of the particular act from among two or more allowed alternatives"). To make this determination, we must construe the meaning of the statute.

{9} According to Section 1(B) of the Act, once the tax amnesty program is established, the Secretary is given discretion to decide how long the amnesty program would be in effect. He is "authorized to declare an amnesty period of no more than ninety days, provided that any amnesty period occur within fiscal year 2000." 1999 N.M. Law ch. 10-1(B). Clearly this language gave the Secretary the power to choose how long the program lasted, so long as it did not exceed ninety days. *See Unisys Corp.*, 117 N.M. at 612, 874 P.2d at 1276 (holding that where legislation gave Secretary choice to act or not to act he had discretion to decide what to do).

{10} Similarly, the Act gives the Secretary authority to waive, during the amnesty period only, the interest and penalty provisions under NMSA 1978, §§ 7-1-67 and 69 (2001). Section 7-1-67 sets the rate of interest to be charged on taxes imposed and not paid. Section 7-1-69 relates to the imposition of civil penalties for failure to pay taxes or file a return. Section 7-1-69(C) assesses a civil fraud penalty and states as follows:

> C. In the case of failure, with willful intent to evade or defeat a tax, to pay when due the amount of tax required to be paid, there shall be added to the amount fifty percent of the tax or a minimum of twenty-five dollars ($25.00), whichever is greater, as penalty.

The Secretary's eligibility guidelines prohibited persons or businesses that had been assessed a civil fraud penalty as per Section 7-1-69(C) from participating in the program. The Secretary is not, however, given discretion as to which paragraphs of the enumerated sections he may waive. Here, the Secretary chose to waive interest but not to waive penalty when the penalty was assessed based on the Secretary's determination of fraud. The legislature provided that the amnesty would extend to all paragraphs of Section 7-1-69. Had the legislature intended to give the Secretary a choice of paragraphs to which the waiver would apply, it would have said so, just as it gave the Secretary the discretion to decide the length of the program.

{11} The Secretary argues that his agency interpreted the 1985 legislation authorizing a tax amnesty in the same way, and that the legislature must be presumed to have been aware of the agency's earlier actions. " '[A] presumption that the Legislature is aware of an administrative construction of a statute should be applied if the

agency's interpretation of the statutory provisions is of such longstanding duration that the Legislature may be presumed to know of it.' " *Alexander v. Anderson,* 1999–NMCA–021, ¶ 17, 126 N.M. 632, 973 P.2d 884 (quoting *Moore v. Cal. State Bd. of Accountancy,* 2 Cal.4th 999, 9 Cal.Rptr.2d 358, 831 P.2d 798, 809 (1992)). The Department's implementation of similar legislation for a few months fourteen years before the Act was passed is not "of such longstanding duration that the Legislature may be presumed to know of it." *Id.*

{12} We hold that the Secretary had no discretion to pick and choose between Sections 7–1–67 and 7–1–69 or which paragraphs of Section 7–1–69 would be subject to the amnesty program.

THE NEW MEXICO CONSTITUTION

{13} The Secretary protests that to interpret the Act as we have violates Article IV, Section 34 of the New Mexico Constitution, because such interpretation would change the rights and remedies of the State and also change set statutory rules of procedure under the Tax Administration Act, NMSA 1978, §§ 7–1–1 to –82 (1965, as amended through 2001). Section 34 provides that "No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." We disagree with the Secretary.

{14} There is no dispute that Shell's protest was a pending case at the time the amnesty was implemented. *See Phelps Dodge Corp. v. Revenue Div. of the Dep't of Taxation & Revenue,* 103 N.M. 20, 23, 702 P.2d 10, 13 (Ct.App.1985) (holding that a taxpayer's request for a tax refund was "a 'pending case' within the meaning of Article IV, Section 34").

{15} The Act's amnesty offer is just that, an offer to taxpayers to forego penalty and interest if the taxpayers pay the tax assessed. Implicit in this is that, upon payment, any pending protest becomes moot. If the taxpayer has a protest pending, the issues of penalty and interest will be settled either through the protest process or the amnesty process. The choice of process is that of the taxpayer. The State has no choice. Rather, the State simply proceeds pursuant to statutory directive and any lawful regulation based on the taxpayer's choice of process to resolve the issues.

{16} Under these circumstances, we fail to see how the Act itself, on its face, without the Secretary's interpretation of it, violates Article IV, § 34. The taxpayer's rights or remedies are unaffected unless and until the taxpayer voluntarily chooses to affect those rights or remedies. The Department can hardly take the position that its rights or remedies are affected, since the Department is the State, and the State is binding itself to a settlement process (the amnesty) different than and in lieu of the protest process and any settlement or compromise procedures in the Tax Administration Act.

SHELL'S TENDER OF PAYMENT AND OFFER TO WITHDRAW ITS PROTEST

{17} The Secretary further contends that Shell's tender of payment and offer to withdraw its protest were ineffective. The Act requires that the taxpayer whose liability has been assessed pay the principal (or enter into a payment plan) during the amnesty period. 1999 N.M. Laws, ch. 10, § 1(C)(2). The Secretary contends that Shell could have revoked its payment at any time and for any reason, and that he was within his discretion in not accepting Shell's tender as a "payment."

{18} The Secretary relies on 3 NMAC 1.7.9:

> Tender by a taxpayer and acceptance by the secretary or secretary's delegate of payment of a protested assessment prior to resolution of the protest constitutes an agreement:
>
> A. by the secretary to waive the taxpayer's election of remedies under Section 7–1–23 NMSA 1978 upon a resolution of the protest favorably to the taxpayer so as to permit the taxpayer to file a claim for refund for the portion of the protested assessment resolved in favor of the taxpayer; and
>
> B. by the taxpayer to waive the accrual of interest on any refund arising from the portion of the protested assessment re-

solved in favor of the taxpayer. [11/5/85, 8/15/90, 11/17/95, 10/31/96]

The Secretary contends that 3 NMAC 1.7.9 allows payment of the principal amounts due during a protest to prevent the accrual of further interest and penalty. The Secretary states his policy is to return money paid under 3 NMAC 1.7.9 whenever the taxpayer so requests. We find nothing in the regulation to alert the taxpayer that the Secretary would consider payment under the tax amnesty program as revocable at the option of the taxpayer.

{19} Moreover, even if we were to assume for purposes of this opinion that a payment under 3 NMAC 1.7.9 is generally revokable at any time, we disagree that Shell's specific tender of payment in this case was revokable at any time. Shell offered to dismiss its protest if the Secretary accepted its payment of the principal amount claimed owed under the amnesty program. Had the Secretary accepted Shell's offer, the parties would have entered into a binding settlement contract under which Shell would have first been required to dismiss its protest and could not have requested its money back, followed by the Secretary's reciprocal obligation to waive interest and penalty under the amnesty program as authorized by the Act. UJI 13–801 NMRA 2001. Here, Shell offered to pay under the amnesty program as set out in the Act and acceptance of Shell's check would have formed a contract binding Shell to proceed to withdraw its protest. Neither consideration nor mutual assent would have been an issue. We see no discretion to reject the tendered payment.

CONCLUSION

{20} We hold that the Secretary did not have discretion to exclude Shell from the amnesty program because of the pending civil fraud penalty assessment under Section 7–1–69(C), nor discretion to exclude Shell from the amnesty program because Shell conditioned its withdrawal of its protest upon the Secretary's acceptance of Shell's tendered payment of the assessed taxes due. We further hold that in granting amnesty to Shell the Act does not violate Article IV, Section 34 of the New Mexico Constitution. We hold, in addition, that the Secretary had no discretion to reject Shell's payment tender with its offer to withdraw its protest upon acceptance of the payment. In sum, the Secretary had a "clear and indisputable" statutory duty to include Shell in the amnesty program. *Brantley Farms*, 1998–NMCA–023, ¶ 16, 124 N.M. 698, 954 P.2d 763. We remand this case to the district court for entry of a peremptory mandamus requiring the Secretary to grant amnesty to Shell under the amnesty program.

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

WE CONCUR: RICHARD C. BOSSON, Chief Judge, and JONATHAN B. SUTIN, Judge.

2002-NMCA-003

38 P.3d 891

ENVIRONMENTAL CONTROL, INC., Plaintiff–Appellant,

v.

CITY OF SANTA FE, a municipal subdivision, Ron Curry, individually and as City Manager of the City of Santa Fe, Cindy Padilla–Cessarich, individually and as Director of the Solid Waste Management Division, Defendants–Appellees.

No. 20,549.

Court of Appeals of New Mexico.

Nov. 21, 2001.

Certiorari Denied, No. 27,263, Jan. 7, 2002.

Mariana G. Geer, Randolph B. Felker, Felker, Ish, Ritchie & Geer, P.A., Santa Fe, NM, for Appellant.

Carl J. Butkus, Gary J. Cade, Butkus, Gay & Jahner, P.C., Albuquerque, NM, Peter Dwyer, Santa Fe, NM, for Appellees.

Randall D. Van Vleck, Santa Fe, NM, for Amicus Curiae New Mexico Municipal League, Inc.

OPINION

CASTILLO, Judge.

{1} Environmental Control, Inc. (ECI) appeals the dismissal of its complaint against the City of Santa Fe (the City) and two of its employees challenging an ordinance that prohibits commercial collection of all garbage within the city limits. We affirm.

BACKGROUND

{2} ECI is a refuse collection disposal company headquartered in Santa Fe, New Mexico. ECI and its predecessors-in-interest have collected refuse within the City for approximately twenty-four years. From at least the early 1980s, the City divided its solid waste into two categories: Class 1 and Class 2 garbage. It reserved unto itself the exclusive right to gather and collect Class 1 garbage and allowed commercial collection of some types of Class 2 garbage.

{3} ECI first filed suit against the City in 1984 when the City originally proposed to amend its garbage ordinance to eliminate commercial collection of Class 2 garbage. ECI's predecessor-in-interest sought a restraining order to prevent the implementation of the ordinance and was granted a preliminary injunction. Litigation ensued and finally, in 1989, the parties entered into a settlement agreement (Settlement Agreement) containing a number of provisions, one of which allowed ECI to engage in the collection of all classes of garbage including Class 2 for a minimum of four years. ECI no longer collects Class 1 garbage but continues to collect Class 2 garbage. In 1993 ECI and Allied Waste Industries, Inc. merged. Prior to the consummation of the sale, the parties requested and received approval for the merger as required by the Settlement Agreement.

{4} In 1996 the City passed two ordinances relating to its refuse disposal system. The first authorized the issuance of revenue bonds (bond ordinance). During the discussion at the August 14, 1996, council meeting at which the bond ordinance was passed, ECI's operating general manager asked about the effect of the bond ordinance language on ECI's hauling of Class 2 garbage. The city staff told him that the bond covenant language would not prohibit ECI from hauling Class 2 garbage. Four months after passage of the bond ordinance, the City published notice of its intent to adopt a second ordinance, the 1996 Solid Waste Ordinance. This ordinance removed any distinction between classes of garbage thereby prohibiting private hauling of Class 2 garbage within the city limits. ECI did not attend the meeting at which the ordinance was passed because it contends the City did not give ECI individual notice, and it was unaware that the City was considering an ordinance that would eliminate the commercial collection of Class 2 garbage. In early 1997 the City informed ECI that effective April 1, ECI would no longer be permitted to collect Class 2 garbage within the city limits. Shortly thereafter, Councillor Montano asked that an amendment to the 1996 Solid Waste Ordinance be drafted to allow private hauling of Class 2 garbage but withdrew his request at the same meeting because of procedural problems. No similar amendment was ever considered by the city council.

{5} ECI objected to the 1996 Solid Waste Ordinance and filed suit against the City for civil rights violations pursuant to 42 U.S.C. § 1983 (Count I), breach of contract (Count II), breach of covenant of good faith and fair dealing (Count III), inverse condemnation (Count IV), and estoppel (Count V). ECI's position is that it should be able to continue collecting Class 2 garbage or to be compensated for the taking of its business. The City responded by filing motions to dismiss. Relying primarily on the language and effect of the Settlement Agreement, the district court granted the City's motions and dismissed the case. We affirm.

DISCUSSION

I. Standard of Review

{6} In reviewing a motion to dismiss for failure to state a claim under Rule 1–012(B)(6) NMRA 2001, we take the well-pleaded facts alleged in the complaint as true and test the legal sufficiency of the claims. *Blea v. City of Espanola,* 117 N.M. 217, 218, 870 P.2d 755, 756 (Ct.App.1994); *Envtl. Improvement Div. v. Aguayo,* 99 N.M. 497, 499, 660 P.2d 587, 589 (1983). We review rulings on such motions de novo, accepting all well-pled factual allegations as true and resolving all doubts in favor of the sufficiency of the complaint. *Wallis v. Smith,* 2001–NMCA–017, ¶ 6, 130 N.M. 214, 22 P.3d 682. Under this standard of review only the law applicable to such a claim is tested, not the facts which support it. *Envtl. Improvement Div.,* 99 N.M. at 499, 660 P.2d at 589. Because the Settlement Agreement provides the principal

basis for the decision in this case, first we will review its terms and then we will address ECI's arguments.

II. 1989 Settlement Agreement

{7} ECI attached a copy of the Settlement Agreement to the complaint as Exhibit B. At the core of the Settlement Agreement is language permitting ECI to collect all classes of garbage as defined in the city's ordinance for a minimum period of four years from the date this lawsuit is dismissed. The lawsuit was dismissed in April 1990. ECI and Robert Haspel, its sole shareholder, were required to obtain approval by the City for any sale, transfer, or alienation of the majority ownership and control of ECI. The City, without admitting any liability, agreed to pay ECI and Haspel $100,000. In addition, the Settlement Agreement authorized the City to "enact whatever ordinances or regulations its legal counsel determines are necessary to put the terms and conditions of [the] agreement into effect." There are other terms regarding a number of requirements not germane to this appeal. ECI correctly states that the Settlement Agreement does not contain express provisions specifying a maximum term, a termination date for the agreement, or a specific method of termination. As to the ordinances in question, ECI acknowledges in its brief in chief that the 1984 ordinance had "exactly the purpose and effect" as the 1996 Solid Waste Ordinance which is the subject of the present lawsuit.

III. Constitutional Arguments (Count I and Count IV)

{8} ECI makes three basic constitutional claims in Counts I and IV of its complaint. In urging reversal, ECI first argues that the City has taken its property, specifically ECI's customers and the revenues they generate, without just compensation. U.S. Const. amend. V, XIV, XV; N.M. Const. art. II, § 20; 42 U.S.C. § 1983 (1996). In the alternative, ECI argues that the City has effectively condemned its property thus, entitling ECI to damages. N.M. Const. art. II, § 20; NMSA 1978, §§ 42–8–1 to –29 (1907, as amended through 1975). ECI also asserts that its Fourteenth Amendment due process rights were violated: it claims a violation of substantive process rights because the Solid Waste Ordinance, to the extent it eliminates the private hauling of Class 2 garbage, is arbitrary and capricious and is not a valid exercise of police power; it claims a violation of procedural due process rights because passage of the 1996 Solid Waste Ordinance deprived it of property without notice and opportunity to be heard. U.S. Const. amend. XIV; N.M. Const. art. II, § 18.

{9} All of ECI's constitutional arguments are dependent on a determination that the operation of its garbage collection business within the city limits is considered property for purposes of constitutional analysis. Recognizing this essential nexus, ECI cites to a number of out-of-state cases standing for the proposition that an interest in a business and the revenues it generates are property to which constitutional protections apply. *See Kimball Laundry Co. v. United States,* 338 U.S. 1, 11, 15–16, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949) (concluding that governmental taking of Laundry's trade routes, e.g., customer lists and continued patronage, required just compensation); *Young v. Bd. of Pharmacy,* 81 N.M. 5, 9, 462 P.2d 139, 143 (1969) (recognizing that right to engage in a profession or business is a constitutionally protected property interest); *Roberts v. Bd. of Embalmers & Funeral Directors,* 78 N.M. 536, 538, 434 P.2d 61, 63 (1967) (stating that the right to practice a profession or vocation is a property right); *State of Texas v. Thompson,* 70 F.3d 390, 392–93 (5th Cir. 1995) (determining that plaintiff had a property interest in operation of aerial applicator business cognizable in a Section 1983 claim); *Cowan v. Corley,* 814 F.2d 223, 227–28 (5th Cir.1987) (holding that an operator of a wrecker business had a protectable property interest in his business); *Coeur D'Alene Garbage Serv. v. City of Coeur D'Alene,* 114 Idaho 588, 759 P.2d 879, 882 (1988) (holding that the city's elimination and usurpation of the garbage company's customers was a taking, entitling the garbage company to just compensation).

{10} While ECI's general statement of the law is correct, it fails to recognize that its right to continue operating a garbage

collection business within the City is subject to the terms of the Settlement Agreement, thus, distinguishing it from the cases cited. ECI's right to collect all types of garbage within the City expired in April 1994, at the conclusion of "a minimum period of four years" from the dismissal of the lawsuit against the City. After that time, ECI had no vested, legally enforceable interest to continue business.

{11} Because ECI's right to continue its business after April 1994 was terminable at the option of the City, ECI possessed no enforceable legal right to perform garbage collection services indefinitely. Therefore, the expectation that ECI could continue to collect garbage was not a right cognizable under the takings clause, inverse condemnation clause, or due process clause of either constitution. *See Hyde Park Co. v. Santa Fe City Council,* 226 F.3d 1207, 1210 (10th Cir. 2000) (stating that an "abstract need for, or unilateral expectation of," some benefits does not constitute " 'property [interests]' " of the type protected by the due process clause); *see also State ex rel. Highway Comm'n v. Gray,* 81 N.M. 399, 402, 467 P.2d 725, 728 (1970) (expecting renewal or continuing possession of lease does not entitle a party to compensation). Having decided that ECI has no property interest protected by either the state or federal constitution, we need not reach ECI's claims that its due process rights were substantively or procedurally violated. Dismissal of Counts I and IV was proper.

IV. Breach of Contract (Count II)

{12} In Count II of its complaint, ECI alleges that the City breached the terms of the Settlement Agreement by terminating its business contrary to an implied agreement that would have allowed ECI to continue to collect Class 2 garbage for the duration of the bond ordinance. While ECI recognizes that the Settlement Agreement is a valid contract that resolved the parties' dispute in 1984, it takes issue with the court's interpretation of the agreement. Its arguments fall into two categories: ambiguity of the contract and its modification.

A. Ambiguity

{13} ECI asserts that the term "minimum" is ambiguous and, therefore, the district court must hear evidence to determine the duration of the Settlement Agreement. ECI contends the district court erred in failing to consider the testimony of Haspel who testified at the preliminary injunction hearing that the four years referenced in the Settlement Agreement was only a minimum term and that he would not have settled the prior litigation in exchange for an agreement that would end in four years. We find ECI's arguments without merit because there is nothing in this part of the Settlement Agreement that is ambiguous as a matter of law.

{14} A contract is deemed ambiguous only if it is reasonably and fairly susceptible of different constructions. *Levenson v. Mobley,* 106 N.M. 399, 401, 744 P.2d 174, 176 (1987). Whether ambiguity exists is a question of law; therefore, this Court reviews the district court's decision de novo. *See Allsup's Convenience Stores, Inc. v. North River Ins. Co.,* 1999–NMSC–006, ¶ 28, 127 N.M. 1, 976 P.2d 1. We agree with the district court that the word "minimum" as used in the Settlement Agreement does not make the agreement ambiguous. The Settlement Agreement sets out the rights and obligations of the parties. ECI was guaranteed a minimum of four years of garbage collection after which the City was free to establish limitations or continue to allow ECI to operate. The City chose not to enact an ordinance limiting ECI's right to collect Class 2 garbage until late 1996, well over two years past the minimum guarantee period. The City complied with the terms of the Settlement Agreement. Once the four-year minimum was met, the terms of the Settlement Agreement allowed the City to decide when and how to limit ECI's garbage collection rights.

{15} Having determined that the Settlement Agreement is unambiguous, there is no need to consider the testimony of Haspel. A party's statement of unilateral subjective intent, without more, is insufficient to establish ambiguity in light of clear contractual language. *Hansen v. Ford Motor Co.,* 120 N.M. 203, 206, 900 P.2d 952, 955 (1995).

As a matter of law, one party's subjective impressions, innermost thoughts, or private intentions do not create ambiguity. *Hoggard v. City of Carlsbad,* 1996–NMCA–003, ¶ 15, 121 N.M. 166, 909 P.2d 726; *see Montoya v. Villa Linda Mall, Ltd.,* 110 N.M. 128, 129, 793 P.2d 258, 259 (1990) ("It is black letter law that, absent an ambiguity, a court is bound to interpret and enforce a contract's clear language and cannot create a new agreement for the parties."); *see also Richardson v. Farmers Ins. Co.,* 112 N.M. 73, 74, 811 P.2d 571, 572 (1991) ("Absent ambiguity, provisions of [a] contract need only be applied, rather than construed or interpreted.").

B. Modification

{16} ECI cites to *Wal–Go Associates v. Leon,* 95 N.M. 565, 624 P.2d 507 (1981) and *Medina v. Sunstate Realty, Inc.,* 119 N.M. 136, 889 P.2d 171 (1995) to support its claim that the City, by its conduct, amended or modified the Settlement Agreement to permit ECI to continue collecting Class 2 garbage until at least the expiration of the bond ordinance. ECI relies specifically on the City's assurances made on August 14, 1996, that the bond ordinance would not affect ECI's business. We disagree.

{17} Normally, interpretation of the parties' conduct is a question of fact in which the meaning depends on reasonable but conflicting inferences to be drawn from events occurring, or circumstances existing, before, during, or after negotiation of the contract. *C.R. Anthony Co. v. Loretto Mall Partners,* 112 N.M. 504, 509, 817 P.2d 238, 243 (1991). When the allegations regarding the conduct are not in dispute and are not susceptible of conflicting inferences, the question becomes one of law. *Id.* at 511, 817 P.2d at 239. In this case, the City does not deny that it assured ECI the bond ordinance would not affect its business. The City was correct. It was not the bond ordinance that affected ECI's business but rather the subsequent passage of the 1996 Solid Waste Ordinance that prohibited the commercial collection of Class 2 garbage.

{18} ECI argues that because the City intended to use any additional income produced by the City's collection of Class 2 garbage to pay off the bonds, passage of the bond ordinance did affect ECI's business. Even if we take ECI's allegations as true, no reasonable person could conclude that, when city councillors discussed the effect of the bond ordinance on ECI's business, the City was implicitly amending the 1989 Settlement Agreement. Municipal governing bodies discuss ordinances on a regular basis; they pass, amend and repeal ordinances on a regular basis. It would defy logic to hold that the discussion of the effect of one ordinance should prevent the passage of a subsequent ordinance. Even if ECI's allegations regarding comments by some councillors were true, there was no official action taken that would be legally binding on the City. *See Trujillo v. Gonzales,* 106 N.M. 620, 622, 747 P.2d 915, 917 (1987) (holding that no liability created by unlawful contract, even if entered in good faith). ECI is deemed to have known this. "[P]ersons dealing with public officials are chargeable with notice of limitations on their powers." *Id.* (citing *Raton Waterworks Co. v. Town of Raton,* 9 N.M. 70, 90–91, 49 P. 898, 905 (1897)).

{19} Consequently, we hold that as a matter of law, the Settlement Agreement was not modified by the discussion at the August 14, 1996, council meeting and that the City had the right to exercise its rights under the Settlement Agreement by passage of the 1996 Solid Waste Ordinance. Public policy encourages settlement agreements, and the courts have a duty to enforce them. *Bd. of Educ. v. Dep't of Pub. Educ.,* 1999–NMCA–156, ¶ 14, 128 N.M. 398, 993 P.2d 112. An agreement of settlement cannot be set aside merely because in light of subsequent events it proves to have been unwise or unfortunate. *In re Tocci,* 45 N.M. 133, 142, 112 P.2d 515, 521 (1941).

V. Breach of Implied Covenant of Good Faith (Count III)

{20} Count III of ECI's complaint alleges that the City's conduct breached the implied covenant of good faith and fair dealing implicit in the 1989 Settlement Agreement. Specifically, ECI contends that it was

bad faith for the City to assure ECI that its business would not be affected by the bond ordinance and then only a few months later pass the 1996 Solid Waste Ordinance which effectively eliminated ECI's business. ECI also complains that notice by publication was inadequate and that the City had the obligation to give it individual notice that passage of the 1996 Solid Waste Ordinance was being contemplated and an opportunity to be heard on the subject. ECI relies on *Planning & Design Solutions v. City of Santa Fe*, 118 N.M. 707, 714, 885 P.2d 628, 635 (1994), for the proposition that " '[the] concept of the implied covenant of good faith and fair dealing requires that neither party do anything that will injure the rights of other[s] ... to receive the benefit of their agreement.' " (Citation omitted.)

{21} We agree that a covenant of good faith and fair dealing can be imputed to the Settlement Agreement. However, the Settlement Agreement did not require the City to give any type of notice before exercising its prerogative to terminate ECI's right to collect Class 2 garbage. ECI received the benefit of its agreement that it was allowed to collect Class 2 garbage for more than the minimum four-year period. ECI asks us to imply a covenant of good faith and fair dealing to prevent the City from exercising its own rights that are either explicit or implicit in the Settlement Agreement; namely, the right unilaterally to terminate ECI's garbage collection, after the minimum four-year period, whenever and however the City chose to do so. This would rewrite the Settlement Agreement. *Cont'l Potash, Inc. v. Freeport-McMoran, Inc.*, 115 N.M. 690, 704–05, 707, 858 P.2d 66, 80–81, 83 (1993) (holding that an implied covenant will not override an express provision of a contract). Accordingly, the district court was correct in dismissing Count III. Even if the facts as pled in the complaint were true, there is no good faith requirement that would prevent the City from exercising its rights under the Settlement Agreement.

VI. Estoppel (Count V)

{22} ECI argues that the district court erred in dismissing Count V of its complaint alleging equitable estoppel. Estoppel is rarely applied against the state or its governmental entities, and only in exceptional circumstances where there is a shocking degree of aggravated and overreaching conduct or where right and justice demand it. *Wisznia v. Human Serv. Dep't*, 1998-NMSC-011, ¶ 17, 125 N.M. 140, 958 P.2d 98. The district court dismissed Count V because it determined that "exceptional circumstances do not exist showing a shocking degree of aggravated and overreaching conduct and concepts of right and justice do not support the application of estoppel" against the City. We need not address whether circumstances support the application of equitable estoppel to the City because ECI's complaint does not properly plead the elements of equitable estoppel.

{23} "[E]stoppel is the preclusion, by acts or conduct, from asserting a right ... to the detriment and prejudice of another, who, in reliance on such acts and conduct, has acted thereon." *Brown v. Taylor*, 120 N.M. 302, 305, 901 P.2d 720, 723 (1995) (internal quotations omitted) (citations omitted). We focus on the acts of ECI. In order to properly plead a claim for equitable estoppel, the party claiming estoppel must assert that in reliance on the conduct of the party to be estopped, it was induced to take or forgo a position to its prejudice or detriment. *See Cont'l Potash, Inc.*, 115 N.M. at 698, 858 P.2d at 74. ECI alleges three acts by the City on which it detrimentally relied: the assurances of City staff that the bond ordinance would not affect its continued collection of Class 2 garbage; the comments of Councillor Montano and his attempt to amend the Solid Waste Ordinance to allow ECI to continue in business; and the fact that in 1993, the City had approved the stock merger of ECI with Allied Waste Industries, Inc. ECI, however, does not allege a change in position based on the acts of the City. ECI was collecting Class 2 garbage as per the Settlement Agreement before any of the three acts occurred, and ECI continued to collect Class 2 garbage after the actions of the City. There was no actual change in position. A party must plead circumstances giving rise to estoppel with particularity. *Id.* Failure to show a material change in position precludes application of equitable estoppel. *Dale J. Bellamah Corp. v. City of Santa Fe.*,

88 N.M. 288, 291, 540 P.2d 218, 221 (1975) (showing no change in position after ordinance took effect, plaintiff could not invoke equitable estoppel); *Tome Land & Improvement Co. v. Silva*, 83 N.M. 549, 554, 494 P.2d 962, 967 (1972) (failing to change position or to rely to their detriment on the board's action resulted in meritless assertion of estoppel by appellants); *Porter v. Butte Farmers Mut. Ins. Co.*, 68 N.M. 175, 181, 360 P.2d 372, 376 (1961) (deciding that plaintiffs did not change their position after comments by a member of the board of directors eliminated plaintiffs from a valid equitable estoppel claim). Because ECI did not allege it took any action based on the actions of the City, we hold that ECI's complaint is legally insufficient to support a claim for equitable estoppel.

CONCLUSION

{24} For the foregoing reasons, we affirm the decision of the district court to dismiss ECI's complaint with prejudice.

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

WE CONCUR: RICHARD C. BOSSON, Chief Judge, and A. JOSEPH ALARID, Judge.

2002–NMSC–001

39 P.3d 124

STATE of New Mexico, Plaintiff–Respondent,

v.

William Mark MANN, Defendant–Petitioner.

No. 26,582.

Supreme Court of New Mexico.

Jan. 11, 2002.

Billy R. Blackburn, John R. Robbenhaar, Albuquerque, NM, for Petitioner.

Patricia A. Madrid, Attorney General, Arthur W. Pepin, Assistant Attorney General, Santa Fe, NM, for Respondent.

OPINION

SERNA, Chief Justice.

{1} Defendant William Mark Mann appeals his conviction for intentional child abuse resulting in death. The Court of Appeals affirmed Defendant's conviction. *State v. Mann*, 2000–NMCA–088, 129 N.M. 600, 11 P.3d 564, *cert. granted*, 129 N.M. 599, 11 P.3d 563 (2000). Defendant argues that he is entitled to a new trial based on juror misconduct during deliberations. We affirm Defendant's conviction.

I. Facts and Background

A. The Trial

{2} The victim was the six-year-old son of Defendant and Rita Yancher. Yancher had primary custody of the victim, and the victim usually spent every other weekend with Defendant and Patricia St. Jeor Mann, at the time, Defendant's girlfriend. On August 29, 1996, the victim was present at Defendant's house. At about 11:00 p.m., Defendant and Yancher argued during a telephone conversation regarding the victim staying with him through Saturday as well as late child support payments. At approximately 1 a.m., on August 30th, St. Jeor awoke and saw Defendant going to the victim's room to take him to the bathroom. She heard a noise from the victim, followed by a loud crash and a scream. She ran to the bathroom and saw the victim, apparently having a seizure, on the floor with Defendant cushioning his head. St. Jeor called 911 and reported that the victim was injured. She returned to the bathroom and saw the victim on his back with a screwdriver protruding from his chest. St. Jeor testified that the victim was trying to move himself and Defendant was cupping the screwdriver. St. Jeor, a nurse, attempt-

ed to attend the victim, but Defendant punched her in the eye, grabbed her by her hair and by the back of the neck and "slammed" her through the door into the opposite wall. She again called 911, telling them that Defendant attacked her.

{3} Paramedics arrived and saw St Jeor exit the house; she was bleeding from her face and had a swollen eye. A paramedic testified that Defendant growled, refused to let him treat the victim, and told him to leave the house. Upon the arrival of sheriff's deputies, Defendant was separated from the victim, and the victim was taken to the hospital. Medical personnel were unable to revive the child. The paramedics and medical personnel testified that they did not disturb the screwdriver from his chest while performing CPR and other medical treatment.

{4} The victim's cause of death was the stab wound in his chest. Almost the entire screwdriver's blade, approximately four inches, was embedded in his chest; an autopsy revealed that the screwdriver was wedged between the sternum and the second and third ribs. The victim had two wounds in his chest but only one entry wound, indicating that the screwdriver was withdrawn several inches but not fully removed before it was thrust into his chest a second time. A pathologist testified that there was blood in both the right and left chest cavities, indicating that the wounds occurred prior to the victim's death. The pathologist testified that "there [were] two trajectories that emanate from one entrance hole, one stab wound with two trajectories." He concluded that the victim's wounds were "stabbing paths that were created by a stab into the right chest, a partial withdrawal and then a stab into the left chest." The pathologist testified that the screwdriver could not simply move over into the left chest because the vertebral column protrudes into the cavity; thus, the screwdriver had to be withdrawn until it was above the range of the column and then reintroduced. He also testified that cardiopulmonary resuscitation compressions to the chest, as well as other medical interventions performed on the victim, could not have caused the second wound path. There were no other injuries on the front of the victim's head, face, hands, or elbows.

{5} Defendant was also charged with child abuse for a head injury the victim suffered in 1994. The State's pathologist testified regarding the victim's earlier skull fracture. He concluded that the brain injuries he observed were inconsistent with a simple fall from a bar stool as described by Defendant.

{6} Defendant testified that he got up around 1 a.m. and realized that he had not taken the victim to the bathroom, a routine occurrence. He woke up the victim and walked him into the bathroom. Defendant testified that he was standing in the bathroom doorway when he saw the victim trip on a rug, put out his arms and knock the items on the hamper, and then fall to the floor. Defendant testified that he turned the victim over and saw the screwdriver. Defendant said he grabbed the screwdriver to prevent the victim from pulling it out in order to minimize the injuries. Defendant testified that St. Jeor came back in and that he thought that she would try to move him, so he pushed her from him and told her to get away. He testified that he did not remember hurting her.

{7} Defendant presented the testimony of Dr. Alan Watts, a physicist, regarding the possibility of the victim impaling himself on the screwdriver consistent with Defendant's explanation of events. He performed several calculations in the courtroom relating to the angle at which the screwdriver may have landed and the amount of force which the victim's body would have exerted upon it on impact, as well as videotaped and live demonstrations for the jury. The videotape consisted of Dr. Watts performing experiments in which he dropped a metal rod, which simulated the victim's body, and a screwdriver onto the concrete floor of his garage. Dr. Watts analogized how a screwdriver might bounce if it hits a solid object with the randomness of throwing dice. Dr. Watts testified that the occurrence of an impalement such as that described by Defendant has "a relatively small overall probability." He stated that, based on the "probability aspects of this," it would be a "freakish accident." Dr. Watts said that "[i]t is a probabil-

ity calculation" and he offered an example for comparison to "Monte Carlo [codes] because basically you roll the dice."

{8} The State did not present rebuttal testimony, but instead cross-examined Defendant's expert. Dr. Watts conceded that he was unable to explain from his calculations how the second wound path occurred, stating that he had "no way of calculating how the second path could have been caused on the basis of physics." The prosecutor asked if Dr. Watts could calculate "the probability of [Defendant's] explanation of the stab wound." Dr. Watts testified that he did not calculate the probability of impaling oneself on a screwdriver because "the whole issue that [he] was asked to address was can this happen, and the answer is, yes, it can." He said that the probability would be "finite," but "never zero." Dr. Watts testified that if he "were to run every option possible, [he'd] come to the conclusion that on average you won't stab yourself by falling on a screwdriver, but there is nevertheless a finite possibility it can happen."

{9} A jury convicted Defendant of child abuse resulting in death and second degree murder arising from the death of the victim. The jury also convicted Defendant of aggravated assault of a household member, St. Jeor. The jury deadlocked on the child abuse charge stemming from the victim's 1994 head injury.

B. The Jurors' Statements

{10} Defendant filed a motion for a new trial, arguing that the verdict was tainted by juror misconduct. Defense counsel interviewed several jurors and was told that Juror 7 presented probability calculations to the other members of the jury regarding the chances of a child and a screwdriver falling in such a manner as to result in impalement. Defendant identified several jurors who he believed had information regarding Juror 7.

{11} The trial court decided to conduct in camera interviews on the record with members of the jury to determine if an evidentiary hearing was necessary because the trial court was concerned with the jurors' privacy after videotape of the jury had appeared on television during the trial. The court gave Defendant the opportunity to name the jurors whom the court should question and gave both Defendant and the State the opportunity to posit any additional question to be asked. Defendant did not request that the trial court interview all members of the jury. The Court interviewed Jurors 4, 6, 7, 9, and 10.

{12} Juror 9 said that Juror 7 wrote "some calculations" on a board in the jury room, and said,

> But, see, I kind of viewed that more as here is a guy that knows numbers, knows mathematics, who knows probabilities. I viewed it as his life experience. You know, much in the same way that relating back to the '94 head injury ... where the one juror ... brought in his life experience. He didn't bring in something, but in effect he did bring in something. He brought in the fact that he had a kid fall out of a tree and had a bad head injury.... [W]e had nurses in there, and the nurses brought in their life experience...."

{13} Juror 4 noted that Juror 7 "didn't say he did any experiments at home" and that "[h]e didn't bring papers" into the jury room, but used the easel in the room. Juror 4 recounted that Juror 7 said, " 'Let's take Dr. Watts' figures.' And you might fly this by that—being an engineer and probably halfway [physicist], he said using his figures, it can't come out the way he said it did." Juror 10 stated that Juror 7 had some "figures that he had thought about and it was explaining his point of view on the testimony of Dr. Watts." Juror 6 stated that "I feel that the particular juror that—the engineer juror, to me that was just his way of venting his feelings and thoughts and emotions during the deliberation."

{14} Juror 7 told the trial court that he did not do any calculations or experiments at home. He contended that he did not dispute or discredit Dr. Watts' testimony but believed that Dr. Watts' testimony consisted of "fine calculations and [he] would agree with the calculations." Juror 7 thought that the testimony did not "[answer] the right question" because he did not accept the "logical tie" between the testimony and Defendant's

story. Juror 7 completed a probability calculation to "verify [his] own gut feeling," beginning with Dr. Watts' calculations which were presented during the trial. He stated that he used his "professional judgment" and a "fairly simple five-step probability" calculation with five events from Defendant's description of the event: first, whether "the screwdriver land[ed] in the correct orientation" or "solid angle" perpendicular to the victim's falling body; second, whether the screwdriver landed with the blade facing up; third, whether the screwdriver separated itself, as it fell, from other items that had been knocked off the hamper; fourth, where it landed on the floor; and fifth, whether its orientation caused the wound path. He recounted, "I simply multiplied the numbers, one over 10 times one over two times 1 over 100 three times, and the number you get is basically five times ten to minus 8 or in what most of us think about, one in a 20 million chance."

{15} The trial court stated,

> I conducted several interviews with the jurors in this case. My concern and purpose for doing that was first of all to find out if there was any juror misconduct requiring possibly a full evidentiary hearing as to the merits of the Defendant's motion as to whether that misconduct may have influenced the jury to the extent the Defendant might be entitled to a new trial in this case.
>
> Also, another reason for my interviews with the jurors were to find in my own mind as to whether anything occurred in the jury room that was such that would require that in the interest of justice that I would have to remedy or should remedy what could be characterized as a manifest miscarriage of justice.

{16} The trial court expressed

> after the most serious contemplation, I find that there has not been sufficient evidence before this Court to require either a further inquiry into the jury's conduct, nor is there such that would require me in my role as a judge to set aside that verdict. I feel I believe in the jury system. I believe that the jury in this case took the evidence as they saw it in court, made a decision based on their [consciences] and on the evidence presented in court, although some people may feel that they would have come to a different resolution. That is not what our system is about, and for me to place myself in the stead of the jury to overturn that would be, I feel, [betrayal] of everything I believe about our system.

The trial court then denied Defendant's motion. The trial court found that Defendant failed to meet his burden to demonstrate that extraneous information had reached the jury, stating that there was insufficient evidence to require further inquiry into the jury's conduct or to set aside the verdict. A majority of the Court of Appeals affirmed the trial court on the issue of juror misconduct, concluding that the trial court did not abuse its discretion by denying Defendant's motion for a new trial. *Mann*, 2000–NMCA–088, ¶ 109, 129 N.M. 600, 11 P.3d 564.

II. Discussion

A. Juror Conduct

1. Standard of Review

{17} This Court will not overturn a trial court's denial of a motion for a new trial unless the trial court abused its discretion. *State v. Volpato*, 102 N.M. 383, 385, 696 P.2d 471, 473 (1985) ("The discretion of a trial court is not to be lightly interfered with, and an order denying a motion for a new trial will not be overturned except for an abuse of discretion."); *accord Gonzales v. Surgidev Corp.*, 120 N.M. 133, 148, 899 P.2d 576, 591 (1995) ("It is within a trial court's discretion whether to grant a motion for a new trial based on bailiff misconduct, and we will review that decision only to determine whether the court abused its discretion."). This Court "will not disturb the trial court's denial of a motion for a new trial unless the ruling is arbitrary, capricious or beyond reason." *State v. Litteral*, 110 N.M. 138, 144, 793 P.2d 268, 274 (1990). The Court of Appeals correctly emphasized that "[r]eliance upon this standard reflects not only the important policies implicated by motions for new trial, but also the trial court's unique position in passing upon such questions in the first instance." *Mann*, 2000–NMCA–088, ¶ 67, 129 N.M. 600,

11 P.3d 564 (citation omitted). We agree that the trial court is in the best position to make this judgment. *United States v. Webster*, 750 F.2d 307, 338 (5th Cir.1984) ("We note at the outset that, sitting as we do far from the daily rigors of trial, we are in a particularly inappropriate position from which to judge the effect of a juror's premature expression of an opinion as to guilt on the minds of the other members of the jury panel. That is precisely why we have traditionally left the manner of handling jury misconduct to the sound discretion of the trial judge.").

2. Extraneous Prejudicial Information

{18} The competency of a juror as a witness is specifically governed by our Rules of Evidence.

> Upon an inquiry into the validity of a verdict ..., a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict ... or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Rule 11–606(B) NMRA 2001. Thus, a juror may testify on the very limited circumstance of whether extraneous prejudicial information was improperly before the jury. Otherwise, the rule prohibits a juror from testifying as to any matter or statement made during the course of deliberations or to the juror's mental processes.

{19} The party requesting a new trial on the basis that the jury was exposed to extraneous information "must make a preliminary showing that [he or she] has competent evidence that material extraneous to the trial actually reached the jury." *State v. Sena*, 105 N.M. 686, 688, 736 P.2d 491, 493 (1987) (quoting *State v. Doe*, 101 N.M. 363, 366, 683 P.2d 45, 48 (Ct.App.1983)). Thus, Defendant has the burden to show that the extraneous information actually reached the jury. "This burden is not discharged merely by allegation; rather, Defendant must make an affirmative showing that some extraneous influence came to bear on the jury's deliberations." *Mann*, 2000–NMCA–088, ¶ 85, 129 N.M. 600, 11 P.3d 564. Rule 11 606(B) tracks the language of the comparable federal rule. *See Doe*, 101 N.M. at 365, 683 P.2d at 47. "Unauthorized communications to the jury in state courts must be judged by the federal requirements of due process."[1] *State v. Gutierrez*, 78 N.M. 529, 531, 433 P.2d 508, 510 (Ct.App.1967).

{20} Although several prior New Mexico cases, as well as some cases from other jurisdictions, do not distinguish jury tampering, juror misconduct, and juror bias, we believe it would provide clarification to do so. While there is bound to be overlap between these categories, we find the distinctions useful to place the issue in the present case into proper context. *See generally Webster*, 750 F.2d at 338 ("[W]e have distinguished between jury panels tainted by outside influence, such as publicity or direct appeals from third parties, and panels on which one or more of the jurors themselves have violated an instruction of the court."). The essence of cases involving juror tampering, misconduct, or bias is whether the circumstance unfairly affected the jury's deliberative process and resulted in an unfair jury. *See United States v. Olano*, 507 U.S. 725, 739, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (discussing the claim of prejudice when the trial court allowed alternates to sit in on deliberations, but instructed them not to participate, concluding, "[t]here may be cases where an intrusion should be presumed prejudicial, but a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict?" (citations omitted)).

1. Defendant does not argue that the New Mexico Constitution provides greater protection, and we do not address this question.

{21} Jury tampering generally refers to private communications between third persons and jurors. The United States Supreme Court has held that private communication, contact, or direct or indirect tampering with a juror during a trial about the matter pending before it, "if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties" may result in a due process violation. *Remmer v. United States,* 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed. 654 (1954); *see also Mattox v. United States,* 146 U.S. 140, 150, 13 S.Ct. 50, 36 L.Ed. 917 (1892) ("Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear."). In *Mattox,* the bailiff remarked to the jury that the defendant had a prior murder charge. 146 U.S. at 142, 13 S.Ct. 50. In *Remmer,* an unnamed individual remarked to a juror that he could profit from a particular verdict, and the judge, ex parte, requested an investigation. In *Gutierrez,* the Court of Appeals addressed the issue of jury tampering when an individual approached a "juror and told her 'to make a wise decision,' " and relied upon *Remmer.* 78 N.M. at 530–31, 433 P.2d at 509–10. The Court of Appeals relied upon *Gutierrez* in another jury tampering case in which an "informant" told a juror about "a witness who had identified [the respondent] in court only after an initial hesitation." *Doe,* 101 N.M. at 365–66, 683 P.2d at 47–48.

{22} Juror misconduct, on the other hand, includes activity by members of the jury which is inconsistent with the instructions by the court. *See Sena,* 105 N.M. at 688, 736 P.2d at 493 (rejecting the defendant's argument that the defendant's sister saw a juror sleeping during the trial and a juror's remark that he knew the defendant was guilty but not based on evidence presented at trial constituted juror misconduct and supported the defendant's claim that extraneous material reached the jury). Juror misconduct would also include members of the jury making an unauthorized visit to the scene of the crime, or referring to material, such as a dictionary, not in evidence and against the instructions of the trial court. *See, e.g., State v. Melton,* 102 N.M. 120, 122–24, 692 P.2d 45, 47–49 (Ct.App.1984) (concluding that, where the judge instructed the jury that it was not allowed to have a dictionary and a juror later copied a dictionary definition and showed it to the jury, an improper communication occurred but that the presumption of prejudice was rebutted); *United States v. Harber,* 53 F.3d 236, 241 (9th Cir.1995) (concluding that, when a copy of the case agent's report, not admitted into evidence, was in the jury room during deliberations, it resulted in inherent prejudice where it was read and relied upon by the jury).

{23} In *State v. Sacoman,* 107 N.M. 588, 762 P.2d 250 (1988), this Court addressed whether juror remarks constituted extraneous information that prejudiced the defendant. In *Sacoman,* the defendant's work as a busboy was relevant to his alibi; he claimed that he had not punched his time card but had been paid as if he had finished work at the end of his shift. *Id.* at 589, 762 P.2d at 251. One juror described his own personal experience as a busboy, "relating that on many occasions when he wanted to take off work early he would work extra hard . . . then leave without punching out." *Id.* at 590, 762 P.2d at 252. Another juror fabricated a story about employment procedures, claiming that a payroll clerk told the juror that if an employee did not clock out, the clerk assumed that the employee worked the full time. *Id.* The *Sacoman* Court summarily concluded that "[t]he defendant's authorities convince us that he is correct in asserting that the juror communications at issue in this case constituted extraneous information." *Id.* at 591, 762 P.2d at 253.

{24} The Court, in *Sacoman,* expressed a rather broad introductory statement: "[c]ommunication of specific knowledge from a particular juror to others involves extraneous information." *Id.* at 590, 762 P.2d at 252. Defendant relies upon this statement as this Court's definition of extraneous information. As discussed further below, this would be a sweeping and far-reaching rule if actually applied. We do not believe this to be a

particularly helpful test in extraneous information cases. Further, a careful review of the authority on which *Sacoman* based its determination leads us to the conclusion that this aspect of the case was questionable. *Sacoman's* out-of-state authority in which jurors had specific knowledge of extrajudicial facts directly related to the litigation before them was inapplicable to the facts in *Sacoman* and is inapplicable in the present case. *See State v. Wisham,* 384 So.2d 385, 387 (La.1980) (concluding that the defendant's right to an impartial jury was violated when jurors saw the defendant's alibi witness arrested for perjury); *People v. Huntley,* 87 A.D.2d 488, 452 N.Y.S.2d 952, 955–56 (1982) (juror falsely claimed to have visited the scene of the crime and corroborated the state's version of events); *State v. Lorenzy,* 59 Wash. 308, 109 P. 1064, 1065–67 (1910) (remanding for a new trial when defendant was convicted of "conniving at the prostitution of his wife" and juror was familiar with a hotel directly at issue in the case as a house of prostitution). Of particular note, *Sacoman* relied heavily on *State v. Thacker,* 95 Nev. 500, 596 P.2d 508, 509 (1979) (per curiam), a larceny case involving two calves, and characterized a juror "as the foreman of a cattle ranch ... who made estimates regarding the weight of the cattle that contradicted the theory of defense." *Sacoman,* 107 N.M. at 591, 762 P.2d at 253. However, the *Sacoman* Court failed to recognize that, in *Thacker,* the juror's ranch was the same ranch where the calves at issue were located. *Thacker,* 596 P.2d at 509. Unlike those cases, the jurors in *Sacoman* and the present case did not have knowledge of extraneous facts directly related to the specific case. The *Sacoman* juror with busboy experience did not inform the jury as to procedures used at the defendant's place of employment; he simply related his own work experiences in that particular field. *Id.* at 590, 762 P.2d at 252. Similarly, the juror who related a false story concocted a description of a different workplace, not the defendant's. *Id.*

{25} *Sacoman* also relied on cases which involve juror bias, *State v. Larue,* 68 Haw. 575, 722 P.2d 1039 (1986) and *Rogers v. State,* 551 S.W.2d 369 (Tex.Crim.App.1977), in which jurors related personal experiences similar to the victims in the respective cases. Although juror bias may involve juror misconduct, we consider these cases to be clearly distinguishable from *Sacoman* and the present case as well. *Larue* involved a juror who related to the jury an experience similar to the victims in the case before her, of sexual abuse at a young age, to support the victims' ability to recall the event despite their age. *Larue,* 722 P.2d at 1040–42. The Supreme Court of Hawaii based its conclusion that this constituted extraneous prejudicial information on the fact that the juror should have been excluded for cause during voir dire. *Id.* at 1042; *see State v. Furutani,* 76 Hawai'i 172, 873 P.2d 51, 61 (1994) ("Explicit in our ruling in *Larue* was a recognition that the foreperson's childhood experience constituted 'important biographical information relevant to a challenge for cause.' " (quoted authority omitted)). In other words, *Larue* addressed juror bias. If a juror is biased, then the defendant, by definition, suffers prejudice. One juror's bias, even if it does not influence other jurors, jeopardizes the defendant's right to an impartial jury. *See United States v. Humphrey,* 208 F.3d 1190, 1199–1200 (10th Cir.2000) (concluding that a juror's statement that the juror knew of the defendant's reputation in the community as a drug dealer constituted extraneous material; noting that the statement raised questions regarding the truthfulness of the juror during voir dire and of bias against the defendant).

{26} The relationship between voir dire and juror bias demonstrates the distinctions between the juror's actions in *Larue* and the present case. During voir dire, the parties and the court in *Larue* questioned venire members regarding sexual abuse. *Larue,* 722 P.2d at 1041–42. The juror in question did not disclose that she had been sexually assaulted at age three. *Id.* The juror did not necessarily commit misconduct because she apparently did not attempt to deceive the parties during voir dire, but instead simply failed to understand the significance of the events in her past to the case before her. *Id.* Had she properly disclosed her history, the defendant could have successfully challenged her for cause. *Id.* at 1042. In other words, it is more generally accepted that a juror

who has experienced a traumatic event similar to a victim in a criminal case is likely to be unable to be fair and impartial in deciding the defendant's guilt. *Sacoman* does not discuss whether the juror's experience as a busboy was a fact disclosed during voir dire. Had the defendant raised this issue, it most likely would not have resulted in an excusal for cause because a juror's work experience in this context, although similar to an issue at trial, is not considered to affect the ability of that juror to be fair and unbiased. *See generally State v. Sanchez,* 120 N.M. 247, 251–53, 901 P.2d 178, 182–84 (1995) (discussing a claim of juror bias and determining that, absent exceptional circumstances justifying a finding of implied bias, a defendant must demonstrate actual bias). In the present case, this reasoning is even more clear. The fact that Juror 7 had the educational and professional ability to understand and perform calculations such as those conducted by Defendant's expert would clearly not provide a basis for Juror 7's excusal for cause.

{27} We emphasize that the underlying issue in cases involving extraneous information is a defendant's right to a fair and impartial jury. Jury tampering and juror bias present the clearest examples of potentially improper influences upon a jury, while the notion of juror misconduct creates a more difficult extension of the issue. *See United States v. Dutkel,* 192 F.3d 893, 894–96 (9th Cir.1999) ("Jury tampering is a much more serious intrusion into the jury's processes [than juror misconduct] and poses an inherently greater risk to the integrity of the verdict."). Although some forms of misconduct, such as a juror making an unauthorized visit to the scene of a crime, may infringe on a defendant's right to a fair jury, we are cautious and reluctant to apply this reasoning to actions approaching juror deliberations. *Sacoman* appears to have imprudently extended the reasoning of jury tampering or bias cases to a situation in which a juror drew on his past experiences in order to deliberate on the case before him.[2] Although Juror 7's conduct arguably could be labeled juror misconduct if we applied the broad introductory statement of *Sacoman* that communication of specific knowledge from one juror to the jury involves extraneous information, we take this opportunity to clarify that jurors may properly rely on their background, including professional and educational experience, in order to inform their deliberations. *See Nichols v. Busse,* 243 Neb. 811, 503 N.W.2d 173, 186 (1993) ("[W]e feel that the proper approach is to prohibit the use of juror affidavits which seek to impeach verdicts due to a juror's intradeliberational statements based on his or her personal knowledge, when that knowledge is not directly related to the litigation at issue."). "Jurors are generally knowledgeable in many areas, and they are entitled to use their common or acquired sense in arriving at a verdict, so long as the knowledge is not imparted to them outside the judicial proceeding in which they sit as jurors. The use of their extrinsic knowledge in the deliberative process does not fall into the category of extrinsic influence." *State v. Anderson,* 748 S.W.2d 201, 205 (Tenn.Crim.App.1985), *overruled on other grounds by State v. Shelton,* 851 S.W.2d 134 (Tenn.1993). We believe this holding is more consistent with the policy articulated in Rule 11–606(B) that a juror may not testify concerning his or her mental processes or the "effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict." Rather, a juror may only "testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention." Rule 11–606(B).

3. Juror 7's Conduct

{28} As discussed below, we conclude that Juror 7's statements constituted proper deliberations based upon his professional and educational experience. Defendant argues that Juror 7 injected new evidentiary facts which contradicted defense testimony rather than expressing opinions, views or beliefs about the evidence. We disagree. Defendant concedes that Juror 7

2. Unlike the juror with busboy experience, the *Sacoman* juror who related a false story could more accurately be described as a potentially biased juror. *See Sacoman,* 107 N.M. at 592–94, 762 P.2d at 254–56.

began with Dr. Watts' testimony, but he asserts that Juror 7 "added his own testimony of probability and physics." *See Mann*, 2000–NMCA–088, ¶¶ 39, 42, 129 N.M. 600, 11 P.3d 564 (Apodaca, J., dissenting in part) (characterizing the remarks as a "dissertation"). Juror 7, albeit with greater understanding than the average person, was engaging in deliberation of the evidence presented at trial. *See State v. Chamberlain*, 112 N.M. 723, 732, 819 P.2d 673, 682 (1991).

{29} In order to provide expert testimony supporting Defendant's version of events, Dr. Watts described basic physics principles, completed extensive calculations, and performed both in-court and videotaped demonstrations with a screwdriver and other materials. Dr. Watts testified that the occurrence of an accidental impalement consistent with Defendant's theory has "a relatively small overall probability." Dr. Watts testified that, based on the "probability aspects" of this scenario, the victim's accidental impalement would be a "freakish accident." On cross-examination, Dr. Watts testified that he did not calculate the actual probability of impaling oneself on a screwdriver because the specific issue Defendant wished for him to address was whether the scenario *could* possibly happen. However, Dr. Watts *did give* his expert opinion regarding the probability of such an accidental impalement as "finite," but "never zero." Dr. Watts testified that if he "were to run every option possible, [he'd] come to the conclusion that on average you won't stab yourself by falling on a screwdriver, but there is nevertheless a finite possibility it can happen." Dr. Watts analogized how a screwdriver might bounce into position to the randomness of throwing dice; he compared the probability calculation to "Monte Carlo codes" which are "named after the gambling place." Defendant himself placed probability calculations regarding his accidental impalement theory in evidence before the jury.

{30} Juror 7 articulated his own thought process as to what this "finite" probability calculation would be, based on the evidence presented in court and based on Dr. Watts' testimony. *Mann*, 2000–NMCA–088, ¶ 102, 129 N.M. 600, 11 P.3d 564 (concluding that "Juror No. 7's expression of his 'professional opinion' appears to have been nothing more than the expression of his subjective take on the evidence in record"). Juror 7's deliberations properly took their content from the evidence and testimony presented at trial. His calculation, as well as several other jurors' calculations, expressed the probability, introduced into evidence by Defendant, as one in several million. The jury's deliberation was an attempt to review and evaluate Defendant's expert testimony. Juror 9 rejected the conclusion of Defendant's expert, and decided that "Not in a zillion billion years did that happen." Juror 4 estimated the probability of Defendant's accident occurring as "one in 10 million." Defendant concedes that this type of opinion is proper. *See Mann*, 2000–NMCA–088, ¶ 42, 129 N.M. 600, 11 P.3d 564 (Apodoca, dissenting in part) (asserting that Juror 7 "could have stated that, based on his experience, Defendant's theory was virtually impossible"). Juror 7, because of his life experience, occupation, and education, verbalized a similar opinion as other jurors based on evidence and testimony presented at trial in a more complex manner, explaining the basis behind the conclusion that Defendant finds permissible. Concluding that Defendant's theory has a less than one in twenty million chance, rather than Dr. Watts' characterization of a "freak accident," is not a new evidentiary fact. The jury, including Juror 7, carefully considered Defendant's theory but was ultimately persuaded that the State demonstrated that Defendant was guilty beyond a reasonable doubt; thus, the jury performed its duty. *See Chamberlain*, 112 N.M. at 733, 819 P.2d at 683 ("The jury was required to evaluate . . . conflicting versions of the truth, and it properly used the evidence before it to perform its duty."). Defendant wishes to be allowed, and in fact, was properly allowed, to present expert physics testimony regarding the ultimate conclusion of the probability of impalement to the jury (possible but extremely unlikely), but now strenuously objects to the jury actually deliberating on this very issue. It would be inordinately bad policy to single out a juror who thoughtfully and conscientiously engaged in deliberation and presented

his conclusion to the jury because he was able to express exactly why he came to that conclusion based on the evidence at trial, rather than more simply state the theory as one in a million.

{31} In *Chamberlain,* 112 N.M. at 731, 819 P.2d at 681, this Court rejected the defendant's argument that the jury's experiment, in which they removed a gun from its holster to compare the noise with a noise on an audiotape, created new or extrinsic evidence, and concluded that the jury's experimentation with properly admitted evidence in a manner not discussed at trial did not constitute "evidence not properly admitted or experimentation based on facts or evidence not properly before the jury." Similarly, Juror 7's calculations were based on testimony and evidence properly admitted at trial. Defendant emphasizes that Juror 7's calculations contradicted those of his expert. We reject this argument. First, Juror 7 said that he in fact agreed with Dr. Watts' calculations. Secondly, as Defendant concedes, the jury is free to reject expert testimony. *Chamberlain,* 112 N.M. at 732, 819 P.2d at 682 ("The jury is not bound by expert opinion."). "Although potential error may occur if an experiment creates a new evidentiary fact outside of the record for the jury, the jury must be allowed latitude to evaluate evidence and to use its experience to deliberate." *Id.* (citations omitted).

{32} "In deciding every case, jurors must necessarily take into consideration their knowledge and impressions founded upon experience in their everyday walks of life, and the fact that these things affect them in reaching their verdict cannot be reversible error, because, indeed, jurors without possessing such knowledge and impressions could not be had." *State v. Dascenzo,* 30 N.M. 34, 37, 226 P. 1099, 1100 (1924). The trial court did not abuse its discretion by denying Defendant's motion for a new trial under New Mexico precedent. Cases from other jurisdictions also support this conclusion. *See, e.g., Wagner v. Doulton,* 112 Cal. App.3d 945, 169 Cal.Rptr. 550, 552–53 (1980) (concluding that an engineer juror's map, drawn based on his understanding of the testimony and used during deliberations, did not constitute extraneous evidence); *State v. Heitkemper,* 196 Wis.2d 218, 538 N.W.2d 561, 563–64 (App.1995) (concluding that a pharmacist juror's remark that he disbelieved a witness regarding drugs she ingested because the quantities should have knocked her out did not constitute extraneous information). "A juror's common sense and experience, including expertise in particular subjects, is not extrinsic information warranting relief if used during deliberations." *State v. Dickens,* 187 Ariz. 1, 926 P.2d 468, 483 (1996) (en banc) (holding that a mechanic juror's statement that he did not believe the defendant's claim that his truck overheated based on his expertise did not constitute extraneous information).

{33} Remarks made by the jurors in the present case illustrate the problematic application of a broad definition that communication of specific knowledge from a particular juror to others constitutes extraneous prejudicial information. Juror 9 described how another juror discussed that juror's experience with his own child falling from a tree and how that experience related to his understanding of the child abuse charge stemming from the victim's 1994 head injury. Both Juror 9 and Juror 7 mentioned that two jurors who were nurses discussed their opinion regarding the expert medical testimony, based on their educational and professional experience. Finally, Juror 7 described another juror recounting a previous experience in which the juror fell straight forward and sustained an injury to her chin. All of this information was not subject to cross-examination regarding the similarity or dissimilarity to the charges in the present case; it could be considered extraneous under this definition. The examples from the present case illustrate the difficulties inherent in attempting to distinguish extraneous information from permissible deliberation based on life experience. This highlights the importance of allowing our jury system to function without improper interference, and the critical need for this Court to protect open, full, and complete deliberations among members of the jury.

{34} Defendant argues that the Court of Appeals opinion will result in the "dumbing

down" of juries because attorneys will remove individuals such as Juror 7. We disagree. We do not believe that because an individual has particular professional experience or is well-educated one can assume that he or she is biased in favor of any particular party. As discussed above, venire members who express experiences which would affect their ability to be unbiased can be dismissed through cause challenges during voir dire. If either party wishes to remove a member of the venire because of that individual's life experience, or educational or professional background, as a matter of strategy, the party will have to do so with a peremptory challenge. These factors, without more as determined by the trial court, will not provide a basis for challenging such individuals for cause and will not subject a jury verdict to attack. Accepting Defendant's argument that an articulate juror who expresses and explains his or her reasoning based on properly admitted evidence results in extraneous information prejudicing the jury would, we believe, surely result in a chilling effect on jury deliberations. *Mann*, 2000–NMCA–088, ¶ 83, 129 N.M. 600, 11 P.3d 564 ("The analysis we apply today has evolved expressly to safeguard the secrecy of jury deliberations from unwarranted invasion.").

{35} Juror 7 discussed evidence and testimony properly admitted at trial and performed calculations similar to those of Defendant's expert. *See Chamberlain*, 112 N.M. at 733, 819 P.2d at 683 (concluding that "in evaluating the evidence presented, the jury is given latitude to use its judgment, and although no testimony had been elicited on the exact issue, the background information was all properly before the jury"). We conclude that the trial court correctly found that Juror 7 did not bring extraneous prejudicial information to the jury. The trial court did not abuse its discretion or act in an arbitrary or capricious manner. Because Defendant did not meet his burden by showing that extraneous information reached the jury, we need not address the issue of prejudice.

{36} However, we do note that it appears that the United States Supreme Court has distanced itself from the *Remmer* presumption of prejudice upon which New Mexico courts have relied. *See Olano*, 507 U.S. at 739–40, 113 S.Ct. 1770; *Smith v. Phillips*, 455 U.S. 209, 214–17, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) (reversing a grant of habeas corpus where a juror allegedly applied for a job with the prosecutor's office and holding that due process only requires that the trial court hold a hearing to determine the existence of prejudice). This development has also been recognized by other courts. *See United States v. Sylvester*, 143 F.3d 923, 934 (5th Cir.1998) ("We agree that the *Remmer* presumption of prejudice cannot survive *Phillips* and *Olano*. Accordingly, the trial court must first assess the severity of the suspected intrusion; only when the court determines that prejudice is likely should the government be required to prove its absence."); *United States v. Williams–Davis*, 90 F.3d 490, 497 (D.C.Cir.1996) (rejecting *Remmer's* automatic presumption, relying on *Olano*, and concluding that the trial court should "inquire whether any particular intrusion showed enough of a 'likelihood of prejudice' to justify assigning the government a burden of proving harmlessness"); *Webster*, 750 F.2d at 338 ("We are reluctant to adopt a [presumption of prejudice] rule that would unduly bridle the discretion of district judges who, as we are ever mindful, are obviously in a far better position from which to control the flow of trial."). *But see Dutkel*, 192 F.3d at 894–96 (determining that the *Remmer* presumption of prejudice survives *Phillips* and *Olano*, but only for jury tampering cases involving bribery or threats). For purposes of this case, it is unnecessary to reconcile existing New Mexico precedent with this more recent articulation by the Supreme Court.

{37} As a final matter, Defendant argues that his right of confrontation was violated and makes an unsupported argument regarding his right to be present while the trial court questioned the jurors. Because, as we explained above, we conclude that no extrinsic evidence was before the jury, Defendant was not deprived of his right of confrontation. The trial court's in camera interviews were within its discretion. *See Commonwealth v. Fidler*, 377 Mass. 192, 385 N.E.2d 513, 519 (1979) ("[P]ermitting unbridled interviews of jurors could lead to

harassment of jurors, exploitation of jurors' thought processes, and diminished confidence in jury verdicts. A rule requiring post-verdict interviews to be supervised and directed by the judge also prevents the interrogation from exceeding its proper scope." (citations omitted)); *United States v. DiSalvo*, 34 F.3d 1204, 1223 n. 18 (3d Cir.1994) (concluding that the trial court did not err by interviewing some members of the jury in camera in response to a claim of juror misconduct); *Webster*, 750 F.2d at 339 ("Whether we consider the presence of counsel bottomed on the need to rebut a presumption of prejudice or as emanating from the defendant's general right to be present at all stages of the trial, our inquiry is the same: were appellants prejudiced by the in camera nature of the juror interviews? A review of the transcript of the juror interviews belies any claim that appellants were prejudiced by the trial court's refusal to allow them to participate.") (citations omitted). Although Defendant clearly requested that the trial court hold an evidentiary hearing, Defendant does not indicate how he preserved his right to be present at the interview for appellate review; Defendant does not assert that he requested to be present while the trial court questioned the jurors. The United States Supreme Court provides guidance: "We hold that failure by a criminal defendant to invoke his [or her] right to be present under Federal Rule of Criminal Procedure 43 at a conference which he [or she] knows is taking place between the judge and a juror in chambers constitutes a valid waiver of that right." *United States v. Gagnon*, 470 U.S. 522, 529, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985). Our rule regarding a defendant's right to be present is similar to the federal rule. *See* Rule 5–612 NMRA 2001 committee commentary (stating that "this rule is almost identical to Rule 43 of the Federal Rules of Criminal Procedure"). Thus, Defendant's failure to invoke any right to be present when the trial court announced that it was going to interview the jurors in camera constituted a valid waiver of that right.

III. Conclusion

{38} Defendant failed to demonstrate that extrinsic information actually reached the jury. We conclude that the trial court did not abuse its discretion in denying Defendant's motion for a new trial. The trial court acted within its discretion with respect to Defendant's motion for a new trial. A juror may properly rely on his or her education, experience and common sense during deliberations; thorough discussion, informed by expertise and based on evidence at trial, does not constitute extraneous prejudicial information. Under Rule 11–606(B), such information concerning the juror's mental processes is not properly the subject of juror testimony. Thus, we affirm Defendant's conviction.

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

WE CONCUR: JOSEPH F. BACA, Justice, GENE E. FRANCHINI, Justice, PAMELA B. MINZNER, Justice, and PETRA JIMENEZ MAES, Justice.

2002-NMSC-002

39 P.3d 136

In the Matter of David G. REYNOLDS, Esquire, an Attorney Licensed to Practice Law Before the Courts of the State of New Mexico.

No. 27,037.

Supreme Court of New Mexico.

Jan. 29, 2002.

Arne R. Leonard, Deputy Disciplinary Counsel, Albuquerque, NM, for Disciplinary Board.

Briggs F. Cheney, Albuquerque, NM, for Respondent.

OPINION

Per Curiam.

{1} This matter came before the Court upon recommendation of the disciplinary board and one of its hearing committees to accept a conditional agreement not to contest and consent to discipline tendered by respondent, David G. Reynolds, pursuant to Rule 17–211 NMRA 2001 of the Rules Governing Discipline. Under that agreement, respondent declared his intention not to contest allegations that he violated Rules 16–102(D), 16–115(A), 16–115(B), 16–804(C), and 16–804(H) NMRA 2001 of the Rules of Professional Conduct. We adopt the disciplinary board's recommendation and hereby disbar respondent.

I.

{2} While respondent was a shareholder in an Albuquerque law firm during the year 2000, he was entrusted with the duties of preparing, reviewing, and approving the billing of firm clients for which he provided legal services. During that time period, respondent also was entrusted with the duties of collecting checks payable to an estate, depositing those checks in a special trust account established by the firm for the estate, and distributing funds from that special trust account on a quarterly basis to the beneficiaries of the estate and other persons entitled to a percentage of those funds under the terms of a court order.

{3} On or about December 20, 2000, other shareholders in the firm discovered that respondent had misappropriated several checks made payable to the firm from one of its clients. As a result, the firm was missing at least $44,069.44 in payments from the client. Shortly thereafter, the firm also discovered that respondent had misappropriated several checks that should have been deposited in the special trust account that the firm had established for the estate. As a result, at least $11,500.00 was missing from the special trust account at that time. The firm reported these discoveries in a complaint that was hand-delivered to the office of disciplinary counsel on December 28, 2000.

{4} In his initial response to the complaint, respondent acknowledged that his conduct was improper. He also indicated that he had accepted payments from other clients that were not reported to the firm. Respondent explained that he was in the process of determining the amounts owed and making restitution to the firm and the estate.

{5} Further investigation of the complaint revealed that respondent had engaged in an elaborate scheme to conceal his misappropriation of funds from others in the firm and from the firm's clients. This scheme began with respondent's decision to open a trust account in his own name without informing the firm or reporting the account on the certification regarding records and handling of trust funds that he submitted to the disciplinary board pursuant to Rule 17–204(B) NMRA 2001. Respondent began depositing checks made payable to the firm from one of its clients in his secret trust account on February 8, 2000. He began depositing checks made payable to the estate into his secret trust account on June 16, 2000. Between February 2000 and December 2000, respondent deposited a total of at least $91,487.75 in funds belonging to the firm, its clients, and third parties in his secret trust account.

{6} Respondent failed to keep these funds in trust or maintain separate ledgers for each separate trust client containing the information required by Rule 17–204(A). Rather, he converted most, if not all, of the funds to his own use by making unauthorized withdrawals from his trust account for the purpose of paying his personal expenses and debts. Several of these withdrawals were accomplished with checks made payable to cash. Respondent also transferred some of the funds to his other personal bank accounts and then withdrew the funds from those accounts.

{7} When other shareholders in the firm became aware that the firm had not received payments from one of its clients, respondent falsely reported to them that the client had not paid. He also intercepted the billing correspondence between the firm and the client. He arranged for the firm's bills to be sent to a post office box that he owned and then reissued these bills to the client on his

own letterhead with a different address. He wrote a letter to the client in which he falsely stated that, because of a change in the firm's billing system, future checks were to be made payable to him and sent to another post office box that he owned.

{8} As a result of these misrepresentations, respondent was able to obtain three additional checks from the firm's client that were made payable to him instead of the firm. The funds from these checks totaled $13,910.28. Respondent deposited two of these checks, for a total of $8,798.64, in his personal bank accounts and converted the proceeds from the two checks to his own use.

{9} Respondent concealed his misappropriation of estate funds from the firm's special trust account by attempting to replenish the account before quarterly distributions were made to the beneficiaries and others entitled to a percentage of those funds. Some of the funds that respondent used to replenish the firm's special trust account, however, were derived from the checks from one of the firm's clients that respondent had previously misappropriated. In addition, respondent failed to repay all the funds in time for the quarterly distributions. Respondent misappropriated a check in the amount of $1,032.05 on June 16, 2000, and failed to repay that amount until sometime between November 3, 2000, and November 6, 2000. At the time the firm discovered respondent's misappropriation of the estate funds in December 2000, more than $11,500.00 was missing from the firm's special trust account.

{10} After his misappropriation was discovered by others in the firm, respondent made restitution to the estate so that the quarterly distributions could be made in January 2001. He also entered into an agreement with the firm to pay restitution regarding other funds that he had misappropriated.

{11} Some of the funds that were the subject of respondent's restitution agreement with the firm were derived from payments that respondent received for legal work he performed for outside clients. According to respondent, the amount of funds he accepted from these outside clients totaled $16,173.73. Respondent failed to disclose his representation of these outside clients or the payments he received from them until after the firm filed its complaint against him with the disciplinary board. In response to requests for information from disciplinary counsel, respondent was unable to specifically identify the date, source, and description of each payment that he deposited or to produce trust account records regarding his outside clients that contained the information required by Rule 17-204(A).

{12} On April 9, 2001, formal charges of professional misconduct were filed against respondent. Following a prehearing conference pursuant to Rule 17-312(B) NMRA 2001 that addressed a number of issues raised by respondent's counsel, respondent filed an answer in which he admitted most, but not all, of the allegations in the charges. A hearing on the merits of the charges was set for July 18 and 19, 2001. On July 13, 2001, respondent entered into a conditional agreement not to contest and consent to discipline. In conjunction with that agreement, disciplinary counsel and respondent's counsel filed a joint petition for summary suspension pursuant to Rule 17-17-207(A)(5) NMRA 2001, which this Court granted on August 1, 2001.

II.

{13} Respondent's misappropriation of funds belonging to others and the elaborate scheme of deception he employed to conceal that misappropriation violated several provisions of the Rules of Professional Conduct. He violated Rule 16-102(D) by engaging in conduct that he knew to be criminal or fraudulent. He violated Rule 16-115(A) by failing to hold funds of clients or third persons that were in his possession in connection with a representation in a separate account and failing to keep complete records of such account funds in a manner that conforms to the requirements of Rule 17-204. He violated Rule 16-115(B) by failing to promptly notify a client or third persons of the receipt of funds in which that person has an interest and failing to promptly deliver to the client or third persons any funds that the client or third persons are entitled to receive. He violated Rule 16-

804(C) by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Finally, respondent's conduct adversely reflects on his fitness to practice law, thereby violating Rule 16–804(H).

{14} Disbarment is the appropriate sanction for respondent's violations of these rules. This Court has consistently imposed the sanction of disbarment when it has been shown that a lawyer knowingly misappropriated funds belonging to a client or third person. *See In re Quintana,* 2001–NMSC–021, ¶ 29, 130 N.M. 627, 29 P.3d 527; *In re Zamora,* 2001–NMSC–011, ¶¶ 12, 18, 130 N.M. 161, 21 P.3d 30; *In re Chavez,* 2000–NMSC–015, ¶ 19, 129 N.M. 35, 1 P.3d 417; *In re Hamar,* 1997–NMSC–048, ¶ 28, 123 N.M. 795, 945 P.2d 1013; *In re Krob,* 1997–NMSC–037, ¶ 6,123 N.M. 652, 944 P.2d 881; *In re Darnell,* 1997–NMSC–025, 123 N.M. 323, 326, 940 P.2d 171, 174; *In re Rohr,* 1997–NMSC–012, 122 N.M. 774, 775, 931 P.2d 1390, 1391; *In re Schmidt,* 1996–NMSC–019, 121 N.M. 640, 642, 916 P.2d 840, 842; *In re Greenfield,* 1996–NMSC–015, 121 N.M. 633, 634, 916 P.2d 833, 834; *In re Kelly,* 1995–NMSC–039, 119 N.M. 807, 809, 896 P.2d 487, 489; *In re Evans,* 1995–NMSC–015, 119 N.M. 305, 310, 889 P.2d 1227, 1233; *In re Wilson,* 108 N.M. 378, 379, 772 P.2d 1301, 1302 (1989); *In re Duffy,* 102 N.M. 524, 525–26, 697 P.2d 943, 944–45 (1985); *In re Royall,* 34 N.M. 554, 556, 286 P. 156, 157 (1930); *In re Fleming,* 32 N.M. 442, 444, 259 P. 613, 615 (1927); *In re Barth,* 26 N.M. 93, 127, 189 P. 499, 511 (1920). We also have observed that "[o]rdinarily, when an attorney engages in intentional conduct involving dishonesty, he or she is disbarred." *In re Thompson,* 105 N.M. 257, 258, 731 P.2d 953, 954 (1987).

{15} Rule 17–214(A) NMRA 2001 provides, in relevant part, that unless otherwise stated in the order of disbarment, a disbarred person may not file a motion for permission to apply for reinstatement for a period of at least three years from the effective date of the disbarment. In most instances where this Court has disbarred an attorney, we have applied the presumptive three-year waiting period provided in this rule. *See, e.g., In re Darnell,* 1997–NMSC–025, 123 N.M. at 328, 940 P.2d at 176; *In re Hamar,* 1997–NMSC–048, ¶ 31, 123 N.M. 795, 945 P.2d 1013. In a few instances, however, we have shortened or lengthened this waiting period based on the presence of aggravating or mitigating circumstances and the relationship between the waiting period and the other conditions of reinstatement that the respondent-attorney is required to satisfy. *Compare In re Quintana,* 2001–NMSC–021, ¶ 22, 130 N.M. 627, 29 P.3d 527 (lengthening waiting period where several aggravating circumstances were present and respondent-attorney failed to cooperate with attorney appointed to inventory his files pursuant to Rule 17–213 NMRA 2001) *with In re Zamora,* 2001–NMSC–011, ¶¶ 18, 20, 130 N.M. 161, 21 P.3d 30 (shortening waiting period where several mitigating circumstances were present and disbarment was coupled with swift intervention by lawyer's assistance committee and lengthy period of supervised probation following reinstatement).

{16} In this instance, respondent has tendered an agreement to discipline by consent pursuant to Rule 17–211 under which his disbarment is to be effective on the date he was summarily suspended and he will not be eligible to move for permission to apply for reinstatement for a period of at least two years from that date. These terms of the agreement are coupled with other conditions that restrict respondent's ability to work as a law clerk or paralegal during his period of disbarment and require that he be placed under supervised probation in the event that his license to practice law is ever reinstated.

{17} We conclude that the two-year waiting period provided in the agreement tendered by respondent is appropriate when considered in conjunction with his summary suspension and the many other conditions in that agreement that respondent is required to satisfy in order to be reinstated or to work in any quasi-legal capacity. We also regard respondent's consent to be disbarred under these conditions and his decision to join in the petition for his summary suspension as clear indications that he has accepted responsibility for his misconduct and cooperated

with disciplinary authorities to a significant degree.

{18} The undisputed facts before us present no additional mitigating circumstances that are entitled to any significant weight in this case. In particular, the fact that a significant amount of the funds converted by respondent belonged to a law firm rather than a client is not a mitigating circumstance and does not make his misconduct any less serious. *See In re Ince,* 957 P.2d 1233, 1237 (Utah 1998). We have not hesitated to disbar lawyers who stole from the firms where they were employed. *See In re Duffy,* 102 N.M. at 525–26, 697 P.2d at 944–45; *In re Krob,* 1997-NMSC-037, ¶¶ 2, 8, 123 N.M. 652, 944 P.2d 881. Disbarment is an appropriate sanction under these circumstances because our legal system is harmed not only by violations of the trust that clients place in their lawyers, but also by violations of the trust that lawyers within a firm place in each other.

{19} The fact that some of the funds respondent misappropriated in this case were later repaid and that respondent made restitution after his misconduct was discovered also "does not excuse his conduct or render him inculpable." *In re Duffy,* 102 N.M. at 525, 697 P.2d at 944. "[M]isappropriation includes 'not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom.'" *In re Chavez,* 2000-NMSC-015, ¶ 18, 129 N.M. 35, 1 P.3d 417 (quoting *In re Wilson,* 81 N.J. 451, 409 A.2d 1153, 1155 n. 1 (1979)). This conclusion accords with Rule 16–115 of the Rules of Professional Conduct, which requires lawyers to appropriately safeguard the property of clients and third persons that is in their possession in connection with a representation. The moment a lawyer makes an unauthorized transfer of funds belonging to a client or third person from the lawyer's trust account to the lawyer's personal accounts, such funds are not appropriately safeguarded because they may be subject to the claims of the lawyer's creditors and others who may have access to the lawyer's personal accounts.

{20} In this instance, a significant portion of the payments respondent made in order to replenish the special trust account for the estate consisted of funds that he previously misappropriated from another source. He continued to misappropriate additional funds from the estate after making such payments to the special trust account. His subsequent restitution payments, made only after his misconduct was discovered and a complaint was filed against him, do not amount to mitigating circumstances. *See In re Stewart,* 104 N.M. 337, 340, 721 P.2d 405, 408 (1986) ("Restitution made only under pressure is entitled to no weight as a mitigating factor."); *In re Thompson,* 105 N.M. at 258, 731 P.2d at 954 (concluding that disbarment is appropriate sanction for intentional conduct involving dishonesty "even where restitution has been made to persons injured by the lawyer's misconduct"); *In re Wilson,* 108 N.M. at 379, 772 P.2d at 1302 ("Some of the money stolen from one client was used by Wilson to reimburse another client whose money he had previously stolen. We do not, however, find this to be a mitigating factor."); *In re Ince,* 957 P.2d at 1238 (concluding that "Ince's restitution should not be given much weight because it was made only after his misconduct had been discovered and he had been confronted by" his employer); *see generally In re Wilson* 409 A.2d at 1156–57 (listing reasons why restitution should not be given significant weight as mitigating factor in cases involving conversion of client funds).

{21} We also emphasize that neither respondent's consent to discipline under Rule 17–211 nor his consent to summary suspension under Rule 17–207 provide any basis for bypassing the procedures set forth in Rules 17–214(A), (D), (E), and (G) in the event that respondent wishes to seek reinstatement if and when he becomes eligible to do so. While it is our intention to allow respondent a reasonable opportunity for rehabilitation in this case, *see In re Zamora,* 2001-NMSC-011, ¶ 13, 130 N.M. 161, 21 P.3d 30, and a reinstatement hearing could appropriately consider the conduct that resulted in respondent's disbarment as well as his behavior in prior disciplinary proceedings, *see In re Quintana,* 2001-NMSC-021, ¶ 28, 130 N.M. 627, 29 P.3d 527, neither respondent's

prior cooperation with disciplinary authorities nor any other mitigating circumstances surrounding the misconduct that led to his disbarment are sufficient to show that he is fit to be reinstated automatically.

{22} If respondent is ever permitted to apply for reinstatement, it will be his burden to meet all the requirements of Rules 17–214(A), (D), (E), and (G) in addition to the preconditions stated in the agreement. Given the elaborate scheme of deception that led to respondent's disbarment and the lack of appropriate recordkeeping that impaired his ability to respond to disciplinary counsel's requests for additional information, the burden that respondent must meet in order to be reinstated to probationary status will be a heavy one. *See In re Ayala*, 112 N.M. 109, 110, 812 P.2d 358, 359 (1991); *cf. In re Wilson*, 409 A.2d at 1157 ("[I]t would be doubly unthinkable to permit resumption of practice by an offending attorney who remained unwilling or unable to set up proper books and records.").

{23} Finally, we neither find nor suggest that the law firm employing respondent fell short of any ethical requirements in this case. This Court has recognized that it is not always possible to protect against a lawyer's fraudulent or dishonest conduct by means of supervisory mechanisms. *See In re Chavez*, 1996–NMSC–059, 122 N.M. 504, 506, 927 P.2d 1042, 1044; *cf. In re Rawson*, 113 N.M. 758, 759, 833 P.2d 235, 236 (1992) (disbarring attorney who converted client funds by using secret trust account that was not reported on trust account certification forms filed with this Court and was not disclosed to supervising attorney or accountant). The difficulty of detecting dishonest or fraudulent conduct before harm occurs is one of the reasons why attorneys who are disbarred for this type of conduct must meet such a heavy burden before being reinstated to probationary status. This difficulty is also one of the reasons why we are reluctant to allow disbarred lawyers to work in a law firm in any quasi-legal capacity without strict supervision by disciplinary authorities. *See In re Chavez*, 2000–NMSC–015, ¶ 31, 129 N.M. 35, 1 P.3d 417.

{24} Nevertheless, this case may provide some important lessons for all law firms. In particular, lawyers who practice in a firm may wish to reexamine the division of responsibilities among firm personnel with regard to accounting, billing, other financial transactions, and the security of the firm's mail. When responsibilities for tasks such as opening and sending mail, making deposits, signing checks, maintaining trust account ledgers, reconciling bank statements, and investigating any irregularities are divided among two or more individuals, there may be less risk that one individual within the firm will be able to misappropriate funds for any significant period of time without being detected and reported by others.

III.

{25} Now, therefore, it is ordered that the recommendation hereby is adopted and the conditional agreement not to contest and consent to discipline hereby is approved;

{26} It is further ordered that David G. Reynolds hereby is disbarred from the practice of law pursuant to Rule 17–206(A)(1) effective August 1, 2001;

{27} It is further ordered that respondent's period of disbarment shall not be deferred, in whole or in part;

{28} It is further ordered that, during the period of disbarment and summary suspension, respondent shall not obtain or continue employment as a law clerk, a paralegal, or in any other position of a quasi-legal nature except under the following conditions:

(1) Respondent shall advise disciplinary counsel within ten days of any employment, or change of employment, in any capacity with a person or firm that provides legal services;

(2) Respondent shall function as a legal assistant, legal secretary, paralegal, law clerk, employee of a lawyer, or employee of a firm that provides legal services in any capacity only under the close supervision of one or more supervising attorneys within that entity who are approved by disciplinary counsel. Such supervision shall be continuous and regular;

(3) In order to be considered for approval as a supervising attorney, the proposed supervising attorney must file a written proposal with disciplinary counsel agreeing to provide supervision and outlining the type of work being performed by respondent as well as the supervising mechanism utilized by the supervising attorney to supervise the actions of respondent;

(4) Under no circumstances shall respondent handle or have access to client funds, accounts, or other property that is subject to the requirements of Rules 16–115 and 17–204 NMRA 2001;

(5) Under no circumstances shall respondent solicit, initiate, or accept representation of a client on his own behalf or on behalf of another licensed attorney. If respondent receives any inquiries that might reasonably be interpreted as a request for legal representation, he shall inform the person making the inquiry that he is not licensed to practice law and can be of no assistance to them in obtaining legal representation;

(6) Respondent shall have no contact with his supervising attorney's clients or any clients of the supervising attorney's firm except when: (a) his supervising attorney is present; (b) his supervising attorney is in a position to directly supervise and monitor his communications with the client; or (c) the contact between respondent and the client is limited to the exchange of factual information concerning a matter for which the supervising attorney has direct responsibility *and* respondent's supervising attorney has provided the client with prior written notice that: "David G. Reynolds is not licensed to practice law and cannot provide you with any legal advice or accept any fees from you. Should you have any unanswered questions or concerns about Mr. Reynolds's communications with you, please contact me directly at [supervisor's telephone number and address]";

(7) Respondent's work area must be physically located within the same office or premises as the supervising attorney;

(8) During the course of his employment as a law clerk, a paralegal, or in any other quasi-legal capacity, respondent shall be prohibited from attending any court or administrative proceedings unless his supervising attorney is present, makes an appearance, and notifies (or has notified) the court or tribunal of respondent's status as a non-lawyer;

(9) It shall be respondent's responsibility to ensure that his supervising attorney reports to disciplinary counsel and confirms the parameters of his employment to disciplinary counsel on at least a quarterly basis;

{29} It is further ordered that at the end of his period of disbarment, respondent shall not be reinstated automatically but shall be required to apply for reinstatement to probationary status under the procedures set forth in Rules 17–214(A), (D), (E), and (G) NMRA 2001;

{30} It is further ordered that respondent shall not become eligible to file a motion for permission to apply for reinstatement to probationary status for a minimum period of at least two (2) years from August 1, 2000, the effective date of disbarment;

{31} It is further ordered that respondent shall satisfy the following terms and conditions before the filing of any application for reinstatement under Rule 17–214(A):

(1) Respondent shall observe and comply with the Rules of Professional Conduct and the Rules Governing Discipline, including the requirements for suspended or disbarred attorneys in Rule 17–212 NMRA 2001;

(2) Respondent shall keep this Court, the State Bar of New Mexico, and the Disciplinary Board apprised of his current address and telephone number and shall promptly notify the clerk of this Court, the State Bar of New Mexico, and the Disciplinary Board of any changes in his address and telephone number within twenty (20) days of any such change; and

(3) Respondent shall respond in an accurate, complete, and timely manner to all disciplinary complaints filed against him and all requests for information from the office of disciplinary counsel;

{32} It is further ordered that if respondent is reinstated at the end of his period of

disbarment upon satisfying the above conditions and terms and satisfying the additional requirements of Rules 17–214(A), (D), (E), and (G), he shall be placed on supervised probation for a minimum period of at least one (1) year pursuant to Rule 17–206(B), or for a longer period if so ordered by the Court at the time of his reinstatement, during which time he shall be required to satisfy the following conditions:

(1) Respondent's law practice shall be supervised by a supervising attorney approved by the office of disciplinary counsel;

(2) Respondent shall meet with his supervising attorney at least once per month or as often as the supervising attorney shall direct, and he shall pay the supervising attorney for his or her services at an hourly rate to be determined by an agreement between him and the supervising attorney, if such payment is required by the supervising attorney and/or the office of disciplinary counsel;

(3) Respondent shall ensure that each client and each prospective client with whom he has contact are provided with the following notice prominently displayed in writing:

> Please be advised that the law practice of David G. Reynolds is being supervised by [supervisor's name]. [Supervisor's] telephone number is _____. Should you have any unanswered questions or concerns about the handling of your legal work, please contact [supervisor's name].

(4) Respondent shall be responsible for ensuring that his supervisor advises disciplinary counsel on at least a quarterly basis as to whether he has met with his supervisor as required and is following the supervisor's instructions;

(5) Respondent shall not handle or have access to any client funds, accounts, or other property subject to the requirements of Rules 16–115 and 17–204, unless he further agrees that: (a) he shall provide disciplinary counsel and his supervising attorney with quarterly reconciliations of any trust account to which he has access reflecting the status of the account and that the account is being maintained in accordance with Rules 16–115 and 17–204; (b) his handling of client funds, accounts, or other property subject to Rules 16–115 and 17–204 shall be audited at his own expense by a certified public accountant approved by disciplinary counsel; (c) such audits shall be ordered by disciplinary counsel on a random basis at least once per calendar year during his period of supervised probation; and (d) the results of such audits shall be reported directly to the Office of Disciplinary Counsel;

{33} It is further ordered that respondent shall pay the costs of this action in the amount of $549.03, pursuant to Rule 17–106(B) NMRA 2001, on or before January 22, 2002;

{34} It is further ordered that interest shall accrue on any unpaid balance as of January 24, 2002, at the rate of fifteen percent (15%) per annum, and said costs shall be reduced to a transcript of judgment; and

{35} It is further ordered that should respondent violate any of the above terms and conditions, disciplinary counsel shall bring the violation to the attention of this Court pursuant to disciplinary counsel's duties under Rule 17–206(G), and that should he be found in contempt of this Court he may be fined, censured, suspended, disbarred for an additional period, and/or have his period of probation extended or revoked.

{36} It is so ordered.

2002-NMCA-007
39 P.3d 144

STATE of New Mexico,
Plaintiff–Appellee,

v.

Ruben RUBIO, Defendant–Appellant.

No. 21,875.

Court of Appeals of New Mexico.

Dec. 3, 2001.

Certiorari Denied, No. 27,272,
Jan. 15, 2002.

Patricia A. Madrid, Attorney General, Katherine Zinn, Assistant Attorney General, Santa Fe, NM, for Appellee.

Phyllis H. Subin, Chief Public Defender, Vicki W. Zelle, Lisa N. Cassidy, Assistant Appellate Defenders, Santa Fe, NM, for Appellant.

OPINION

WECHSLER, Judge.

{1} Defendant, Ruben Rubio, appeals from his conviction for possession of cocaine. He argues that the trial court erred by denying his motion to suppress evidence obtained pursuant to a search warrant and his motion to suppress incriminating statements made to police while they were executing the search warrant. Additionally, Defendant claims that the trial court abused its discretion by admitting into evidence the cocaine found during the execution of the search warrant. We affirm.

Facts

{2} On January 11, 2000, Detective Daniel Carter of the Lea County Drug Task Force of the Hobbs Police Department prepared an affidavit for search warrant to search the home of Stephanie Sosa. The affidavit initially sets forth the place to be searched, the items sought to be seized, and the basis for the request. According to the affidavit, Detective Carter was contacted by Agent Darcy White of the New Mexico State Police. Agent White advised Detective Carter that she had been contacted by a "reliable" confidential informant who had provided information on at least two occasions in the past which led to the seizure of illegal narcotics. The affidavit states that the informant "is familiar with cocaine, it's [sic] use, packageing [sic], and methods of sale due to his/her past involvement with cocaine." It further states:

> The above informant contacted affiant on 1/11/2000. This informant advised they were at a house in the 400 block of W. Temple during the 48 hours preceeding [sic] this date. While at this house, the informant observed a spanish [sic] female known only as Stephanie in possession of a large quantity of cocaine. The informant provided a detailed description of the location of the cocaine and the package in which it is contained.
>
> While in this house, this informant did observe a[sic] unknown spanish [sic] male wearing white pants and a black shirt with a gun in the front of his pants. As the informant entered the house, this male reached for the gun but did not remove it from his pants.

{3} Based upon this information, the magistrate court issued a search warrant for Sosa's residence at 401 W. Temple in Hobbs. Detective Carter, along with eight other officers, executed the search warrant. Defendant and a woman were in the residence at the time the warrant was executed. Detective Carter testified that he gave Defendant the required warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), prior to questioning him. During questioning, Defendant told Detective Carter that he lived at the house, that he had bought half an ounce of cocaine for $200 the previous week, that he had been using and selling that cocaine since then, and that there were no scales at the residence because Defendant would simply "eyeball" the amounts for sale. During the search of the residence, Sergeant Ken Ragland found four baggies of what appeared to be marijuana and one bag of a white powdery substance in the bathroom drawer.

Sufficiency of the Affidavit

{4} Defendant argues that the information contained in the affidavit for the search warrant did not provide probable cause for the issuance of a search warrant. In reviewing the sufficiency of an affidavit submitted in support of the issuance of a search warrant, we apply a de novo standard of review. *State v. Whitley*, 1999-NMCA-155, ¶ 3, 128 N.M. 403, 993 P.2d 117.

{5} Defendant does not argue that the information contained in the affidavit failed the *Aguilar-Spinelli* test for reliability as adopted in New Mexico by our Supreme Court in *State v. Cordova*, 109 N.M. 211, 217, 784 P.2d 30, 36 (1989). *See also Spinelli v. United States*, 393 U.S. 410, 415, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 112-13, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). Rather, Defendant argues that the information in the affidavit was stale and did not indicate that the cocaine would still be located in Sosa's residence when the search warrant was issued. When an affidavit for a search warrant does not contain sufficient information of ongoing criminal activity, there is no probable cause for the issuance of the search warrant. *Whitley*, 1999-NMCA-155, ¶ 3, 128 N.M. 403, 993 P.2d 117. Probable cause for the issuance of a search warrant must be established from within the four corners of the supporting affidavit. *State v. Pargas*, 1997-NMCA-110, ¶ 7, 124 N.M. 249, 948 P.2d 267. All direct and circumstantial evidence, as well as all reasonable inferences that can be drawn from those allegations, should be considered. *Id.*

{6} We addressed the staleness of information in an affidavit in support of a search

warrant in *Whitley* and *State v. Lovato,* 118 N.M. 155, 158, 879 P.2d 787, 790 (Ct.App. 1994). In *Whitley,* the affidavit indicated that the defendant had been seen selling marijuana from a motel room within the previous forty-eight hours. *Whitley,* 1999–NMCA–155, ¶ 2, 128 N.M. 403, 993 P.2d 117. We determined that the information in the affidavit was stale taking into account: (1) the time that had elapsed from when the marijuana was observed to the time that the warrant was issued, "[(2)] the character of the crime and the extent of prior activity, [(3)] the consumable or transferable nature of the items to be seized, [(4)] the information known about the suspect and his or her habits, and [(5)] the location to be searched." *Id.* ¶ 8. In making this determination, we noted the time that had elapsed since the sale was witnessed and the fact that the sale had occurred from a motel room, which, due to its transient nature, indicated that the drugs might not still be in the room. *Id.* ¶¶ 8, 9. In addition, we noted both the absence of facts indicating an ongoing operation and the highly consumable nature of marijuana. *Id.* ¶ 9.

{7} In *Lovato,* this Court concluded that there was insufficient evidence to establish probable cause to issue a search warrant when a confidential informant made a controlled purchase of heroin from a motel room within seventy-two hours. *Lovato,* 118 N.M. at 158, 879 P.2d at 790. The affidavit did not have any information concerning the amount of heroin involved in the sale and whether there was any additional heroin or illegal drugs in the motel room at the time of the sale or at any other time. *Id.* Additionally, the affidavit did not contain information about the identity of the person staying in the motel room, or any other information linking the defendant with the heroin. *Id.* We stated that:

> Although seventy-two hours is not necessarily an extensive amount of time between a reliable informant's observation and issuance of a search warrant, under the facts and circumstances of the instant case, the affidavit fails to support a conclusion that criminal activity at the motel room was of an ongoing, continuous nature.

Id.

{8} Defendant correctly states that the question before this Court is whether, taking the circumstances of the case into account, the affidavit provided probable cause to indicate that the cocaine observed forty-eight hours earlier would still be at the residence. He argues that *Whitley* and *Lovato* are controlling and indicate that there was insufficient probable cause for the magistrate to issue a search warrant. Defendant contends that cocaine is highly consumable, making it less likely that it would still be present forty-eight hours after it was observed. However, the confidential informant told Agent White that there was a "large" quantity of cocaine in the residence. We recognize that the affidavit would be more persuasive if it also contained facts indicating the manner in which the cocaine was packaged as well as a more precise estimate of the amount of cocaine present. Nevertheless, all direct and circumstantial evidence, as well as all reasonable inferences that can be drawn from those allegations, should be considered. *Pargas,* 1997–NMCA–110, ¶ 7, 124 N.M. 249, 948 P.2d 267. It can be reasonably inferred from the testimony of a confidential informant who is familiar with cocaine and its use, packaging, and methods of sale, that the informant would be qualified to know what constituted a large amount of cocaine as opposed to an amount that could be rapidly consumed or sold. *See id.* Moreover, we view *Whitley* and *Lovato* differently because of the transitory nature of a motel room. *Whitley,* 1999–NMCA–155, ¶ 9, 128 N.M. 403, 993 P.2d 117; *Lovato,* 118 N.M. at 158, 879 P.2d at 790. Because a residence does not have the same transitory nature, the probability that the cocaine would continue to be there after a forty-eight hour period is greater.

{9} Further, a magistrate may make inferences from the behavior described in the affidavit. *State v. Duquette,* 2000–NMCA–006, ¶ 12, 128 N.M. 530, 994 P.2d 776. The confidential informant stated that the cocaine was guarded by a man with a gun. We do not agree with Defendant that the presence

of an armed man was merely an "innocent fact" under the facts and circumstances of this case. The magistrate could infer that the presence of an armed individual in the residence where the cocaine was located indicated that there was a large amount of cocaine present.

{10} Finally, although we agree with Defendant that there is no evidence in the affidavit setting forth any sales or pattern of sales of cocaine at the residence, such activity is only one factor to consider in determining whether there is probable cause to issue a search warrant. The confidential informant stated that there was a "large" amount of cocaine at a private residence guarded by a man with a gun within the previous forty-eight hours. The magistrate could reasonably infer from this information that the cocaine would still be at the residence at the time of the issuance of the search warrant.

Waiver of Fifth Amendment Right to Remain Silent

{11} Defendant argues that his statement to Detective Carter was not made after a knowing and voluntary waiver of Defendant's Fifth Amendment right to remain silent. According to Defendant, there were several officers at the small residence at the time he gave his statement, and no other officer heard Detective Carter read Defendant his rights pursuant to *Miranda*, 384 U.S. at 436, 86 S.Ct. 1602. In addition, Detective Carter did not have Defendant read or sign an advice of rights form and did not tape-record the questioning, contrary to the protocol of the Hobbs Police Department.

{12} The trial court's determination that Defendant agreed to waive his Fifth Amendment right to remain silent is a question of fact that we review for substantial evidence. *State v. Barrera*, 2001–NMSC–014, ¶ 23, 130 N.M. 227, 22 P.3d 1177. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Salgado*, 1999–NMSC–008, ¶ 25, 126 N.M. 691, 974 P.2d 661. Detective Carter testified that he gave *Miranda* warnings to both Defendant and Sosa prior to questioning. Despite contrary circumstantial indications, Detective Carter's testimony is substantial evidence upholding the trial court's determination that *Miranda* warnings were given to Defendant.

{13} We next address whether, under the circumstances, the trial court properly determined that Defendant's waiver of rights was voluntary. "In order for a defendant's waiver of *Miranda* rights to be constitutionally valid, the waiver must be knowingly and intelligently made." *State v. Fekete*, 120 N.M. 290, 301, 901 P.2d 708, 719 (1995). A waiver " 'must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception .... [and] made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.' " *Id.* at 301, 901 P.2d at 719 (quoting *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)).

{14} Defendant argues that under the circumstances as they existed at the time he gave his statement, it was not possible for Defendant to have knowingly and voluntarily waived his Fifth Amendment right to remain silent. Defendant gave his statement during the search of the residence by Detective Carter and eight other officers. We agree with Defendant that the benchmark of whether a *Miranda* waiver is valid is the absence of government coercion or overreaching. *State v. Pisio*, 119 N.M. 252, 257, 889 P.2d 860, 865 (Ct.App.1994). However, Defendant does not set forth evidence indicating coercion or overreaching by Detective Carter or the other officers. *Accord Barrera*, 2001–NMSC–014, ¶ 27, 130 N.M. 227, 22 P.3d 1177 (stating that when a defendant sets forth no evidence that police coerced or intimidated him into waiving *Miranda* rights, and there is no evidence that threats, promises, or physical force were used, there is no governmental coercion such that a waiver of rights is not voluntary). Detective Carter testified that he read Defendant his *Miranda* warnings and Defendant agreed to give a statement. Defendant has not provided evidence that he did not understand these warnings or that he did not agree to give a statement. We find no authority, and Defen-

dant cites none, holding that a waiver of Fifth Amendment rights is invalid solely because it is obtained during the execution of a search warrant or in the presence of several officers. *Accord State v. Martinez*, 1999-NMSC-018, ¶ 24, 127 N.M. 207, 979 P.2d 718 (no unduly coercive environment found where defendant was questioned in custodial surroundings with six officers present). The State has satisfied its burden of proving by a preponderance of the evidence that Defendant knowingly and voluntarily waived his Fifth Amendment right to remain silent.

{15} Although Defendant concentrates his argument on an invalid waiver of his Fifth Amendment rights, he also suggests that his statements were not voluntary for many of the same reasons. The prosecution has the burden of showing "the voluntariness of a defendant's statement by a preponderance of the evidence." *Id.* at 298, 901 P.2d at 716. On appeal, this Court reviews "the entire record and the circumstances under which the statement or confession was made in order to make an independent determination of whether a defendant's confession was voluntary." *Id.* In order to decide the ultimate question of voluntariness, we examine the totality of the circumstances surrounding the confession. *Id.* The same considerations that make Defendant's waiver of his rights voluntary show that his statements, too, were voluntary. In particular, there was no coercion, no intimidation, no promises, no threats, and no suggestions. In short, there was nothing to show that the statements were anything other than voluntary.

Admission of Cocaine as Evidence

{16} Defendant argues that the trial court abused its discretion by admitting the cocaine into evidence because the State failed to prove that the evidence was what the State claimed it to be by a preponderance of the evidence. We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *State v. Woodward*, 121 N.M. 1, 4, 908 P.2d 231, 234 (1995). In order to admit real or demonstrative evidence, "the evidence must be identified either visually or by establishing custody of the object from the time of seizure to the time it is offered into evidence." *State v. Peters*, 1997-NMCA-084, ¶ 26, 123 N.M. 667, 944 P.2d 896. The State is not required to establish the chain of custody in sufficient detail to exclude all possibility of tampering. *Id.* Rather, there is no abuse of discretion when the preponderance of the evidence demonstrates that the questioned evidence is what it purports to be. *Id.*

{17} Defendant claims that the trial court abused its discretion because Forensic Chemist Heather Collins could not account for an approximate one gram discrepancy between the weight of the sample when weighed by Detective Durham and when later weighed by Collins. But such a discrepancy in the chain of custody relates to the strength of the evidence, rather than to its admissibility. *Id.*

{18} The chain of custody was adequately described in the trial testimony. Sergeant Ragland found the evidence and gave it to Detective Durham. Detective Durham field tested the evidence positive for cocaine, sealed it in an envelope, and maintained it in his presence until he placed it in the police department evidence locker. Prior to placing the cocaine into the evidence locker, Detective Durham weighed the bag containing the cocaine on uncertified scales to get an approximate weight. The weight was 6.8 grams. Detective Durham sealed the evidence and sent it to the Southern Crime Lab for analysis. Collins removed the evidence from the vault, removed the cocaine from its bag, and weighed it. It weighed 5.82 grams. Collins then performed the required tests on the cocaine which were positive. She replaced the cocaine into the evidence vault for return to the Hobbs Police Department.

{19} Furthermore, the discrepancy in the weight of the cocaine was adequately explained by the differing certification of the scales and the fact that the cocaine was weighed by Detective Durham while it was still in a bag and by Collins when it was out of the bag. The trial court did not abuse its discretion by admitting the cocaine into evidence.

Conclusion

{20} Based upon the foregoing, we affirm Defendant's conviction.

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

WE CONCUR: LYNN PICKARD, Judge, and CYNTHIA A. FRY, Judge.

2002-NMCA-011

39 P.3d 704

Michael GALLEGOS, Plaintiff–Garnishor–Appellee,

v.

Robert ESPINOZA, Sr., Eagle Eye Construction, Inc., a New Mexico Corporation, Robert Espinoza, Jr., and Benito Espinoza, Defendants,

Armstrong Construction Co., Garnishee–Appellant.

No. 21,298.

Court of Appeals of New Mexico.

Nov. 21, 2001.

Certiorari Denied, No. 27,296, Jan. 29, 2002.

Peter V. Culbert, Santa Fe, NM, for Appellee.

David C. Henderson, Santa Fe, NM, for Appellant.

Sean Calvert, Calvert & Menicucci, Albuquerque, NM, Amicus Curiae American Subcontractor Association.

Linda Zemke, Gardner & Zemke Co., Albuquerque, NM, Amicus Curiae Associated Builders and Contractors, Rio Grande Chapter.

David Gorman, Sheehan, Sheehan & Stelzner, Albuquerque, NM, Amicus Curiae Association of General Contractors of New Mexico.

OPINION

BOSSON, Chief Judge.

{1} A general contractor on a public works project owes payments to its subcontractor who, in turn, owes money to various suppliers. The subcontractor also owes an unrelated debt on a judgment. The judgment creditor obtains a writ of garnishment against the general contractor demanding that, instead of paying the subcontractor, it pay the judgment creditor. We discuss the circumstances under which the garnishee-general contractor may raise defenses against the garnishor-judgment creditor that the garnishee had under its contract with the subcontractor, whose unpaid judgment debt has caused the garnishment. The district court

granted summary judgment in favor of the garnishor. We reverse and hold that the general contractor's contractual defenses prevail against the writ of garnishment.

BACKGROUND

{2} On April 29, 1999, Armstrong Construction Co. (Armstrong) contracted with the New Mexico State Highway and Transportation Department to make improvements on State Highway 18, near Eunice, New Mexico (the Project). On June 17, 1999, Armstrong subcontracted with Eagle Eye Construction, Inc. (Eagle Eye) to install a fence as part of the Project (the Subcontract). The Subcontract provided that Armstrong would make progress payments to Eagle Eye within ten days after receipt of funds from the State and final payment including retainage within twenty days. Eagle Eye, in turn, contracted with other businesses for supplies to use on the Project.

{3} Meanwhile, unknown to Armstrong, Michael Gallegos filed an unrelated lawsuit against Eagle Eye for collection of a private debt and for fraud. On August 24, 1999, Gallegos obtained a default judgment in the First Judicial District Court, which awarded Gallegos $212,422 in compensatory and punitive damages against Eagle Eye. A transcript of the judgment was issued on August 24, 1999, and recorded in Santa Fe County on August 31, 1999. Attempting to collect on his judgment, on October 22, 1999, Gallegos served a writ of garnishment on Armstrong in regard to any payments Armstrong owed Eagle Eye as part of the Subcontract.

{4} Armstrong answered the writ asserting that it owed $28,464.26 to both Eagle Eye and Eagle Eye's suppliers. The district court ordered the $28,464.26 paid into the court registry. Some of Eagle Eye's suppliers intervened below, but most did not.

{5} The district court granted summary judgment to Gallegos on the writ of garnishment. After crediting Armstrong $3000 in costs and attorney's fees, the district court awarded the remaining $25,464.26 to Gallegos. Armstrong now appeals from that judgment. Intervenors did not appeal.

DISCUSSION

{6} We review a trial court's grant of summary judgment de novo, as a matter of law. *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." *Id.*

Gallegos' Writ of Garnishment is Subject to Contractual Defenses Armstrong had Against Eagle Eye

{7} "Garnishment proceedings provide a remedy, in the form of attachment, which is controlled by statute." *Amaya v. Santistevan*, 114 N.M. 140, 142, 835 P.2d 856, 858 (Ct.App.1992). Gallegos, as garnishor of Eagle Eye's rights to payment from Armstrong, has only those same rights that Eagle Eye could assert against Armstrong. *See Jemko, Inc. v. Liaghat*, 106 N.M. 50, 54, 738 P.2d 922, 926 (Ct.App.1987) (explaining that garnishor is subrogated to judgment debtor's rights against garnishee).

{8} The garnishee, Armstrong, has the same liability, legal and equitable, to the garnishor as it has to the judgment debtor, Eagle Eye. *See Field v. Sammis*, 12 N.M. 36, 47–48, 73 P. 617, 620 (1903) (holding that garnishor takes no more than rights of debtor); *see also Cent. Sec. & Alarm Co. v. Mehler*, 1998–NMCA–096, ¶ 13, 125 N.M. 438, 963 P.2d 515 ("[A] garnishor can acquire no greater rights by a writ of garnishment than those that the judgment debtor would have been able to assert against the garnishee."); *Jemko, Inc.*, 106 N.M. at 52, 738 P.2d at 924 ("A judgment creditor acting under a writ of garnishment, after due notice to interested parties, can only seize the property that belongs to the judgment debtor."); *Carpenters S. Cal. Admin. Corp. v. Mfrs. Nat'l Bank*, 910 F.2d 1339, 1341 (6th Cir.1990) (predicting that Michigan Supreme Court would hold that "the judgment-creditor garnishor stands in the same position as the judgment-debtor with respect to the garnishee and may not prevail against the garnishee unless the debtor could do so"); *Valley Nat'l Bank v. Hasper*, 6 Ariz.App. 376, 432 P.2d 924, 926 (1967) ("[A] garnishor cannot obtain

rights against a garnishee superior to the rights held by the judgment debtor against the garnishee at the time of garnishment."); *Messall v. Suburban Trust Co.*, 244 Md. 502, 224 A.2d 419, 421 (1966) ("[T]he rights of the creditor vis a vis the garnishee cannot rise above those of the debtor.").

{9} Thus, the garnishor stands in the shoes of the judgment debtor. Armstrong can assert against Gallegos any contractual defenses that it could have asserted under the Subcontract against Eagle Eye. *See Hasse Contracting Co. v. KBK Fin., Inc.*, 1999–NMSC–023, ¶¶ 19–22, 127 N.M. 316, 980 P.2d 641 (*Hasse II*) (allowing account debtor to assert contractual defenses against assignee); *see also Garland v. Sperling Bros.*, 6 N.M. 623, 632, 30 P. 925, 927 (1892) (holding that the debt must be "absolutely, and unconditionally owing and payable at the present or some future time" when the writ is served), *aff'd*, 7 N.M. 121, 32 P. 499 (1893); *Beaufort Transfer Co. v. Fischer Trucking Co.*, 357 F.Supp. 662, 667 (E.D.Mo.1973) ("The Missouri authorities make it abundantly clear, however, that a debt which is conditional or dependent for its existence upon some contingency is not a subject of garnishment.").

The Subcontract

{10} We now turn to the Subcontract between Eagle Eye and Armstrong to assess Eagle Eye's rights against Armstrong, and therefore Gallegos' rights against Armstrong in light of Armstrong's defenses. We "apply the plain meaning of the contract language as written." *Christmas v. Cimarron Realty Co.*, 98 N.M. 330, 332, 648 P.2d 788, 790 (1982). Although the parties disagree as to the meaning of the Subcontract, neither claims it is ambiguous, and we do not find it so. *See Kirkpatrick v. Introspect Healthcare Corp.*, 114 N.M. 706, 711, 845 P.2d 800, 805 (1992) (holding that court decides as a matter of law whether contract is ambiguous; noting that parties' disagreement as to proper interpretation does not establish ambiguity).

{11} We also consider custom and usage in the construction industry to illuminate the meaning of the terms in the Subcontract. *See Points v. Wills*, 44 N.M. 31, 36–37, 97 P.2d 374, 377 (1939) (noting that evidence of industry custom is admissible to amplify but not to contradict express terms of contract); *see also* Restatement (Second) of Contracts § 222(3), at 155 (1981) ("Unless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged or a usage of trade of which they know or have reason to know gives meaning to or supplements or qualifies their agreement."), § 220(1), at 147 ("An agreement is interpreted in accordance with a relevant usage if each party knew or had reason to know of the usage and neither party knew or had reason to know that the meaning attached by the other was inconsistent with the usage."); *cf. State ex rel. Nichols v. Safeco Ins. Co.*, 100 N.M. 440, 444, 671 P.2d 1151, 1155 (Ct. App.1983) (holding that evidence of usage of trade is admissible to illuminate terms of agreement for sale of goods).

{12} Both parties to the Subcontract, Armstrong and Eagle Eye, were members of the construction industry. We have commented earlier on a central custom in that industry: "Economic viability of the [construction] industry requires that payments made by the owner are properly applied down the line in order to assure performance and an unburdened final product." *Hasse Contracting Co. v. KBK Fin., Inc.*, 1998–NMCA–038, ¶¶ 27–34, 125 N.M. 17, 956 P.2d 816 (*Hasse I*), *aff'd on other grounds by Hasse II*, 1999–NMSC–023, 127 N.M. 316, 980 P.2d 641.

{13} Our deliberations are also informed by a statute pertaining to public works contracts that was in force at all times relevant to this dispute. In NMSA 1978, Section 13–4–28 (1995, repealed 2001), the legislature provided that contractors and subcontractors were required to pay their subcontractors and materialmen promptly out of monies received for payment on public works contracts:

> Public works contracts *shall provide* that all payment for amounts due and owing shall be paid within twenty-one days after receipt of the request for payment by the central purchasing office to the contractor by mailing via first class mail or by hand delivery of the undisputed amount of any pay request based on work completed

> or service provided under the contract.... The contract shall also provide that contractors and subcontractors make prompt payment to their subcontractors and suppliers for amounts due and owing within seven days after receipt of payment from the central purchasing office or the contractor or subcontractor. When the contractor receives payment from the central purchasing office for work completed, he is required to pay his subcontractors and suppliers promptly by mailing via first class mail or by hand delivery. If the contractor fails to pay his subcontractors and suppliers within seven days of receipt of payment from the central purchasing office, the contractor shall pay an interest penalty beginning on the eighth day after payment was due. Interest penalties shall be computed at one and one-half percent of the undisputed request for payment per month or fraction thereof until payment is issued. *These payment provisions apply to all tiers of contractors, subcontractors and suppliers.*

(Emphasis added.) The subsequent repeal of this provision does not deprive it of the legal force it had while it was in effect. Its provisions were mandatory and incorporated by law into the Subcontract. *See Schmick v. State Farm Mut. Auto. Ins. Co.*, 103 N.M. 216, 218, 704 P.2d 1092, 1094 (1985) (reading statutory provisions regarding uninsured motorists into automobile insurance policy).

{14} The Subcontract included certain paragraphs under the title "Additional Provisions," that allowed the Contractor, Armstrong, to take certain precautions to protect Eagle Eye's suppliers in the event that Eagle Eye's financial condition became unsound. Paragraphs 4 and 5 of the Additional Provisions read:

> 4. Upon request of Contractor, Subcontractor shall furnish to Contractor, from time to time, (1) sworn affidavits, in accordance with the form provided by Contractor, which shall state amounts due or to become due, for labor, materials, supplies, rentals on equipment and the like, used or to be used by Subcontractor on the job, amounts paid, and any other information clearly to indicate the financial condition of Subcontractor, insofar as the financial condition relates to performance under this subcontract, and (2) partial or final releases and waivers of lien from Subcontractor's materialmen, laborers or creditors. Regardless of the terms of payment provided for herein, Contractor, if it deems itself insecure, or deems that Subcontractor's financial condition has become unsound, shall have the right to take such steps as it may deem necessary to protect itself against claims including the right to control the application of funds otherwise payable to Subcontractor to satisfy obligations of Subcontractor for labor, materials, supplies, rentals on equipment, and the like, furnished or to be furnished by Subcontractor hereunder, and the right to direct Subcontractor to make immediate payment of unpaid bills to claimants upon written notice by Contractor.
>
> 5. Monies received by Subcontractor for the performance of this subcontract shall be used primarily for labor, material, rentals on equipment, and the like, used or to be used by Subcontractor on this job, and said monies shall not be diverted to satisfy other obligations of Subcontractor.

{15} As stated in Paragraph 4, the Additional Provisions provided that, regardless of other provisions for payment to Eagle Eye, Armstrong, "if it deems itself insecure, or deems that Subcontractor's financial condition has become unsound, shall have the right to take such steps as it may deem necessary to protect itself against claims including the right to control the application of funds otherwise payable to Subcontractor." Armstrong argues that it reasonably deemed itself insecure, and deemed that Eagle Eye's financial condition had become unsound, when it was served with the writ of garnishment showing a substantial unpaid judgment that Eagle Eye owed to Gallegos. Accordingly, Armstrong argues that it had a defense to any demand for direct payment to Eagle Eye, because under the Subcontract it had the right to control those funds. It follows, according to Armstrong, that it had the same defense to a garnishment by Gallegos, who must stand in the same shoes as Eagle Eye.

{16} In addition, Armstrong also points to Paragraph 5 of the Additional Provisions that provided that payments received by Eagle Eye would be used "primarily" to pay Eagle Eye's suppliers and "shall not be diverted to satisfy other obligations of Subcontractor [Eagle Eye]." Armstrong argues, self-evident as it may be, that any funds of Eagle Eye "diverted" to Gallegos would not be available, primarily or otherwise, to pay Eagle Eye's suppliers.

{17} Gallegos, although not a party to the Subcontract, does not agree with Armstrong's interpretation of its language. Gallegos contends that the last phrase in Paragraph 4, "upon written notice by Contractor," requires that Armstrong give written notice to Eagle Eye before exercising any of its rights to control funds under that paragraph. We disagree with Gallegos. The quoted language modifies the immediately antecedent clause and means only that Armstrong must give written notice before exercising "the right to direct Subcontractor to make immediate payment of unpaid bills to claimants." That language is not a prerequisite to Armstrong's exercise of the other rights under Paragraph 4. *See Hale v. Basin Motor Co.*, 110 N.M. 314, 318, 795 P.2d 1006, 1010 (1990) (" '[R]elative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote.' " (quoting *In re Goldsworthy's Estate*, 45 N.M. 406, 412, 115 P.2d 627, 631 (1941))).

{18} Gallegos also argues that the comma in Paragraph 4 before the words "and the right to direct Subcontractor to make immediate payment of unpaid bills to claimants upon written notice by Contractor" is not a disjunctive comma, separating that phrase with its requirement for written notice from the rest of the paragraph. Gallegos argues instead that the comma is merely one of a pair of commas setting off the phrase, "furnished or to be furnished by Subcontractor hereunder." We do not view the placement of a comma as controlling. Grammatically the phrase "upon written notice by Contractor" modifies only "the right to direct Subcontractor to make immediate payment of unpaid bills to claimants," whether with or without the comma upon which Gallegos places such stress. It makes good sense that written notice to Eagle Eye would be required before Armstrong could require Eagle Eye to take action. However, no written notice to Eagle Eye would be necessary for Armstrong to invoke its own right to control the application of funds.

{19} We agree with Armstrong's interpretation of the Subcontract. We hold that the plain language of the Additional Provisions, Paragraphs 4 and 5, gave Armstrong the right to control the application of funds otherwise payable to Eagle Eye, and to pay Eagle Eye's Project creditors directly whenever it reasonably deemed itself insecure or Eagle Eye's financial condition unsound. Armstrong claims no rights in the money itself. We do not hold that it has any such rights, but only the right to direct payments of the money.

{20} The statute, Section 13-4-28, reinforces our conclusion that Eagle Eye's right to demand payment from Armstrong was not absolute. Armstrong's contractual rights to control payment reflected its statutory duty to see that all tiers of subcontractors and suppliers were paid, *see Hasse II*, 1999-NMSC-023, ¶¶ 19-21, 127 N.M. 316, 980 P.2d 641 (holding that Section 13-4-28 "provides an adequate basis" for Hasse to pay suppliers of its subcontractor rather than subcontractor's assignee). Armstrong's contractual right to control payments also reflects the expectations of the construction industry that suppliers and subcontractors down the "multi-tier" payment system will receive their proportionate share of payments made on the project. Therefore, Eagle Eye did not have an unconditional right to the entire $28,464.26, but only to such funds as remained after Armstrong exercised its contractual right to divert payment to Eagle Eye's suppliers and other creditors of the Project.

{21} We find support for our decision in cases from other jurisdictions. In *F & W Welding Service, Inc. v. ADL Contracting Corp.*, 217 Conn. 507, 587 A.2d 92, 98-99 (1991), the court held that a town's contractual right to withhold payment until the con-

tractor's work was acceptable was properly invoked as a defense to attachment of those funds by a creditor of the contractor. In *Town of Gastonia v. McEntee–Peterson Engineering Co.,* 131 N.C. 359, 42 S.E. 857, 858 (1902), the court held that the contractor's creditor could not garnish amounts due under a contract with the town when the contractor could not receive payment until it furnished the town with releases from its suppliers, and those releases were not forthcoming. *Cf. Victore Ins. Co. v. City of Bowie,* 23 S.W.3d 499, 503 (Tex.Ct.App.2000) (holding that when project owner had a contractual right to withhold from contractor amounts necessary to satisfy subcontractor and supplier claims, retained funds were not contractor's property, and federal government could not acquire those funds by a tax lien against contractor's property). *See generally* Christopher Vaeth, *Garnishment of Funds Payable Under Building and Construction Contract,* 16 A.L.R.5th 548 (1993).

{22} Gallegos cites various cases from other jurisdictions that we do not find persuasive. In *Able Distributing Co. v. Lampe,* 160 Ariz. 399, 773 P.2d 504, 510 (Ariz.t.App.1989), the Arizona court held that "[Debtor's] failure to demonstrate that all costs incurred in connection with the project had been paid does not make the debt contingent for purposes of garnishment." The court affirmed payment of remaining funds to the garnishor after deduction of lien amounts and back charges, noting that no further liens could be filed on the private construction project. *Id.* at 507, 510. We do not find the opinion in *Able Distributing* instructive because there was no indication that the garnishee had the contractual right to divert funds, as Armstrong did in this case, or that the garnishee could be held liable to unpaid suppliers. In *A.F. Blair Co. v. Mason,* 406 So.2d 6, 11–12 (La.Ct.App.1981), the court held that a progress payment to a contractor for a private construction project was due and owing at time writ of garnishment was served. The contractor's surety had to step in after service of the writ and finish the project. *Id.* The surety's subrogation to the contractor's right to receive payment was subsequent to the writ and was held not to defeat the rights of the garnishor. In *A.F. Blair,* like *Able Distributing,* there was no indication that the garnishee had contractual rights similar to those of Armstrong to control distribution of the funds. Moreover, both of these cases involved private construction projects, whereas the project in this case is a public project to which the statutory policy applies protecting payments owed "to all tiers of contractors" of public works projects. Section 13–4–28.

{23} Gallegos also notes that Armstrong had taken no steps to assert any of its contract rights before the writ of garnishment was served, and thus Gallegos protests that his lien should take priority over Armstrong's rights. He relies on *Hasse II,* 1999–NMSC–023, ¶ 12, 127 N.M. 316, 980 P.2d 641 ("[T]iming and actual or constructive notice—not a general public policy favoring materialmen—are the principal considerations in determining priority between suppliers and other creditors, at least in the context of private construction projects."). *Hasse II,* however, proceeded to hold that the garnishee could assert contract defenses against the subcontractor's assignee. *Id.* ¶¶ 19–21. As we have explained, Armstrong possessed contract rights at the time the writ was served and was not required to take affirmative action under the contract to preserve them. This is not a case of establishing priorities among competing liens but of enforcing contractual rights. *See id.*

{24} Gallegos further relies on the principle that a writ of garnishment entitles the garnishor to take precedence over general creditors of the judgment debtor, a principle this court has endorsed in the past. *See Amaya,* 114 N.M. at 143, 835 P.2d at 859 (noting that a writ of garnishment has priority over writs served at a later time); *Behles v. Ellermeyer (In re Lucas),* 107 B.R. 332, 335 (Bankr.D.N.M.1989) ("Once the lien attaches to the property, no contract creditor can obtain a superior judicial lien."). But Armstrong is not a general creditor. As we have explained, Gallegos is subrogated to Eagle Eye's contractual rights to the money. Because Armstrong has contractual defenses to paying Eagle Eye the entire $28,464.26, Gallegos is subject to those same contractual defenses. Our decision leaves the rights of

garnishors exactly where they have always been: superior to general creditors but subject to the contractual rights and duties of the judgment debtor. *Field*, 12 N.M. at 47–48, 73 P. at 620.

{25} Gallegos cites to *Central Security & Alarm Co. v. Mehler*, 1998–NMCA–096, ¶ 25, 125 N.M. 438, 963 P.2d 515, for the proposition that a non-bank garnishee cannot increase or decrease the assets of the debtor in its control after service of the writ. Gallegos reads *Central Security* too broadly. In that case we approved the rule that "[t]he garnishee's responsibility ends when it delivers a check to the judgment debtor." *Id.* ¶ 13. Here Armstrong, the garnishee, has not delivered a check to Eagle Eye. Eagle Eye has only a conditional right to the funds held by Armstrong, and Armstrong has chosen to assert its own contractual right to pay Eagle Eye's Project creditors directly out of the funds that it holds.

{26} Gallegos also argues that Armstrong may not assert the claims of Eagle Eye's suppliers, when the suppliers either failed to intervene below after receiving notice or intervened and failed to appeal to this Court. But Armstrong is asserting its own rights, not those of any other entity. Armstrong may assert its own contractual right to withhold payments destined for Eagle Eye's suppliers. Armstrong will have to pay those suppliers from other funds if Gallegos takes the entire amount due Eagle Eye.

{27} Finally, Gallegos asserts that Eagle Eye's suppliers need not be paid from the funds being garnished because the suppliers can make claims against the payment bond that Eagle Eye was required to post at the beginning of the Project to insure compliance with its payment obligations. *See* §§ 13–4–18 to –20 (New Mexico's Little Miller Act); *Hasse I*, 1998–NMCA–038, ¶ 11, 125 N.M. 17, 956 P.2d 816. The Supreme Court rejected this position in *Hasse II* and we reject it here. 1999–NMSC–023, ¶ 23, 127 N.M. 316, 980 P.2d 641 ("KBK insists that Gosney should not be paid from the interpled funds because, in its view, the payment bond required by the Little Miller Act adequately protects suppliers like Gosney. In other words, KBK would have the payment bond be a supplier's exclusive remedy. There is no support in the [A]ct or at common law for this view, and we therefore reject it."). We also note this Court's prior observation in *Hasse I* on this same subject: "From a practical standpoint, acceptance of [Gallegos'] position would result in [Armstrong] creating a claim against itself since the project surety or the general contractor would seek reimbursement for payments made to [suppliers] under the payment bond." *Hasse I*, 1998–NMCA–038, ¶ 14, 125 N.M. 17, 956 P.2d 816.

CONCLUSION

{28} We hold that the trial court erred in granting summary judgment to the garnishor, Gallegos. We remand for further proceedings so that the trial court may determine (1) the amounts to be diverted by Armstrong to Eagle Eye's suppliers, (2) how much should be retained by Armstrong to pay its attorneys, (3) how much ultimately belongs to Eagle Eye and is subject to garnishment, and (4) such other matters as are consistent with this opinion.

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

WE CONCUR: CYNTHIA A. FRY, Judge, and CELIA FOY CASTILLO, Judge.

2002-NMCA-009

39 P.3d 710

WESTSTAR MORTGAGE CORPORATION, Plaintiff/Counterdefendant–Appellant/Cross–Appellee,

v.

Ken JACKSON, Defendant/Counterplaintiff–Appellee/Cross–Appellant.

No. 21,179.

Court of Appeals of New Mexico.

Nov. 26, 2001.

Certiorari Granted, No. 27,270, Jan. 15, 2002.

Alice Tomlinson Lorenz, James J. Widland, Miller, Stratvert & Torgerson, P.A., Albuquerque, NM, for Appellant/Cross–Appellee.

Joseph P. Kennedy, Albuquerque, NM, for Appellee/Cross–Appellant.

OPINION

PICKARD, Judge.

{1} The question before us is whether the use of the criminal process to assist in the collection of money mistakenly deposited into the wrong account gives rise to civil liability under the tort of malicious abuse of process. *See DeVaney v. Thriftway Mktg. Corp.*, 1998–NMSC–001, ¶ 17, 124 N.M. 512, 953 P.2d 277 (defining the elements of malicious abuse of process). In addition, we address whether NMSA 1978, § 56–8–4(A) (1993) requires a trial court to apply post-judgment interest to an award of punitive damages. Under the specific facts of this case, we answer both questions in the affirmative.

{2} Appellant Weststar Mortgage Company (Weststar) appeals from a judgment awarding Appellee Ken Jackson (Jackson) $50,000 in compensatory damages and $150,000 in punitive damages on Jackson's claim for malicious abuse of process. Weststar challenges the jury's verdict on every element of the malicious abuse of process claim and on the award of punitive damages. In particular, Weststar argues that (1) Weststar did not initiate or procure criminal proceedings against Jackson; (2) the trial court erred by failing to find, as a matter of law, that Weststar had probable cause to believe that a criminal claim could be established against Jackson; (3) the claim for malicious abuse of process was precluded by the facts that Jackson was guilty of larceny and the criminal proceedings did not terminate in Jackson's favor; (4) Weststar did not misuse the criminal proceedings; (5) there was no evidence that Weststar had a primary improper motive in seeking the criminal prosecution; (6) the jury instructions were misleading; (7) the jury's award of punitive damages was not supported by substantial evidence; and (8) the trial court erred in denying Weststar's motion for a new trial given that Jackson failed to present evidence sufficient to support the jury's findings. Jackson raises only one issue on cross-appeal, namely whether the trial court erred in failing to award post-judgment interest on Jackson's punitive damages award. We affirm on the appeal, reverse on the cross-appeal, and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

{3} Weststar is an escrow company that provides escrow, loan, and mortgage servicing. Its services include holding real estate contracts, collecting payments, and disbursing proceeds. Weststar also purchases real estate contracts.

{4} In 1998, Jackson owned a real estate contract encumbered by a mortgage. Weststar held the contract and disbursed payments to Jackson and to the mortgage holder. In April 1998, Weststar and Jackson executed a contract for Jackson to sell his real estate contract to Weststar. Pursuant to this agreement, Weststar arranged to direct-deposit approximately $3,000 in Jackson's account at Norwest Bank. However, Norwest misunderstood Weststar's instructions and mistakenly transferred all of the sale proceeds, including $12,927.26 that should have gone into Weststar's account, into Jackson's account.

{5} Jackson and his wife discovered the error several days later. On his wife's advice, Jackson called Weststar to ask whether the wire transfer had been made correctly. Jackson admits that he did not tell Weststar why he thought there may have been a mistake during this phone call. The Weststar representative, Lori Lynch, told Jackson that the wire transfer had been completed. Jackson then withdrew $12,000 from his account and purchased a certificate of deposit. Jackson testified that he bought the CD because he thought Weststar might eventually want the money returned and he wanted to ensure that he did not spend it.

{6} When Weststar discovered the bank error in July 1998, Lynch called Jackson.

During this first telephone call, Jackson denied having any knowledge of the money. However, later that day, Jackson called Lynch and arranged to return the money when the CD matured in August. Lynch testified that she did not demand that Jackson immediately return the money: "At that point he seemed willing to find out what he could do about the CD and return the money to us, so we were allowing him some time to do that."

{7} Shortly after Lynch and Jackson made arrangements for the repayment of the money, Weststar's attorney sent a letter to Jackson, demanding return of the money and threatening legal action should Jackson fail to cooperate. Concerned by the tone of the letter, Jackson and his wife contacted an attorney. The attorney erroneously, if not recklessly, told Jackson that it was his "lucky day" and that he was entitled to keep the money. Based on this advice, Jackson cashed in the CD and deposited the proceeds into another account.

{8} As the CD maturity date approached, Lynch again called Jackson. Jackson told Lynch that he had retained counsel and directed her to communicate with him through his attorney. Lynch reported this conversation to her supervisor, Gary Inman. Inman then called Jackson's attorney. Jackson's attorney told Inman that he viewed the situation as a "golden opportunity" for Jackson and that he would be responding to Weststar's demand letter in due time.

{9} Inman or another supervisor then directed Lynch to make a complaint with the Carlsbad Police Department. Lynch met with Detective Boutelle on September 23, 1998. Boutelle testified that Lynch told him, "We want to avoid going to criminal court, if we can. We are hoping we get cooperation, and can get this resolved where we can just close the whole matter out and go from there." Boutelle explained that he was not a collection agent and asked if Weststar wanted to proceed with the prosecution of Jackson. Lynch responded that she lacked the authority to authorize the prosecution and that her purpose in contacting the police was to document the situation in the event that Weststar was unable to resolve the situation civilly.

{10} Based on Lynch's representations that Weststar wanted to avoid a criminal prosecution if possible, Boutelle called Jackson's attorney to attempt to resolve the situation. Lynch was in the room at the time Boutelle made the call. Boutelle testified that he told the attorney, "I'm asking that you might talk to your client and try to come up with a reasonable solution, so that I can be eliminated from this process and you-all handle it yourselves. Otherwise I will be compelled—I will have to do my job and pursue this further." Jackson's attorney laughed at Boutelle and told Boutelle that he did not believe the matter was a criminal issue.

{11} The following day, Inman called Boutelle and directed the detective to pursue the prosecution of Jackson. During this conversation, Inman told Boutelle that he had received a letter from Jackson's attorney basically stating that Jackson would not be returning the money. In fact, the letter discussed a settlement offer. Nonetheless, Inman told Boutelle that the letter was not the answer he was hoping to get from Jackson and therefore that Weststar wished to proceed with the criminal case.

{12} Jackson did not return the money and was arrested. The district attorney eventually dismissed the prosecution because he was unable to get necessary records from Norwest Bank in order to carry through with the trial before a required deadline.

{13} Shortly after Jackson's arrest, Weststar filed a civil complaint alleging unjust enrichment, fraud, constructive fraud, conversion, and promissory estoppel. Jackson counterclaimed for malicious abuse of process. After Jackson acquired new counsel and repaid the money, Weststar obtained partial summary judgment on its claim of unjust enrichment to memorialize Jackson's repayment of the money.

{14} Weststar filed a motion for summary judgment on Jackson's claim of malicious abuse of process. The trial court did not rule on the motion, and the counterclaim was tried to a jury. The jury found in favor of

Jackson and awarded $50,000 in compensatory damages and $150,000 in punitive damages. Weststar then filed a motion for judgment as a matter of law or, in the alternative, for a new trial. The trial court denied the motion.

{15} At the presentment hearing, Jackson asked for pre- and post-judgment interest on both the compensatory and punitive damages awards. The trial court denied Jackson's request and awarded pre- and post-judgment interest on the compensatory damages only. Weststar appeals from the judgment and damages awards, and Jackson cross-appeals from the failure to award post-judgment interest on the punitive damages award.

DISCUSSION

I. Malicious Abuse of Process

{16} The tort of malicious abuse of process represents "an attempt to strike a balance between the interest in protecting litigants' right of access to the courts and the interest in protecting citizens from unfounded or illegitimate applications of the power of the state through the misuse of the courts." *DeVaney,* 1998–NMSC–001, ¶ 14, 124 N.M. 512, 953 P.2d 277. Because of the importance of the right of access to the courts, the tort is disfavored in the law and must be narrowly construed. *Id.* ¶ 19.

{17} The elements of malicious abuse of process are:

> (1) the initiation of judicial proceedings against the plaintiff by the defendant; (2) an act by the defendant in the use of process other than such as would be proper in the regular prosecution of the claim; (3) a primary motive by the defendant in misusing the process to accomplish an illegitimate end; and (4) damages.

Id. ¶ 17. To sustain an action for malicious abuse of process, "there must be both a misuse of the power of the judiciary by a litigant and a malicious motive." *Id.*

A. Standard of Review

{18} Weststar challenges the legal and factual sufficiency of the jury's verdict. In determining whether the evidence is legally sufficient to support the verdict, we resolve all disputes of facts and indulge all reasonable inferences in favor of the prevailing party. *Las Cruces Prof'l Fire Fighters v. Las Cruces,* 1997–NMCA–044, ¶ 12, 123 N.M. 329, 940 P.2d 177. We do not reweigh the evidence and do not substitute our judgment for that of the fact finder. *Id.* "The question is not whether substantial evidence exists to support the opposite result, but rather whether such evidence supports the result reached." *Id.* Under the traditional standard of appellate review applicable to this case, we disregard all evidence and inferences unfavorable to the jury's verdict. *See Tallman v. ABF (Arkansas Best Freight),* 108 N.M. 124, 126–27, 767 P.2d 363, 365–66 (Ct.App.1988). The dissent does not appear to take this admonition to "disregard" unfavorable evidence and inferences to heart.

B. Initiation or Procurement of Judicial Proceedings

{19} Weststar asserts two challenges to the jury's finding that it initiated or procured the criminal prosecution of Jackson: (1) the court erred in instructing the jury that it could hold Weststar liable for procuring, rather than initiating, the prosecution; and (2) Weststar could not be held liable as a matter of law because Detective Boutelle conducted an independent investigation of the allegations against Jackson and the district attorney made the ultimate decision to prosecute. We conclude that the jury was properly instructed and the evidence was sufficient to support a finding that the decision to prosecute Jackson was made at the request and insistence of Weststar.

1. Jury Instruction

{20} The jury was instructed that Jackson bore the burden of proving that "Weststar initiated or procured criminal proceedings against Jackson." Weststar's challenge to this instruction focuses on the absence of the term "procured" from the definition of malicious abuse of process given by our Supreme Court in *DeVaney.* *See* 1998–NMSC–001, ¶ 17, 124 N.M. 512, 953 P.2d 277. We reject Weststar's argument. Although *DeVaney* changed the law of malicious prosecution and abuse of process by merging the torts into one cause of action, the cases addressing the

separate torts are still helpful in our analysis of the requirements of the unified tort. This is particularly true in a case such as the one at bar, where the claim arises from a criminal prosecution rather than a civil claim as was at issue in *DeVaney*. *See id.* ¶ 4.

{21} New Mexico cases involving liability for a criminal prosecution have consistently defined the first element of malicious abuse of the criminal process as requiring proof that the " 'defendant initiated, *or procured* the institution of, criminal proceedings against plaintiff without probable cause.' " *Johnson v. Weast*, 1997–NMCA–066, ¶ 19, 123 N.M. 470, 943 P.2d 117 (quoting *Zamora v. Creamland Dairies, Inc.*, 106 N.M. 628, 632, 747 P.2d 923, 927 (Ct.App.1987)) (emphasis added). The inclusion of the term "procured" in assessing liability is consistent with the Restatement of Torts, on which our cases have relied in defining the elements of the tort. *See* RESTATEMENT (SECOND) OF TORTS § 653 (1976). "[O]ne who procures a third person to institute criminal proceedings against another is liable under the same conditions as though he had himself initiated the proceedings." *Id.* cmt. d.

2. Initiation or Procurement

{22} When a malicious abuse of process claim is predicated on a criminal prosecution, the evidence must show that a complainant took an active part in instigating or encouraging the prosecution before the complainant may be held liable. *Zamora*, 106 N.M. at 633, 747 P.2d at 928. If a complainant gives a prosecutor information believed to be true, "and the officer, in the exercise of his uncontrolled discretion, initiates proceedings based on that information, the informer is not liable." *Id.* at 632, 747 P.2d at 927. " 'There can be no liability where the prosecuting officer relies upon his own investigation and upon information furnished by others than defendant or where defendant has himself fairly disclosed, and it is left to the officer's own discretion, judgment and responsibility as to whether there shall be a prosecution.' " *Id.* (quoting *Hughes v. Van Bruggen*, 44 N.M. 534, 540, 105 P.2d 494, 498 (1940)).

{23} Weststar argues that the evidence was undisputed that it provided information that it believed to be true and that Boutelle conducted his own investigation. We disagree. First, we note that evidence was presented that Inman told Boutelle that Jackson admitted removing the money from his bank account in order to prevent the bank from correcting its error and that Jackson refused to return the money. However, Jackson testified that he removed the money from his bank account and purchased the CD to insure that he did not accidently spend the money by mingling it with his own funds. In addition, the letter upon which Inman based his statement that Jackson refused to return the money was actually an offer to settle the dispute and explained why Jackson and his attorney believed that Jackson might be entitled to keep a portion of the disputed funds. Under these circumstances, a jury could infer that Weststar had provided Boutelle with misleading information.

{24} Second, we disagree with Weststar's characterization of Boutelle's investigation as independent. From the record, it appears that Boutelle's investigation consisted of requesting additional documentation from Weststar and perhaps requesting documents from Norwest Bank. However, neither Boutelle nor the district attorney were able to secure records from Norwest. As such, the prosecution was based solely on the information provided by Weststar. This lack of independent investigation and corroboration is in marked contrast to the facts of *Zamora*, on which Weststar relies in its brief in chief. In *Zamora*, the defendants provided an investigative report to the police and filed an offense report at the request of the police. 106 N.M. at 632–33, 747 P.2d at 927–28. During their investigation of the defendants' allegations, the police interviewed twelve people other than the defendants. In addition, in deciding to prosecute, the district attorney relied on the results of the police investigation and used a confidential informant in connection with the case. *Id.* In this case, Boutelle's investigation was based solely on information provided by Weststar, and the evidence suggests that the district attorney's decision to prosecute was based solely on Boutelle's representation of the

facts as provided by Weststar and included in the police report. Under these circumstances, we conclude that the investigation by Boutelle was not independent of Weststar.

{25} Nonetheless, Weststar suggests that, to hold a complainant liable for initiating a criminal prosecution, the evidence must show that the complainant exercised undue influence upon the prosecuting authorities so as to effectively usurp the authorities' discretion. We disagree. A complainant who persuades, requests, directs, or pressures prosecuting authorities to proceed with a prosecution can be regarded in proper circumstances as initiating the prosecution and be held liable for it. *See id.* at 633, 747 P.2d at 928; *Kurschus v. PaineWebber, Inc.*, 16 F.Supp.2d 386, 392 (S.D.N.Y.1998) ("Under New York law, the minimum action necessary to sustain a claim of malicious prosecution is a request by a defendant that the authorities prosecute a plaintiff."); *Conway v. Smerling*, 37 Mass.App.Ct. 1, 635 N.E.2d 268, 271 (1994) (holding that defendants who repeatedly inquired into progress of criminal investigation had initiated or procured criminal proceedings for the purposes of a malicious prosecution claim); W. Page Keeton, et al., PROSSER & KEETON ON THE LAW OF TORTS § 119, at 873 (5th ed. 1984) (hereinafter PROSSER & KEETON).

{26} Viewed in the light most favorable to Jackson, the evidence of Weststar's participation in the criminal proceedings supports a finding that Weststar procured the prosecution of Jackson. When Lynch first met with Boutelle, Lynch indicated that Weststar hoped to avoid proceeding with a criminal complaint, but would do so if Jackson did not cooperate by repaying the money. Based on this testimony, the jury could reasonably conclude that Lynch intended that the decision to proceed with the criminal investigation be left to Weststar. This understanding was confirmed by Boutelle when he assured Lynch that he would not proceed with the investigation unless instructed to do so. The following day, Inman called Boutelle for the express purpose of asking Boutelle to commence the prosecution. When Inman made this phone call, the evidence shows that he knew that the prosecution would not proceed without direction from Weststar. As Boutelle testified, "It is my understanding [that] Lori Lynch had called Gary [Inman], who is her supervisor, and relayed to him what my advice to her was, that I needed the authorization to keep going with this. And Gary, as the supervisor, called me back and he said, 'Yes, we do want to pursue this.'" Clearly, Weststar did more than merely provide information to the police. Under these facts, we cannot say as a matter of law that Weststar's desire to have the proceedings initiated was not the determining factor in Boutelle's decision to commence the prosecution. *Cf. Zamora*, 106 N.M. at 632–33, 747 P.2d at 927–28 (holding that defendants had not procured prosecution given district attorney's statement that "the decision [to prosecute] was made solely by the district attorney's office, without any encouragement, recommendation, direction, or pressure of any kind from the defendants"); *Hughes*, 44 N.M. at 537, 105 P.2d at 496 (finding no procurement where the record indicated that there was "no evidence to show that defendant himself initiated the action or that he advised or counselled (sic) with the District Attorney or any other person suggesting, even, that there should be a prosecution").

C. Probable Cause

{27} Weststar argues that the trial court erred in not finding, as a matter of law, that Weststar had probable cause to believe that Jackson had committed a criminal offense. Weststar asserts that, in all cases, probable cause is an issue to be determined by the trial court and not the jury. We disagree that probable cause is necessarily an issue to be determined by a trial court and conclude that the evidence was sufficient to support a finding that Weststar lacked probable cause in this case.

{28} In *DeVaney*, the Court held that "the filing of a proper complaint with probable cause, and without any overt misuse of process, will not subject a litigant to liability for malicious abuse of process, even if it is the result of a malicious motive." 1998–NMSC–001, ¶ 20, 124 N.M. 512, 953 P.2d 277. Probable cause is defined as "the reasonable belief, founded on known facts established

after a reasonable pre-filing investigation, that a claim can be established to the satisfaction of a court or jury." *Id.* ¶ 22 (citation & footnote omitted).

{29} If the facts surrounding the initiation of process are in dispute, the question of probable cause is properly left to the jury. *See id.* ¶ 41; *see also Stanley v. Webber*, 260 Va. 90, 531 S.E.2d 311, 314–15 (2000); *Brown v. Nationsbank Corp.*, 188 F.3d 579, 586 (5th Cir.1999); *Lee v. Southland Corp.*, 219 Va. 23, 244 S.E.2d 756, 758–59 (1978) (reversing trial court's determination of probable cause as a matter of law where evidence of plaintiff's intent in breaking door was disputed). In this case, the record indicates that the facts surrounding Inman's decision to request that Boutelle pursue criminal charges, and the inferences to be drawn from those facts, were in dispute. As such, it was up to the jury to weigh the evidence and resolve the conflicts.

{30} Weststar argues that probable cause was established as a matter of law based on the "undisputed" facts that Jackson knew the extra money wired into his account did not belong to him, purchased the CD to deny Weststar access to the money, and, for a period of time, refused to return the money when requested to do so. We disagree that the facts upon which Weststar relies were undisputed. More importantly, however, the critical question in determining the existence of probable cause is not what Jackson knew or intended, but whether Weststar had a reasonable belief, founded on known facts established after a reasonable pre-filing investigation, that Jackson had committed a criminal offense. *See DeVaney*, 1998–NMSC–001, ¶ 22, 124 N.M. 512, 953 P.2d 277. In evaluating Weststar's belief that Jackson had committed larceny, we look to the facts as they appeared at the time Inman directed Boutelle to pursue the prosecution.

{31} It is undisputed that Jackson was not responsible for the money being mistakenly deposited into his account. Although Jackson did not report the mistake to Weststar until after he was contacted by Lynch, he acknowledged that he was in possession of the money and initially indicated a willingness to return it to Weststar. When the CD matured in August, Jackson did not tell Weststar he would not return the money. Rather, he informed the company that he had retained counsel and directed Weststar to communicate with him through the attorney, as he apparently had been instructed to do by the attorney. Jackson's attorney then indicated that Jackson was seeking a way to keep the money, but that the attorney would respond to Weststar's demand letter.

{32} Inman's decision to prosecute Jackson for larceny was based on the letter sent to Weststar by Jackson's attorney. In this letter, the attorney indicated that Jackson had expended a portion of Weststar's money in reliance on Weststar's representations that the money had been properly wired into Jackson's account. The attorney acknowledged that Jackson did not have the entire balance demanded by Weststar, but offered $3,000 to settle the matter without civil action. In his closing, the attorney stated: "Please consider this offer as an attempt to settle this matter in an amicable and expeditious matter [sic]. If you have any questions, please do not hesitate to contact me." Based on these facts, the jury could have properly concluded that a reasonable person would not have believed that Jackson was guilty of a criminal offense.

{33} Weststar argues that, notwithstanding the foregoing, we should find that it had probable cause as a matter of law because Boutelle, the district attorney, the magistrate judge who issued the warrant for Jackson's arrest, and the committing magistrate all believed that probable cause existed. In some circumstances, reliance on the advice of a district attorney or a commitment by a magistrate may be enough to establish probable cause as a matter of law. *See* RESTATEMENT, *supra*, §§ 663, 666. Nonetheless, under the circumstances of this case, we conclude that a jury could find that the beliefs of the district attorney and the magistrate were based on incomplete knowledge of the material facts known to Weststar. "In determining what, if any, weight should be given to the commitment by a magistrate, the court should take into account evidence that the commitment ... was procured by

false testimony offered by the prosecutor or given in his behalf, or by his withholding of material evidence known to him." RESTATEMENT, *supra*, § 663 cmt. h; *see also Chandler v. United States*, 875 F.Supp. 1250, 1269 (N.D.Tex.1994) (indicating that a complainant may be shielded from liability by the actions of a public prosecutor only if the complainant makes a full and fair disclosure of material facts known to the complainant).

{34} Boutelle's police report includes both incomplete and misleading statements of facts:

> Lori presented a copy of a Certified Letter sent to Ken Jackson after several phone calls to him could not get him to cooperate with correcting this mistake. Lori said Ken first denied any knowledge of receiving that much money, but later changed his story to "well I guess it was my lucky day, huh." Lori said Ken told her he did not have the money because it was tied up somewhere else, and he would work on trying to get it back to them sometime.
>
> . . . .
>
> Gary advised their attorney Tom Marek (Carlsbad) received a letter from Ken Jackson's attorney Mike Carrasco (Carlsbad) basically stating that Jackson would not be returning the misguided monies he received. . . . Gary said during contacts from Lori, Ken Jackson acknowledged that he knew what he was doing when he took that money out of his account so the bank could not reclaim it, but Ken would not tell Lori where the money is now hidden.

{35} Without a full disclosure of all material facts known by Weststar at the time it procured the prosecution of Jackson, we cannot say, as a matter of law, that Weststar had probable cause to initiate those proceedings. *See id.* at 1269–70 (concluding that complainant lacked probable cause due to complainant's failure to make a full and fair disclosure during grand jury proceedings).

D. Jackson's Guilt and Termination of Criminal Proceedings

{36} Weststar argues that Jackson's guilt and the fact the criminal proceedings did not terminate in Jackson's favor preclude a finding of malicious abuse of process. First, the *DeVaney* opinion explicitly rejects the requirement that a proceeding terminate in favor of the malicious-abuse-of-process plaintiff. 1998–NMSC–001, ¶ 23, 124 N.M. 512, 953 P.2d 277 ("[F]avorable termination is not an element of an action for malicious abuse of process. . . ."). Second, we disagree that Jackson was guilty of larceny as a matter of law.

{37} To hold Jackson criminally liable for larceny, the State would bear the burden of proving beyond a reasonable doubt that Jackson "took and carried away" the money belonging to Weststar and that at the time of the taking, Jackson intended to permanently deprive Weststar of its money. *See* UJI 14–1601 NMRA 2001. " 'Carried away' means moving the property from the place where it was kept or placed by the owner." UJI 14–1603 NMRA 2001. "Generally one who innocently receives an overpayment of money by mistake is not guilty of larceny if, after discovering the mistake, he converts the excess moneys to his own use, but the rule is otherwise if he receives the overpayment knowingly with intent at the time of the overpayment to convert the excess." 52A C.J.S. *Larceny* § 29(c) (1968); *see also Cook v. State*, 196 Tenn. 104, 264 S.W.2d 571, 572 (1954) (stating that common law larceny includes situation in which defendant receives more money than was intended, defendant knows of the mistake at the time of delivery, and defendant intends to keep the money); *State v. Woll*, 35 Wash. App. 560, 668 P.2d 610, 613 (1983) (stating that common law larceny includes the wrongful appropriation of mistakenly delivered property if, upon receipt, the recipient knew that the property was mistakenly delivered and at that time formed the intent to keep it).

{38} Based on the evidence introduced at trial, a reasonable jury could conclude that Jackson was innocent of the crime of larceny. Whether Jackson ever intended to permanently deprive Weststar of its money was hotly disputed. Jackson testified that he removed the money from his bank account and purchased the CD to insure that he did

not mistakenly spend the money before Weststar asked him to return it. If a jury believed Jackson's testimony, it would necessarily acquit Jackson of larceny because Jackson lacked the intent to permanently deprive Weststar of its money at the time the money was "carried away" from the bank account and placed in the CD. *See* UJIs 14–1601, –1603. Similarly, if the State attempted to prove that Jackson committed larceny when he cashed the CD and deposited the money into a different account, Jackson could have raised the defense of good faith reliance on the advice of counsel. *See United States v. Butler*, 211 F.3d 826, 833 (4th Cir.2000) (describing elements of advice-of-counsel defense as (1) full disclosure of all material facts to the attorney and (2) good faith reliance on the attorney's advice); *United States v. Cross*, 113 F.Supp.2d 1253, 1262–63 (S.D.Ind.2000) (stating that advice-of-counsel defense applies to specific intent crimes and describing elements of defense). Under these circumstances, we reject Weststar's contention that Jackson was guilty of larceny as a matter of law.

E. Misuse of Process

{39} Even if a complainant initiated proceedings with probable cause, the complainant may nonetheless be held liable for malicious abuse of process if the evidence shows that the complainant misused the process "through some irregularity or impropriety suggesting extortion, delay, or harassment[.]" *DeVaney*, 1998–NMSC–001, ¶ 28, 124 N.M. 512, 953 P.2d 277. The act giving rise to liability for misuse of process need not be improper per se. *See id.* ¶ 48. Instead, a factfinder must evaluate the act or acts in context and in light of the surrounding circumstances to determine whether they were improper. *See id.* ¶¶ 49–50.

{40} " '[A] demand for collateral advantage that occurs before the issuance of process may be actionable, so long as process does in fact issue at the defendant's behest, and as part of the attempted extortion.' " *Id.* ¶ 20 (quoting PROSSER & KEETON, *supra*, § 121, at 898). It is well established that an action for malicious abuse of process may arise out of the use of a criminal prosecution for the purpose of debt collection. *See generally* Annotation, *Use of Criminal Process to Collect Debt as Abuse of Process*, 27 A.L.R.3d 1202, 1205–06 (1969). "[I]t has been held to be an improper use of criminal process for the creditor, or an officer of the law acting in concert with the creditor, to demand payment of a debt as a condition of the debtor's avoiding arrest, or further confinement, or further proceedings in a criminal prosecution." *Palmer Ford, Inc. v. Wood*, 298 Md. 484, 471 A.2d 297, 311 (1984).

{41} After sending Jackson a demand letter threatening legal action, Weststar contacted Boutelle to investigate the possibility of prosecuting Jackson. In this meeting, Lynch explained to Boutelle that Weststar hoped to avoid criminal action, but could only do so if Jackson repaid the money. Boutelle then called Jackson's attorney while Lynch was still in the room, and he conveyed Weststar's message that the only way for Jackson to avoid criminal prosecution was to resolve the dispute with Weststar. "There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort." PROSSER AND KEETON, *supra*, at 898. Given the facts of this case, a reasonable jury could conclude that Boutelle was acting on behalf of Weststar and therefore Weststar should be charged with Boutelle's action. Contrary to Weststar's argument that it could not be charged with Boutelle's action unless there was a formal, legal, agency relationship, we believe that the elements of the tort, particularly those discussed above in the "Initiation or Procurement" section of this opinion, permit Weststar to be charged with all conduct it initiated or procured. We conclude that the evidence was sufficient to support a finding that Weststar used the criminal prosecution of Jackson to compel Jackson to return the money owed to Weststar.

F. Primary Improper Motive

{42} "Under the requirement of a primary improper motive, it is insufficient that the malicious-abuse-of-process defendant acted with ill will or spite. There must be a purpose to accomplish an illegitimate

end." *DeVaney,* 1998–NMSC–001, ¶ 29, 124 N.M. 512, 953 P.2d 277 (internal citations omitted). In the context of a criminal prosecution, an improper motive may be proven with evidence that the prosecution was "initiated primarily for a purpose other than that of bringing an offender to justice." *Zamora,* 106 N.M. at 632, 747 P.2d at 927. The Restatement makes it clear that using the criminal process to compel another to pay a debt, even if the debt is owed, constitutes a misuse of process:

> Since the only proper purpose for which criminal proceedings can be initiated is that of bringing an offender to justice and thereby aiding in the enforcement of the criminal law, it follows that one who initiates the proceedings to force the accused to pay money or to turn over land or chattels to the accuser, does not act for a proper purpose. This is true although the money is lawfully owed to the accuser or the thing in question has been unlawfully withheld or taken from him, so that relief, might have been secured in appropriate civil proceedings.

RESTATEMENT, *supra,* § 668 cmt. g.

{43} In this case, it is unnecessary for us to infer an improper motive because Jackson presented direct evidence that Weststar initiated the criminal proceedings to collect the money from Jackson and not for the purpose of bringing Jackson to justice. When Lynch met with Boutelle she admitted that Weststar just wanted its money back and would prefer to avoid a criminal trial. Boutelle also testified that he understood that Weststar would have and could have dropped the criminal charges had Jackson repaid the money. While we agree with Weststar that it was reasonable and legitimate for it to seek the return of its money, the criminal process was not a proper avenue for it to seek this result. *See* RESTATEMENT, *supra,* § 668 cmt. d (including as an improper purpose "when the proceedings are initiated for the purpose of obtaining a private advantage even though the advantage might legitimately have been obtained in civil proceedings"). We conclude that substantial evidence supports the jury's finding that Weststar acted with an improper motive.

II. Jury Instructions

{44} Weststar challenges the validity of the jury instructions on several grounds. In particular, Weststar argues that (1) the jury should not have been instructed on elements of malicious abuse of process because the evidence was insufficient to support the claim; (2) the instructions improperly left the determination of probable cause to the jury rather than to the court; and (3) the trial court erred in failing to instruct the jury as to the meaning of "initiated or procured criminal proceedings," "probable cause," and "extortion."

{45} We have already disposed of Weststar's first two points of error. We decline to reach Weststar's third point of error because Weststar failed to preserve the issue. *See Baxter v. Gannaway,* 113 N.M. 45, 50, 822 P.2d 1128, 1133 (Ct.App.1991). Weststar concedes that it failed to preserve the issue, but urges us to nonetheless consider the issue because the "trial court had an independent duty to define legal terms and terms of art used in its instructions." We reject this argument. The cases cited by Weststar to support its contention that failure to instruct on legal terms is an exception to the general requirements of preservation do not support Weststar's position. In all of these cases, the appellant had requested that the trial court provide definitional instructions and the trial court had refused to do so. *See, e.g., Epperly v. Johnson,* 734 N.E.2d 1066, 1074 (Ind.Ct.App.2000) ("It is generally error for a trial court to refuse to define in its instructions technical and legal phrases relevant to material issues of a lawsuit if it is properly requested to do so.") (internal quotation marks, citation, and emphasis omitted). Even in criminal cases in which the trial court's duty to instruct is arguably more important, it is not reversible error for a trial court to fail to give definitional instructions unless they are requested. *See State v. Tarango,* 105 N.M. 592, 599, 734 P.2d 1275, 1282 (Ct.App.1987), *overruled on other grounds by Zurla v. State,* 109 N.M. 640, 645, 789 P.2d 588, 593 (1990). Because Weststar neither tendered instructions defining the terms at issue nor requested that the trial court pro-

vide such definitions, we will not consider Weststar's argument on appeal. *See Bassett v. Bassett*, 110 N.M. 559, 563, 798 P.2d 160, 164 (1990).

III. Punitive Damages

{46} Weststar contends that, even if the evidence was sufficient to find it liable for malicious abuse of process, the evidence was insufficient to sustain the jury's award of punitive damages. We disagree.

{47} An award of punitive damages may be sustained on appeal only if the evidence shows a culpable state of mind. *Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 53, 127 N.M. 1, 976 P.2d 1. We require "the presence of aggravated conduct beyond that necessary to establish the basic cause of action in order to impose punitive damages." *Teague-Strebeck Motors, Inc. v. Chrysler Ins. Co.*, 1999-NMCA-109, ¶ 78, 127 N.M. 603, 985 P.2d 1183 (order on motion for rehearing). Punitive damages may be awarded only when the evidence shows that the wrongdoer's conduct was malicious, willful, reckless, wanton, fraudulent, or in bad faith. *See* UJI 13-1827 NMRA 2001. In this case, the jury was instructed that it must find that Weststar acted maliciously, willfully, recklessly, or wantonly before it could award punitive damages to Jackson. "Willful conduct is the intentional doing of an act with knowledge that harm may result." *Id.* "Recklessness requires indifference to the rights of the victim, rather than knowledge that the conduct will violate those rights." *Kennedy v. Dexter Consol. Schs.*, 2000-NMSC-025, ¶ 32, 129 N.M. 436, 10 P.3d 115.

{48} The financial and emotional costs of wrongfully being the subject of criminal proceedings are obvious. Viewed in the light most favorable to the award, the evidence shows that Weststar acted with utter indifference to Jackson's right to be free from such a needless intrusion. In meeting with Boutelle, Weststar, at the very least, portrayed the facts known to it in the light most unfavorable to Jackson, and, at worst, misrepresented those facts. Weststar knew that Jackson's belief that he might be entitled to keep part of the money was based on the advice of an attorney, and the evidence shows that Weststar's decision to prosecute Jackson was based on its fear that Jackson and his attorney would defend against a civil action. By misusing the criminal process to gain an advantage in its negotiations for the return of the money, Weststar acted with a sufficiently culpable state of mind to warrant an award of punitive damages.

{49} Weststar also raises a general challenge to the amount of the punitive damages award. In determining whether a damages award is excessive, we do not reweigh the evidence, but instead determine whether the award is excessive as a matter of law. *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶ 49, 127 N.M. 47, 976 P.2d 999. On appeal, Weststar bears the burden of showing that the award was infected with "'passion, prejudice, partiality, sympathy, undue influence, or some corrupt cause or motive.'" *Id.* ¶ 51 (quoting *Allsup's Convenience Stores, Inc.*, 1999-NMSC-006, ¶ 19, 127 N.M. 1, 976 P.2d 1). As we discussed above, Weststar's belief in Jackson's guilt was unreasonable given that Jackson never refused to return the money and was in the midst of negotiating with Weststar when it decided to procure the criminal prosecution. As a result of Weststar's actions, Jackson was arrested twice and suffered stress in his marriage. Under these circumstances, we cannot say that the award is "'so unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice rather than reason or justice.'" *Id.* ¶ 53 (quoting *Chavez-Rey v. Miller*, 99 N.M. 377, 379, 658 P.2d 452, 454 (Ct.App.1982)). Because Weststar has presented nothing to demonstrate that the jury was somehow corrupted or unduly influenced, we conclude that the award is not excessive as a matter of law.

III. Post-Judgment Interest

{50} Jackson appeals the trial court's refusal to award post-judgment interest on the punitive damages portion of his award. Weststar recognizes that Jackson asserted his right to post-judgment interest below, but argues that Jackson has changed the basis of

his claim on appeal and urges us not to consider his appeal for this reason. Weststar asserts that Jackson's argument below was essentially that post-judgment interest is different from pre-judgment interest and therefore that *Weidler v. Big J Enterprises, Inc.*, 1998-NMCA-021, ¶ 55, 124 N.M. 591, 953 P.2d 1089, in which we held that pre-judgment interest could not be awarded on punitive damages, was not controlling on the issue of post-judgment interest. On appeal, Jackson argues that post-judgment interest is mandatory under Section 56-8-4(A). The fact that pre-judgment interest is discretionary while post-judgment interest is mandatory is one of the major differences between the two forms of interest. Because Jackson's cross-appeal raises a purely legal issue and requires us to analyze the post-judgment interest statute in light of the *Weidler* opinion, we conclude that the issue was properly preserved and will reach it on the merits. To do otherwise would require an overly technical application of the rules of preservation. *See Garcia ex rel. Garcia v. La Farge*, 119 N.M. 532, 540-41, 893 P.2d 428, 436-37 (1995).

{51} Weststar makes two arguments in support of the trial court's denial of post-judgment interest on the punitive damages award. First, Weststar argues that post-judgment interest does not apply to punitive damages as a matter of law under our decision in *Weidler*. Second, if post-judgment interest is held to apply to punitive damages, Weststar argues that the award of interest is within the discretion of the trial court and the court did not abuse its discretion in this case. We reject both contentions and conclude that the trial court erred in denying post-judgment interest on the punitive damages award.

A. *Weidler v. Big J Enterprises*

{52} In *Weidler*, we held that pre-judgment interest does not apply to awards of punitive damages for two reasons. First, we noted that while pre-judgment interest serves to prevent undue delay and to compensate a plaintiff for the deprivation of just compensation for the wrong suffered, punitive damages serve to punish a defendant for prior bad acts and to deter the defendant from such acts in the future. 1998-NMCA-021, ¶¶ 52-53, 124 N.M. 591, 953 P.2d 1089. Because punitive damages are a "windfall conferred upon an otherwise fully compensated plaintiff" and are a penalty to be determined by the jury, we concluded that "[a]dding pre-judgment interest to a punitive damages award would change what the jury determined to be appropriate punishment and, thus, undermine the principles of punitive damages." *Id.* ¶ 53. Second, we noted that the compensatory purpose of pre-judgment interest is at odds with punitive damages, insofar as a plaintiff is not entitled to punitive damages. *See id.* ¶ 54.

{53} By contrast, the purpose of post-judgment interest is to compensate the prevailing party for the deprivation of its judgment money and to discourage parties from pursuing meritless appeals. *See, e.g., Brinn v. Tidewater Transp. Dist. Comm'n*, 113 F.Supp.2d 935, 938 (E.D.Va.2000). As such, the rationale behind this Court's denial of pre-judgment interest on punitive damages does not have much force. Once judgment has been entered on a verdict awarding punitive damages, the plaintiff becomes entitled to the punitive damages award to the same extent as the plaintiff is entitled to compensatory damages. Awarding post-judgment interest on the full award, therefore, compensates the plaintiff for the deprivation of money owed and encourages the defendant to expeditiously pay the judgment debt. We conclude that once a punitive damages award has been incorporated into a judgment, it becomes a judgment for the payment of money and the award of post-judgment interest is mandatory. *See Sunwest Bank v. Colucci*, 117 N.M. 373, 379, 872 P.2d 346, 352 (1994); *Bustos v. Bustos*, 2000-NMCA-040, ¶¶ 20-21, 128 N.M. 842, 999 P.2d 1074; *but see Gonzales v. N.M. Dep't of Health*, 2000-NMSC-029, ¶ 38, 129 N.M. 586, 11 P.3d 550

B. Post-Judgment Interest Mandatory Under Section 56-8-4(A)

{54} Weststar cites to *Gonzales*, in support of its argument that an award of post-judgment interest is within the discretion of the trial court. We disagree that *Gonzales*

stands for this proposition. The issue before the Supreme Court in *Gonzales* was whether a section of the Human Rights Act, NMSA 1978, § 28-1-13(D) (1969, as amended through 1987, prior to 1991, 1993, 1995, and 2000 amendments) was a statutory exception to the general rule that the state is exempt from an award of pre- or post-judgment interest under Section 56-8-4. *See Gonzales,* 2000-NMSC-029, ¶ 37, 129 N.M. 586, 11 P.3d 550. In reaching the conclusion that the Human Rights Act does not create such an exception, the Supreme Court noted that "an interest award under Section 56-8-4 is not an absolute right, but rather is a matter to be left to the discretion of the trial court." *Id.* ¶ 38. However, the basis for the Court's holding was that Section 28-1-13(D) does not list judgment interest as an award for which "the state shall be liable the same as a private person." *Id.* ¶ 38. Because Section 28-1-13(D) does not explicitly conflict with Section 56-8-4(A), and the plaintiff in *Gonzales* offered no authority for her assertion that the legislature intended to include judgment interest as an award allowed under Section 28-1-13(D), the Court held that it would not expand Section 28-1-13(D) to allow such interest. *Id.* ¶ 38. As such, the Court's general statement regarding the discretionary nature of Section 56-8-4 was not necessary to reach its conclusion, is therefore dicta, and is not binding on this Court except in cases like *Gonzales* involving Section 28-1-13(D). *See Ruggles v. Ruggles,* 116 N.M. 52, 59-60 n. 8, 860 P.2d 182, 189-90 n. 8 (1993).

{55} Our conclusion is supported by the facts that the seminal case of *Sunwest Bank* was not cited and that the cases on which the Supreme Court relied were cases dealing with interest as an element of damages under NMSA 1953, § 50-6-3 (Repl.1962), now NMSA 1978, § 56-8-3 (1983), and not Section 56-8-4(A). *See Kennedy v. Moutray,* 91 N.M. 205, 206, 572 P.2d 933, 934 (1977); *Trujillo v. Beaty Elec. Co.,* 91 N.M. 533, 538, 577 P.2d 431, 436 (Ct.App.1978). Prior to 1983, the award of interest was left to the discretion of the trial court, and the statutes merely set the interest rates applicable to various causes of action and judgments. *See* § 50-6-3, NMSA 1953, § 50-6-4 (Repl.1962), now § 56-8-4. In 1983, however, the law was amended such that the award of prejudgment interest under Sections 56-8-3 and 56-8-4(B) remained within the discretion of the trial court, but post-judgment interest under Section 56-8-4(A) became mandatory. *See* 1983 N.M. Laws, ch. 254, §§ 1-2. As such, although *Kennedy* and *Trujillo* remain good law with respect to awards of prejudgment interest under Sections 56-8-3 and 56-8-4(B), they are inapplicable to Section 56-8-4(A). *See Sunwest Bank,* 117 N.M. at 377-79, 872 P.2d at 350-52 (extensively discussing the distinctions between interest awards under Sections 56-8-3, 56-8-4(A), and 56-8-4(B) and holding interest under Section 56-8-4(A) to be mandatory).

CONCLUSION

{56} For the foregoing reasons, we affirm the judgment against Weststar and the awards of compensatory and punitive damages to Jackson. We reverse the trial court on its failure to award post-judgment interest on the punitive damages award and remand for further proceedings consistent with this opinion.

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

I CONCUR: IRA ROBINSON, Judge.

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

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

{58} I respectfully dissent with regard to the majority's holding that the issues of whether Weststar initiated or procured Jackson's criminal prosecution and whether Weststar's primary motive was to obtain the return of money through the criminal process were properly submitted to the jury. Because I would reverse on these issues, I do not address the punitive damages issue.

{59} Court scrutiny of malicious abuse of process actions is more demanding than that required in garden variety tort actions. We should carefully adhere to the watchwords of our precedent. The tort of malicious abuse of process is disfavored in the law and is to be "favored only in plain, compelling cases." *Zamora v. Creamland Dairies, Inc.,* 106

N.M. 628, 634, 747 P.2d 923, 929 (Ct.App. 1987). These actions " 'ought not to be favored, but managed with great caution.' " *Hughes v. Van Bruggen*, 44 N.M. 534, 540, 105 P.2d 494, 498 (1940) (quoting Lord Holt). The claimant has a heavy burden in establishing his claim. *Zamora*, 106 N.M. at 634, 747 P.2d at 929.

{60} Citizens are to have "wide latitude in reporting facts to authorities so as not to discourage the exposure of crime." *Id.* The tort is to be narrowly construed in order to protect the right of "access to the courts." *DeVaney v. Thriftway Mktg. Corp.*, 1998-NMSC-001, ¶ 19, 124 N.M. 512, 953 P.2d 277. This right must include the right to report facts to law enforcement officials and to engage in a discussion with those officials of how the officials intend to proceed based on the facts reported. That discussion might center on the need for further investigation. It might include the officials extending to the victim an option to say whether the victim wanted the officer to continue.

{61} This case is a hybrid. It lies somewhere between crime and debt. It is closer to crime than to debt. While cases dealing with debt collection might be instructive, along with cases dealing with outright crime, they are not controlling. This is the odd, in-between case. Jackson's conduct is neither breach of obligation nor, at least arguably, criminal. The conduct borders more on the side of crime than debt because Jackson made a decision not to return the full amount of the money while neither stating nor having any lawful basis whatsoever, not even an arguable one, on which to hold on to the money.

I. Initiation or Procurement

{62} Appropriate scrutiny in this appeal requires a conclusion that insufficient evidence exists from which a jury could determine, even based on reasonable inferences, that Weststar initiated or procured the criminal prosecution thereby giving rise to tort liability under malicious abuse of process. I therefore respectfully disagree with the majority's conclusion that the evidence was sufficient to support a finding that the decision to prosecute Jackson was made at the request and insistence of Weststar. Majority Opinion ¶ 19. This conclusion is drawn from erroneous premises and insufficient factual bases.

{63} The erroneous premises are (1) a factual dispute existed as to whether Weststar provided information to Officer Boutelle that it reasonably believed to be true; (2) Officer Boutelle's investigation was not an independent one; (3) Weststar participated in the proceedings; and, perhaps (4) Weststar did not have probable cause to believe Jackson was guilty of a criminal offense. The factual bases are insufficient, in that Jackson failed to meet his heavy burden of proof to show something more for initiation or procurement of Jackson's prosecution than Weststar's selection of Boutelle's offered option to say it wanted Boutelle to proceed in the case. I discuss these faults in more detail.

A. Weststar's Reasonable Belief

{64} I respectfully disagree with the majority's conclusion that a factual dispute existed as to whether Weststar provided information to Boutelle that it believed to be true. Majority Opinion ¶ 23. This was not a legal issue in this case. Even were it an issue, it cannot be disputed that Weststar reasonably believed the information it gave to the police was true.

{65} Jackson first told Weststar he would return the money. After he received bad advice from a lawyer, he did an about-face and told Weststar to "talk to my lawyer." In the context of Weststar wanting the money returned, the lawyer, who was Jackson's agent, answered by telling Weststar this was Jackson's "golden opportunity." Weststar, reading this loud and clear, decided to report the circumstances to law enforcement officials. Weststar provided information to the officials that it reasonably believed to be true. No evidence exists that Weststar did not reasonably believe the information it provided was accurate. Significantly, the jury was not asked to consider evidence to the contrary. This was never a jury issue. Jackson did not argue below or on appeal to the contrary.

{66} Furthermore, it is not disputed that Weststar reasonably believed Jackson was acting wrongfully. Boutelle gave Weststar the option to call off any further activity if Weststar was able to obtain the money through discussion with Jackson. Offering that option was the officer's call, not Weststar's. Two significant events occurred. Weststar was present when Jackson's lawyer laughed at Boutelle in response to Boutelle's suggestion that the matter might be settled by paying the money back. Then Weststar received a letter that can reasonably be read, if not only be read, to say that Jackson had no intent to pay all the money back—at least not without further pressure to do so—extortive conduct under the circumstances where the lawyer, acting as Jackson's agent, knew or must be held to have known this position lacked any legal basis. A reasonable person would believe Jackson acted wrongfully and unlawfully. Weststar told Boutelle it wanted to proceed. Significantly, Weststar's belief that Jackson acted wrongfully was not a legal or a factual issue in this case.

{67} Even looking at the facts in a light most favorable to Jackson, there can be no question that (1) Weststar provided information to Boutelle that Weststar reasonably believed to be true, and (2) at the time Weststar told Boutelle that it wanted to proceed, Weststar reasonably believed it was not going to receive all the money, and neither Jackson nor Jackson's lawyer had given any reason whatsoever to Weststar or Boutelle to justify not returning the money, other than this was Jackson's "golden opportunity."

B. Officer Boutelle's Independent Investigation

{68} I respectfully disagree with the majority's conclusion that there was a "lack of independent investigation." Majority Opinion ¶¶ 23, 24. First of all, and once again, whether Boutelle's investigation was independent was never a legal or factual issue. It was not argued below or on appeal. It was not before the jury. Secondly, it cannot be disputed that Boutelle conducted an independent investigation. No evidence supports a conclusion it was insufficient or that it lacked independence. The investigation was sufficient and it was sufficiently independent as a matter of law.

{69} All of the evidence could come only from Weststar, Jackson (including his wife and his lawyer), and Norwest. Boutelle received information and statements from people at Weststar, and was also given documents and facts, that showed, unquestionably, that Jackson received, and then, without stating any justification to either Boutelle or Weststar for doing so, held, continued to hold, and did not return upon request, money that was not his. Boutelle, who was Jackson's witness, testified he "collected all the information [he] could gather." Boutelle had also spoken in separate conversations directly with Jackson and with Jackson's lawyer. Boutelle believed he had sufficient evidence to take the matter to the district attorney and to file a complaint. He never testified to any skepticism on his part about the accuracy of the evidence or about Jackson's culpability. That Boutelle did not have Norwest documents at the time the district attorney approved the complaint and proceeded is immaterial.

{70} *Zamora*, discussed by the majority, Majority Opinion ¶ 24, is a different case. The amount of investigation in *Zamora* is not a basis on which to say the investigation in the present case was insufficient or not independent. What is required under *Zamora* is a fair disclosure to law enforcement authorities. *Id.* at 634–35, 747 P.2d at 929–30 (precluding liability where citizen gives honest, even if mistaken, information about crime). That occurred here. " 'There can be no liability where the prosecuting officer relies upon his own investigation and upon information furnished by others than defendant or where defendant has himself fairly disclosed, and it is left to the officer's own discretion, judgment and responsibility as to whether there shall be a prosecution.' " *Id.* at 632, 747 P.2d at 927 (quoting *Hughes*, 44 N.M. at 540, 105 P.2d at 498).

C. Weststar Did Not Participate in the Proceedings

{71} I respectfully disagree with the majority's view that Weststar participated in the

criminal proceeding thereby supporting a finding that Weststar procured the prosecution of Jackson. Majority Opinion ¶ 26. Boutelle thought a crime had been committed. He is a law enforcement officer. He knew and told Weststar at least twice that the office of the police was not a collection agency. At the point Weststar said it wanted to proceed with the criminal case, no complaint had been filed. Weststar then did nothing more except what may have been required by law enforcement authorities. Any "participation" (¶ 26) could only have been cooperation by providing documents to Boutelle and testifying at the preliminary hearing.

{72} No evidence exists that Weststar filed a civil action knowing Jackson had been arrested or tracking what the officials were doing, or that Weststar was checking in with the authorities or encouraging or pressuring them in any way. The evidence in the case is to the contrary. Furthermore, the district attorney acted independently in approving Boutelle's complaint, and in moving the matter through two magistrate judge proceedings, one to obtain an arrest warrant, the other to bind Jackson over after a preliminary hearing. Weststar did nothing to pursue, to procure, or to cause an arrest or prosecution beyond acting upon Boutelle's option and telling him it wanted the authorities to proceed with the criminal case.

{73} That an officer gives a citizen the option to ask that the criminal proceeding go forward or not does not create a jury issue as to initiation or procurement simply because the citizen says "go forward." It is the responsibility of the law enforcement officer and district attorney to investigate or not and to prosecute or not. It is the responsibility of the officer or district attorney to explain, as Boutelle did, that the police and district attorney are not collection agencies, and that the authorities do not want to prosecute certain cases unless the citizen wants it done and will cooperate. But that is just the first step. Even if the citizen wants to proceed, it nevertheless remains the responsibility of the officer and district attorney to explain that even if the citizen wants to prosecute, the officer or district attorney can and will make independent decisions whether to go forward and how far to proceed. Boutelle and the district attorney each made separate independent decisions to proceed. Something more is required in this case for procurement than Weststar's selection of the option to proceed given by the officer. With this evidence alone, Jackson failed to meet his "heavy burden" of proof. *See Zamora*, 106 N.M. at 634, 747 P.2d at 929.

{74} Under circumstances such as this case presents, where it is a close question whether a person has committed a crime, surely we must rely on the authorities, not the citizen-victim, to carefully and properly interpret criminal laws and apply those laws to the facts. Where the authorities err, the courts must step in to correct the error. Where the citizen-victim errs by acting with malice and derailing the independence of the decision-making by authorities, the law of torts may properly be applied as a corrective measure.

D. The Majority's Cases

{75} The majority cites two out-of-state cases to support its conclusion that sufficient evidence existed to find initiation or procurement of Jackson's prosecution, namely, *Kurschus v. PaineWebber, Inc.*, 16 F.Supp.2d 386 (S.D.N.Y.1998), and *Conway v. Smerling*, 37 Mass.App.Ct. 1, 635 N.E.2d 268 (1994). Majority Opinion ¶ 25.

{76} *Kurschus* is a trial court decision denying summary judgment to a defendant on a malicious prosecution claim. 16 F.Supp.2d at 394. The trial court determined issues of fact existed as to whether the defendant played a role in the initiation of criminal proceedings. *Id.* at 392–93. That initiation consisted at a minimum of the defendant's wife having filed a complaint with the police and having specifically requested that the police arrest the plaintiff. *Id.* at 392.

{77} *Conway* is another malicious prosecution case. An employer mentioned to a police officer a concern that a departed employee had wrongfully "diverted inventory and sold it for her own account." 635 N.E.2d at 270. An investigation ensued, and a detective who did not comprehend the underlying

transactional circumstances decided, "because of continuing inquiry by the [employer] about the progress of the investigation," to "apply to a clerk-magistrate for a criminal complaint . . . and 'let the clerk decide it.'" *Id.* at 271. The court stated: "Although the evidence suggests that the [employer] did no more than inquire about the progress of an investigation, taking that evidence most favorably to the plaintiff, it could be said that they were the instrument of the complaint." *Id.*

{78} *Conway* required, for malicious prosecution, that "the citizen presses the police to apply for a complaint." *Id.* Yet *Conway* stated, "[i]f a citizen registers with the police an apprehension that a crime has been committed and leaves the matter to the judgment and responsibility of the public officers, that citizen, though having started the chain of events that led to legal process, cannot be charged with malicious prosecution." *Id.* The jury's verdict in *Conway* was for the plaintiff. *Id.* at 270. The trial court granted the defendant's judgment notwithstanding the verdict, and the court of appeals affirmed on the ground of lack of evidence of malice: No evidence was adduced that the defendants, in mentioning the matter to the police and continuing to inquire about the progress of the investigation, "had a purpose other than bringing suspected thieves to justice." *Id.* at 270, 272.

{79} *Conway's* ultimate result was correct. Insufficient evidence existed for a jury determination on the issue of the improper motive or malice. I do not agree, however, with the *Conway* determination that whether the employer was "the instrument of the complaint" was for the jury in that case. Further, I do not agree that *Conway* paves the way for our Court, in the present case, to hold Weststar liable for providing information to the police and accepting Boutelle's offer of the option to withhold a stated desire that the case proceed pending attempts to obtain the return of money wrongfully held.

{80} The case before us is different from these out-of-state cases. A citizen does not initiate or procure a criminal prosecution where, as here, the citizen goes to the police with a complaint and sets out the circumstances of a person receiving mis-directed money and refusing to return it. The officer personally corroborates the circumstances. The officer explains the procedures and requirements and asks the citizen if the citizen is "willing to cooperate with everything we ask you to do and continue fully with the prosecution." In the conversation, the citizen says "[w]e are hoping to resolve this before anything has to go further." "We are hoping to get cooperation, and can get this resolved where we can just close the whole matter out and go on from there." It appears to the officer a crime may have been committed, but the officer tells the citizen he must first check it out with the district attorney. The officer says to the citizen: You (citizen) need to know law enforcement authorities are not debt collectors. You (citizen) say you are interested in getting your money back, and if you get it back, you are not interested in whether or not I continue. You (citizen) tell me that you will let me know. I (officer) won't proceed until you tell me that you (citizen) want to proceed. After reasonably believing that it was not going to get the money back, based on circumstances indicating no intent on the part of the person holding the money to return it, the citizen tells the officer it wants the officer to proceed. Thereafter, except perhaps to deliver further documentation or statements regarding the circumstances, the citizen does nothing, and has no involvement with the officer or the district attorney until required to testify at a preliminary hearing. The ultimate, final decisions whether to file a complaint, arrest, and prosecute are made by the police officer and the district attorney.

{81} *Kurschus* and *Conway* fall short when placed in the same ballpark with our own cases, *Hughes,* 44 N.M. at 541, 105 P.2d at 498–99, and *Johnson v. Weast,* 1997–NMCA–066, ¶ 20, 123 N.M. 470, 943 P.2d 117. *Hughes* and *Johnson* support reversal and should be followed.

{82} In *Johnson,* the Court analyzed whether the actions of the defendant, a drug inspector for the New Mexico Board of Pharmacy, constituted the initiation of criminal proceedings against the plaintiff. At the request of an assistant district attorney, the

defendant submitted an investigative report regarding the plaintiff. The report was used as the basis for grand jury proceedings. *Id.* ¶ 17. The fact the report stated "Complaint against Bill Johnson" as part of the printed Pharmacy Board form was determined by this Court not to rise to the level of a criminal complaint under the rules of criminal procedure. *Id.* One significant aspect of *Johnson* is this Court's determination that the defendant's report was "simply gathering information which may lead to probable cause, a determination to be made by someone else, such as the police, the prosecutor, or the grand jury." *Id.* ¶ 13. Yet, in *Johnson,* the defendant gathered information regarding the plaintiff's issuing forged prescriptions, "took this information to [the] Assistant District Attorney," proceeded then at the assistant district attorney's request to conduct further investigation and to provide a written report, and wrote in the report that the plaintiff was "a target of an investigation" and concluded in the report that "the case remain 'open pending further investigation.'" *Id.* ¶¶ 2, 3. The assistant district attorney used the report to obtain an indictment against the plaintiff and to arrest him, and the defendant then testified against the plaintiff at the criminal trial. *Id.* The charges against the plaintiff were later dismissed when evidence was suppressed. *Id.* ¶ 4.

{83} The defendant in *Johnson* appears to have gone beyond anything Weststar did in the case before us. Yet no evidence existed that "the [assistant district attorney] was influenced or pressured by [the][d]efendant ... into bringing an indictment." *Id.* ¶ 20. The defendant's initiation of the process, by taking information to the assistant district attorney, and continuation of the investigation at the assistant district attorney's request, "[did] not initiate proceedings so as to give rise to a malicious prosecution claim, [where] the decision to proceed [was] left to the discretion of ... the prosecutor and the absence of falsity allows the prosecutor to exercise independent judgment." *Id.* I respectfully submit we should take our cue from *Johnson,* not from *Kurschus* and *Conway.*

{84} In *Hughes,* a malicious prosecution action, the defendant, a victim of theft, gave information to the officers regarding the plaintiff and signed a criminal complaint against the plaintiff at the request of law enforcement officers. The New Mexico Supreme Court held the defendant did not initiate the criminal proceeding, because "'[t]he exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings.'" *Id.* at 538, 105 P.2d at 497 (quoting Restatement of the Law of Torts, § 653(g)). It was of no concern to the Court that a defendant "sign[ed] the complaint which puts in motion the prosecution." *Id.* at 539, 541, 105 P.2d at 497, 499.

{85} The court in *Hughes* looked at all inferences to be reasonably drawn from the facts in support of the plaintiff's claim, and then proceeded to reverse the verdict for the plaintiff, holding the trial court erred in overruling the defendant's motion for a directed verdict. *Id.* at 537, 542, 105 P.2d at 496, 499. *Hughes* is important not only for its holding but for its statements of policy and law.

> If we are to have prosecutions of law violations only at the very great hazard of unreasonably subjecting the complaining witness to the expensive ordeal and uncertain results of suits for damages if convictions not be obtained, we then approve a rule which thwarts justice upon the very threshold of its entrance. Few men would take the chance and invite such a suit, even though they would otherwise be boldened to advocate and uphold law and order. Their attitude could very properly be, 'let the other fellow do it.' The policy of the law is not, as it should not be, unreasonably to deter those who know of breaches of the law from complaining against the offenders.
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> ....
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> "This kind of suit, by which the complainant in a criminal prosecution is made liable to an action for damages, at the suit of the person complained of, is not to be favored; it has a tendency to deter men who know of breaches of the law, from prosecuting offenders, thereby

endangering the order and peace of the community."

The policy of the law in this respect has not changed through the centuries. We have like expressions and find like support for such a policy in the cases down through the years and to the very present time.

Id. at 540–41, 105 P.2d at 498 (quoting *Cloon v. Gerry*, 79 Mass. 201 (1859)). I respectfully submit we should follow *Hughes*, not *Kurschus* and *Conway*.

E. Non-Issues

{86} Weststar raises, and the majority therefore discusses, what in my mind are non-issues. The arguments stem from *DeVaney*. One is probable cause. The second is the manner in which the criminal proceedings were terminated. The third relates to an aspect of misuse of process. These issues have no applicability or bearing on this case or its outcome.

1. Probable Cause (Majority Opinion ¶¶ 27–35)

{87} Weststar argues probable cause because *DeVaney* discusses it. The trial court instructed on it, although it should be noted that the trial court did not state what probable cause was required. Weststar argues, and the majority reiterates, a requirement of probable cause to believe Jackson was guilty of a criminal offense. Majority Opinion ¶¶ 27, 30, 32. Probable cause to believe Jackson was guilty of a criminal offense is a false issue in this case, and needs little, if any discussion.

{88} *DeVaney* is an important guideline for our new tort of malicious abuse of process, but certain statements in *DeVaney* should be limited to *DeVaney* circumstances, and the "probable cause" issue and discussion in *DeVaney* is one of those. *DeVaney* involved an underlying civil action, not a citizen-victim seeking access to law enforcement authorities. Citizens who go to the police to report facts are not required to develop a belief that amounts to probable cause that a crime has been committed. They need only fairly report (disclose) the facts. *Hughes*, 44 N.M. at 541, 105 P.2d at 499; *Zamora*, 106 N.M. at 632, 747 P.2d at 927. It is up to law enforcement officers and district attorneys to proceed if they determine a crime has been committed.

{89} Furthermore, even under *DeVaney's* analysis, a procedural impropriety, as opposed to lack of probable cause, may be shown as a means of demonstrating *DeVaney's* second, or misuse of process, element. 1998–NMSC–001, ¶¶ 21, 22, 28, 124 N.M. 512, 953 P.2d 277. In the present case, if one of the two means were required to be selected to prove the misuse of process element, only the procedural impropriety means is applicable.

{90} Weststar's decision to tell Boutelle that it wished to proceed was not based solely on the letter from Jackson's lawyer, but on the entire set of circumstances. *See* Majority Opinion ¶ 32. Weststar's belief that Jackson was holding on to money that he had no right to hold on to and that it appeared he did not intend to return the full amount was objectively reasonable as a matter of law. That is the issue. It is not whether Weststar had probable cause to believe a crime had been committed. The jury had no business considering (if it did) whether a reasonable person would or would not have believed that Jackson was guilty of a criminal offense.

{91} Under this probable cause non-issue, the majority raises and discusses another non-issue, misleading information. Misleading and incomplete information have never been an issue below. They were not argued. The jury was not given the issue, and it had no basis on which to get into that question. Boutelle did not testify that any information or statement he received was misleading. No evidence exists of any concern on his part or on the part of the district attorney about the accuracy or reliability of any information or statement. No evidence exists that any purported incorrect information was in any respect material to the decisions of Boutelle, the district attorney, or the magistrates. Even were this an issue, I respectfully disagree with the majority that Weststar gave Boutelle misleading information, much less material, misleading information on which Boutelle or the district attorney relied. Majority Opinion ¶¶ 33–35. I further respectfully disagree with the majority's conclusion

that a jury could find the beliefs of the district attorney and the magistrates were based on incomplete knowledge of material facts known to Weststar. Majority Opinion ¶ 33.

{92} The majority discusses controverted evidence concerning the location of the money in Jackson's hands and whether he intentionally placed it out of Weststar's reach. Majority Opinion ¶¶ 23, 34, 37–38. The issue in this case is not whether Jackson had the money in one account or another. The issue is not whether Jackson acted with intent to commit a crime or committed a crime. The only valid issue relating to probable cause is whether Weststar reasonably believed the facts it presented to Boutelle were true. Whether Weststar had such reasonable belief was not questioned or at issue. In addition, whether the beliefs of the district attorney or the magistrates were based on incomplete knowledge or on false statements was not an issue. It was not argued. It was not before the jury for consideration.

{93} Citing *DeVaney,* 1998–NMSC–001, ¶ 41, 124 N.M. 512, 953 P.2d 277, the majority holds the question of probable cause is properly for the jury where the facts are in dispute. Majority Opinion ¶ 29. *DeVaney* states "[t]he existence of probable cause is a matter of law and shall be decided by the trial judge." 1998–NMSC–001, ¶ 41, 124 N.M. 512, 953 P.2d 277. *DeVaney* also says where unresolved disputed facts material to the issue of probable cause exist, the court is precluded from resolving the issue as a matter of law. *Id. DeVaney* relies on *Leyser v. Field,* 5 N.M. 356, 362–63, 23 P. 173, 174 (1890), and the Restatement (Second) of Torts § 681B(1)(c). *Leyser* quoted 'the celebrated case of *Sutton v. Johnson*' in which the rule was thus laid down:

> "The question of probable cause is a question of law and fact. Whether the circumstances alleged to show probable cause are true, and exist, is a matter of fact; but supposing them to be, whether they amount to probable cause, is a question of law."

Id. at 362, 23 P. at 174. "This doctrine is generally adopted." *Id.* "We know that what facts or circumstances amount to probable cause is a question of law for the court." *Hughes,* 44 N.M. at 542, 105 P.2d at 499.

{94} I will leave unaddressed for now the apparent lack of clarity on the question of whether the court or the jury decides whether probable cause exists. The decisive point is that, even were Weststar's reasonable belief at issue in this case, no evidence exists to place Weststar's objectively reasonable belief as to the circumstances in dispute. On that question, Weststar passes muster as a matter of law.

2. Jackson's Guilt and Termination of Criminal Proceedings (Majority Opinion ¶¶ 36–38)

{95} Weststar raises issues of Jackson's guilt and termination of the proceedings. These issues require very little discussion. The manner in which the criminal proceedings were terminated is useful, if at all, only to complete a picture. The criminal prosecution was dismissed. While the dismissal was not based on acquittal, it was nevertheless a good outcome for Jackson. That favorable outcome, however, "is not an element of an action for malicious abuse of process." *DeVaney,* 1998–NMSC–001, ¶ 23, 124 N.M. 512, 953 P.2d 277. The evidence has no bearing one way or the other on the outcome of this case. Further, whether Jackson was guilty or not is irrelevant. That a jury could conclude Jackson was innocent of the crime of larceny is irrelevant. Whether the deprivation of the money was intended to be permanent or not is irrelevant. Even were it relevant, the belief that Jackson intended a partial or indefinite deprivation came from the entirety of the circumstances, not just from the movement of the funds from a certificate of deposit.

{96} Furthermore, the parties' disagreement over whether the conduct was at most a civil conversion or constituted criminal theft of mis-delivered property is of no consequence. The important point is that Jackson took advantage of mistakenly credited funds by forming an intent to keep a portion of the money with no justification or even arguable justification for doing so. Public policy does not fault Jackson for his initial query about what he should do with the funds. Public

licy commands that, upon reflection, he estore the funds to the owner, without first causing the owner to have to resort to civil action or to report the circumstances to law enforcement authorities. The dishonesty arose when Jackson decided he could get away with keeping a part of the money even though it belonged to someone else.

3. Misuse of Process (Majority Opinion ¶¶ 39–41)

{97} It appears that this "misuse of process" point is meant to support the *DeVaney* element of "an act by the defendant in the use of process other than such as would be proper in the regular prosecution of the claim." Majority Opinion ¶ 17. The trial court specifically instructed on this element. While the element might fit the circumstances in *DeVaney*, it does not fit, nor is it essential to, this case. This misuse of process point in the majority opinion is little different than the next point in the opinion regarding primary motive. Majority Opinion ¶¶ 42–43. For affirmance, both points rely on proof of the threat of use, and use, of the criminal prosecution to compel Jackson to return the money he held. The majority's opinion does not distinguish between the second and third *DeVaney* elements. *See Conway*, 635 N.E.2d at 271 (stating that malicious prosecution and abuse of process, although distinct torts, have "the common ingredient of an improper purpose").

F. The Conduct of Jackson, His Lawyer, and the Authorities

{98} I understand that our main focus is to be on the side of this story pertaining to Weststar's actions. We cannot, however, fail to take the conduct of others into consideration. We should not exclude Jackson's and his lawyer's conduct and the officer's and district attorney's actions in our analysis. Jackson's and his lawyer's conduct and the authorities' actions strengthen my view that Weststar cannot be saddled with initiation or procurement of the prosecution.

{99} By use of the very broad rule that one cannot use the criminal process to collect a debt, Jackson was able to obtain a verdict of $50,000 compensatory and $150,000 punitive damages. Looking at the actions of those involved, one wonders how could this occur. Jackson was clearly a wrongdoer with an improper motive. He never expressed, and has never shown, the slightest colorable or arguable basis on which to keep Weststar's money. Jackson's wife, a bank employee, testified the money was to be returned when the certificate of deposit matured, and that she "never felt like the money was ours. I felt like it should be returned." There was no question in Mrs. Jackson's mind that all of the money needed to be returned. Jackson's lawyer was Jackson's agent, if not his accomplice, perhaps pushing Jackson into, and unquestionably supporting Jackson's wrongful conduct. The two of them set this mess in motion.

{100} The law enforcement official, if anyone at all, mishandled the procedure during the investigation stage. Right or wrong, it is the law enforcement officer or district attorney that chooses to await a citizen's attempt to obtain return of wrongfully held money or property before launching a police investigation. It is the law enforcement officer or district attorney who then decides to investigate or not. Following an investigation, it is the responsibility of the law enforcement officer and district attorney and whatever magistrates are required to be involved to determine whether probable cause exists to arrest and prosecute. If this is not so, our society is in trouble.

{101} Weststar, caught up in this tangled web of bad judgment, was turned into a wrongdoer rather than a victim. Those who initiated and created the circumstances for harm managed to turn this case on its head.

{102} The following circumstances simply cannot be disputed: Jackson made a decision not to return all the money, but rather to negotiate return of only a portion of it. We do not know whether he may have returned it all if "push came to shove" at some point. However, his unmistakable intent at the time of Boutelle's and the district attorney's institution of the criminal proceeding, as well as at the time of Weststar's institution of a civil proceeding, was to continue to hold the money. Jackson was holding the money, not

returning it, and giving all indications that this was, indeed, his "lucky day." He thought he could get away with negotiating and give up only a portion of the money. Jackson claimed no right, neither colorable nor arguable, to justify keeping any of the money. These were the circumstances confronting Weststar and law enforcement authorities. It is noteworthy, too, that Jackson eventually paid the money back after the criminal action was dismissed. That action was dismissed because the prosecution did not obtain Norwest documents before the deadline to take the case to trial.

II. Misuse of Process/Primary Motive

{103} The majority "conclude[s] the evidence was sufficient to support a finding that Weststar used the criminal prosecution ... to compel Jackson to return the money." Majority Opinion ¶ 41. This conclusion is based on Boutelle's conversation with Jackson's lawyer while a Weststar employee was present. *Id.* I respectfully disagree with the majority that "[g]iven the facts of this case, a reasonable jury could conclude that Boutelle was acting on behalf of Weststar and therefore Weststar should be charged with Boutelle's action," and that "Weststar [is] to be charged with all conduct it initiated or procured." *Id.* Based on Boutelle's telephone conversation with Jackson's lawyer while a Weststar employee was present, the majority makes Weststar the responsible and controlling party not only for choosing the option given it by Boutelle to give the "go ahead," but for Boutelle's statements to Jackson's lawyer, for the criminal complaint, and for the district attorney's decision to prosecute. No evidence exists in the record that Weststar asked Boutelle to call Jackson's lawyer on Weststar's behalf or that Boutelle and Weststar's employee had any conversation regarding what he was to say to Jackson's lawyer. A citizen-victim who is merely sitting in a police officer's office cannot be held derivatively responsible for the officer's actions and statements.

{104} The majority also "conclude[s] that substantial evidence supports the jury's finding that Weststar acted with an improper motive." Majority Opinion ¶ 43. Scrutinized by the watchwords discussed at the beginning of this dissent (¶¶ 59–60), I do not think Jackson met his burden. The majority's conclusion is based on Weststar's saying it wanted its money back and would prefer to avoid a criminal trial, and because Weststar "would and could have dropped the criminal charges had Jackson repaid the money." Majority Opinion ¶ 43. But Weststar brought no "criminal charges." Boutelle and the district attorney brought the charges. No evidence exists Weststar would have been able to "drop" any charges. Before it was clear to Weststar it would not be receiving its money, Weststar would have preferred to avoid a criminal trial. That Weststar later indicated it no longer wanted to avoid a criminal trial does not, as a matter of law, tip the scale to provide substantial evidence of a primary improper motive.

{105} Unable to obtain the return of the money through lawful requests, Weststar indicated its willingness to have the criminal matter go forward. Soon afterward, Weststar filed its own civil lawsuit, reflecting a motivation to collect through a civil lawsuit, leaving the pursuit of criminal charges and prosecution to the independent discretion, responsibility, and control of the law enforcement authorities, and leaving the vicissitudes and unpredictable outcome of the criminal process to those responsible for the prosecution. At no time did Weststar use the facts that Boutelle filed a complaint or that the district attorney succeeded through a preliminary hearing to bind Jackson over for felony prosecution to threaten Jackson or extract the return of the monies.

III. What Precedent to Set

{106} In criminal prosecution cases, more than occurred here can be shown to send the issue of malicious abuse of process to the jury. I might look at this case differently if Boutelle or the district attorney had testified about some undue influence or pressure or that they were materially misled in some manner, or if there had been independent evidence of such conduct. I might read the circumstances differently if there had been a statement made by Weststar to Jackson that could be construed as a threat it would use

the criminal process to get its money back. Here, no such statement was ever made. Boutelle could not say Weststar wanted the criminal case to proceed for the purpose of leverage to help get the money back.

{107} The majority opinion paves the way toward making it a jury issue whenever a victim of wrongful, unlawful action goes to the police, files a civil action, and cooperates with the authorities in an ensuing criminal prosecution. It appears no mention can be made between citizen and authorities regarding what may occur if the alleged perpetrator were to return the money or property being wrongfully held, except at the risk of going to trial for malicious abuse of process.

{108} The important precedent to set is that citizens can feel free to go to the police with facts that show wrongful, possibly criminal conduct. *See Zamora*, 106 N.M. at 634, 747 P.2d at 929 ("A citizen, without fear of liability, may report information to the authorities upon mere suspicion."). The police and district attorney should decide whether and to what extent to investigate. That investigation might include talking with the alleged wrongdoer. In that conversation the authorities should make no threat. However, in the real world, that conversation with the wrongdoer could well turn to the question of giving back what the alleged wrongdoer has received or taken, and might also cause the officer to discuss with the reporting citizen-victim whether the citizen wants to continue to pursue the matter if the property or money is returned. The officer might discuss with both sides the extent of the investigation and how the results may relate to a criminal statute. In the real world, law enforcement, wrongdoer, and victim understand this give-and-take may occur. Reporting citizens might broach the question of getting the money or property returned as part of the citizen's initial conversation with the officer. The police may raise it first. The police should discuss the fact they are not collection agents. The authorities can, and do, distinguish between contractual obligations and criminal dishonesty, refusing to act in the former when contract debt is apparent, and investigating when criminal dishonesty is apparent. In those cases presenting reasonably arguable criminal conduct, the police may want to screen the matter by asking whether, if the citizen receives back what was taken, the citizen has an interest in a continued investigation, arrest, and prosecution. Unless abused by irresponsible or corrupt authority, this process can be good business for all parties, including the State, with no harm to the health, safety, or welfare of society, and justice still done.

{109} Boutelle, Jackson's own witness, testified about his separate conversations with Jackson and with Jackson's lawyer. In this trial examination, Jackson's trial counsel sought to show a process that implicated Weststar as the initiator and procurer of the criminal prosecution. Boutelle's testimony is significant on several fronts. I therefore set it out, lengthy as it is, in an appendix to this dissent. In summary, Boutelle describes his "common practice" and his "job" to try without threat and coercion to resolve this type of criminal circumstance before arrest and prosecution. He also describes his practice in such cases of talking to the victim about whether the victim wants to continue with the matter if the money in question were returned. Boutelle makes it clear that he and the district attorney can override, and have several times overridden, a victim's decision not to cooperate and continue with a prosecution if they feel it is in the best interest of the State. Yet, the authorities are busy and their docket is full. When the victim changes his or her mind about proceeding, Boutelle explains this to the district attorney. The district attorney often decides not "to mess with it if they don't want it." Boutelle testified he gave Weststar "the right to protest and say, 'well, let's not go any further,'" while at the same time making sure to clear up any misconception that the prosecution was for the purpose of getting the money back. Boutelle testified he could not take into consideration any payment back; it was irrelevant. "If Mr. Jackson had paid the money back, that would not change my pursuit of the criminal case." Boutelle further testified, "All indications were that [Weststar] intended to go through with this."

{110} Boutelle's testimony in the appendix is important because it shows his manner of

approaching a citizen-victim's concern about the conduct of a wrongdoer. It shows his rationale behind the approach. It indicates the thinking of a citizen-victim.

{111} The police and district attorneys are often overloaded with reports and investigations. From their point of view, there exist certain cases in which the best result is one in which an investigation might be shortened and a prosecution deemed unnecessary without harm to the system of justice, where a victim is happy with the return of the property or money.

{112} As for the citizen-victim, it is in our human nature to want to see criminal wrongdoers prosecuted. At the same time, it is in our human nature to forgive when the offender sincerely atones. And when an offender sincerely atones, it is often in our human nature not to want to see the offender prosecuted. It is not outside the nature of ordinary citizens to think in the following terms: If the offender apologizes and returns the goods, I'd just as soon not have him prosecuted; and if the offender fights, then I'd just as soon see him prosecuted. These entirely natural human reactions and emotions should not subject the citizen to substantial tort liability. Something more is required before allowing a jury to infer a malicious and improper use of process and a malicious and improper motive.

{113} The system turns bad when threats of criminal prosecution are made by citizens or authorities as leverage for action, or when evidence is presented showing the authorities are acting based on improper influence or motive. The system is misused when the citizen really does act with malice and ulterior motive and without reasonable basis, intentionally misleads the authorities, or exerts undue pressure or improper influence on a police officer or district attorney to the extent the law enforcement authority no longer exercises independent discretion and judgment as to whether to prosecute someone.

{114} In the case here, the evidence fails as a matter of law to reach the level of initiation or procurement by Weststar of the criminal prosecution of Jackson. The evidence also fails as a matter of law to constitute sufficient evidence for jury consideration of primary improper motive. I would reverse the jury verdict and judgment.

Concurrence in Part

{115} I concur in the majority's holding that NMSA 1978, § 56-8-4(A) (1993) requires a trial court to apply post-judgment interest to an award of punitive damages.

APPENDIX

Boutelle's Call With Jackson

A. ... I left a message ... for [Jackson] ... and he had returned the call. This was long before I came to completion of this case. And he acknowledged to me that, yes, he had received the money and he was told by [Jackson's lawyer] it was his. And man to man I spoke to Mr. Jackson and said, 'He is leading you wrong. He is telling you wrong, and I hate to see you get in trouble for something because this attorney is leading you down the road.'

> I said, 'There is a good possibility that, you know, you could be charged criminally with this because they have filed a complaint against you.'
>
> I said, 'I will have to do my job. You know, is there anything we can do to resolve it?' I try to make that common practice. When I have a suspect accused of a similar nature-type crime, I call them and interview them and say is there something we can do to resolve this before you have to get arrested and go to jail.

Q. Is there something Mr. Jackson could have done to not get arrested and not go to jail?

A. I don't threaten. I don't coerce. I don't try to intimidate. All I do is give an offer of a way out of this mess and say, 'Listen, I don't like putting people in jail. I don't like arresting people. I have to do my job,' and I offered the same to him. I said, 'Is there any way that we can resolve this so that I can get back with the complainant and find out if we can close this matter out?'

Q. What could Mr. Jackson have done to close this matter out?

A. My suggestion to him was if he felt it reasonable to take and return the monies back to Weststar, and then file a complaint through the civil courts if he really felt the money was justified. There are legal ways of doing that. I offered the same to [Jackson's lawyer], but I got laughed at by [the lawyer].

Q. And the deal was pay the money back and there would be no criminal prosecution?

A. It was an option. It was an offered option.

Q. And that was based upon your understanding of what the alleged victim wanted to do?

A. I believe I could talk [to] the victim—not in that term, not talk the victim out of it, but I would consult with the victim, and say, 'Listen, you know, I understand Mr. Jackson paid the money back. From our initial contact, are you sure your attorneys and your supervisors want to continue with this? Let me know and we can go from there. I can close this out. It doesn't hurt my feelings any, you know.'

Boutelle's Call With Jackson's Lawyer

Q. The third sentence [of the report] you [Boutelle] write that you advised [Jackson's lawyer] you would be working a criminal intent investigation against [Jackson] if they refused to work with the victim. Did you write that?

A. Yes, I did.

Q. And that's what you told [Jackson's lawyer], right?

A. Yes.

Q. And Ms. Lynch was present when you told him that?

A. Right.

Q. And that's the way the whole thing played out, right?

A. Well, yes. It is my job. She came with a complaint to investigate it. She asked for my assistance to investigate. I advised [Jacksons' lawyer] that, you know—he was getting ugly with me on the phone. So I said, '... come on let's be reasonable. Don't be stupid here. I think you are advising your client wrong.'

I said, 'You know, from what I see here initially there is already enough for me to pursue this further.'

I said, 'You know, I'm going to have to do this unless I'm called off of it because it has been resolved before I get to that point.'

Q. Why would you be called off?

A. Well, when I get completed with an investigation, there's an unwritten rule that we take everything to the district attorney['s] office for their review and approval, make sure that I've done all of my work properly and they are agreeable to go ahead and continue prosecution, because the district attorney is ultimately responsible for the criminal trial.

Once I review it with them, I get either the okay or the no, we won't take it, answer from them. Should I even get to that point, and the victims come through and say, 'Well, we've changed our mind. We don't want to continue with this any further.' I go back to the district attorney and say, 'Listen, this is what we have. The victim really does not want to pursue it any further.' The majority of the time the district attorney says, 'Fine, we're busy. Our docket is too [full]. We don't want to mess with it if they don't want it.' Because we're there for the victims, and to make the crime right, okay.

We can override that and use the victim as a hostile witness if we need to, if we feel it is in the best interest of the state. We have done that several times, but the majority of the time we say, 'Okay, listen it is not my time ticking. If you don't want it done, I'm not going to waste my time, and the state's time and all of the money and expense of going to trial. You know, fine. We've got the problem corrected, and we'll dismiss it.'

Q. And what was—in your initial meeting with Ms. Lynch, what was your understanding of the intent of Weststar as it

relates to criminal prosecution, whether to proceed or not?

A. All indications were that they intended to go through with this.

Q. Was there any event that could have happened that would have, in your mind, in your impression of Ms. Lynch, that would have led them not to go through with this?

A. I explained to her the same thing I explained to you, that at any time should there be any question about this, you know, that they would have the right to protest and say, 'Well, let's not go any further.' At the same time I explained that we are not a collection agency. Most people have that misconception. They come in and say, 'I want you to prosecute this guy because I want my money back. I want my property back.'

I say, 'I'm sorry. We can't do that.' Hopefully, the Court, if a criminal prosecution is successful the courts can order that the defendant pay restitution, but that is not part of my job to see that happen.

. . . .

Q. Did you have any sense from Ms. Lynch as to whether the payment or nonpayment of Mr. Jackson of the debt that was claimed would have any effect on Weststar's decision to prosecute?

A. Well, there is always that possibility. This is what I explained to her, that I could not take into consideration any of the payment back to the company, as far as my actions. That was irrelevant. If Mr. Jackson had paid the money back, that would not change my pursuit of the criminal case. Only the representative's decision not to continue with criminal prosecution for whatever their reasons were, and just say, 'Okay we've had enough. We don't want to go no further. Please drop it.' I would say, 'Fine.'

2002-NMCA-013

39 P.3d 739

Yvette LUCERO, individually and as parent and next best friend of Luke Lucero and Isaac Lucero, minors, and Michael J. Lucero, Plaintiffs–Appellants,

v.

RICHARDSON & RICHARDSON, INC.; Wright & Hammer Architects; Albuquerque Public Schools; and John Does 1–15, Defendants–Appellees.

No. 21,816.

Court of Appeals of New Mexico.

Dec. 13, 2001.

Certiorari Denied, No. 27,288, Jan. 29, 2002.

Linda J. Rios, Kathleen D. Carter, Carter Law Firm, P.C., Albuquerque, NM, for Appellants.

Michael L. Carrico, Max J. Madrid, Elizabeth A. García, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, NM, for Appellees.

OPINION

PICKARD, Judge.

{1} Plaintiffs appeal from the district court's grant of summary judgment in favor of the Defendant Albuquerque Public Schools. Plaintiff Yvette Lucero was injured when she tripped and fell on the grounds of the Apache Elementary School, where she had been watching her son's Little League game. Lucero, her husband, and their two children filed suit for damages, claiming Defendant had waived its immunity from liability under the Tort Claims Act, NMSA 1978, §§ 41–4–1 to 27 (1976 as amended through 2001). Defendant filed a motion for summary judgment, asserting that it was immune from liability under the Recreational Use Statute, NMSA 1978, § 17–4–7 (1967), which limits the liability of landowners who allow the public to use their land free of charge for recreational purposes. The trial court granted summary judgment. We hold that the Recreational Use Statute (RUS) does not provide immunity for organized team sports such as Little League baseball. Accordingly, we reverse.

FACTS AND PROCEEDINGS

{2} Ms. Lucero tripped and fell while walking from her truck to the spectator area of the school ballfield. Plaintiffs filed suit against Defendant to recover damages for Ms. Lucero's injuries. They allege that the school was negligent because it allowed construction workers to leave the school grounds in a dangerous condition and that Defendant can be held liable under Section 41–4–6, which waives sovereign immunity for the operation and maintenance of public buildings and their grounds. Defendant moved for summary judgment, contending that the RUS controls the outcome of this case. The RUS limits the liability of

> *[a]ny owner,* lessee or person in control of lands who, without charge or other consideration, other than a consideration paid to said landowner by the state, the federal government or any other governmental agency, grants permission to any person or group to use his lands for the purpose of hunting, fishing, trapping, camping, hiking, sightseeing *or any other recreational use* . . . .

Section 17–4–7(A) (emphasis added). Defendant argued that this statute protects APS from liability in this case because APS allows Zia Little League to use the field at Apache Elementary School free of charge. In response, Plaintiffs argued that the statute, though written with no limitation, applies only to privately held land. Plaintiffs also argued that the Little League baseball is not the type of activity that triggers the statutory protection and that the statute is inapplicable in this case because the school was charging a fee for the use of its land. Finally, they argued that the application of the statute to public lands would violate equal protection because it would create differential treatment for similarly situated tort vic-

tims. The trial court, rejecting all Plaintiffs' arguments, granted summary judgment for Defendant. Plaintiffs raise all but the equal protection argument on appeal.

DISCUSSION

{3} Because we hold that the protections of the RUS apply only when landowners allow free public access for a limited range of outdoor activities, and that organized team sports such as Little League baseball do not fall within that range of activities, we need not decide the more difficult question of whether the statute applies to public as well as private landowners. Nonetheless, we pause to address this issue because the parties have exposed a gap in our statutory scheme, one that could impact the extent of government tort liability in this state. We seek to clarify the issue as presented so that the legislature, if it sees fit, can fill in this gap rather than leaving it to the courts to make what may appear to be tortured efforts at statutory interpretation.

Background of the Recreational Use Statute

{4} The Recreational Use Statute, like many of the statutes passed by our legislature, was adapted from an external source. In 1965, the Council of State Governments published a model statute that proposed limits on the liability of landowners who allow the public to use their land at no charge. *See Public Recreation on Private Lands: Limitation on Liability,* 24 Suggested State Legislation 150 (1965) (hereinafter "MODEL STATUTE"). At that time, approximately one-third of the states had adopted legislation limiting landowner liability in this fashion. *Id.* Following its publication, several states adopted the proposed statute verbatim. *See Rivera v. Philadelphia Theological Seminary,* 510 Pa. 1, 507 A.2d 1, 8–9 n. 18 (1986) (listing states in addition to Pennsylvania that had adopted proposed statute without alteration). New Mexico passed a modified version in 1967. As of 1988, 48 states had statutes providing some form of limited liability for landowners who open their lands for public use. *See Redinger v. Clapper's Tree Serv., Inc.,* 419 Pa.Super. 487, 615 A.2d 743, 745 (1992).

{5} The commentary to the Model Statute makes it clear that the drafters were focusing on private land:

> Recent years have seen a growing awareness of the need for additional recreational areas to serve the general public. The acquisition and operation of outdoor recreational facilities by governmental units is on the increase. However, large acreages of private land could add to the outdoor recreation resources available.... [I]n those instances where private owners are willing to make their land available to members of the general public without charge, it is possible to argue that every reasonable encouragement should be given to them.
>
> ...
>
> The suggested act which follows is designed to encourage availability of private lands by limiting the liability of owners to situations in which they are compensated for the use of their property....

MODEL STATUTE at 150.

{6} The Model Statute itself, however, provides immunity for "owners of land" without any express limitation to private, as opposed to public, landowners. The Model Statute defines the term owner, somewhat inaccurately, as "the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises," again without express limitation to private landowners. New Mexico's statute similarly limits the liability of "[a]ny owner, lessee or person in control of lands" without reservation. Section 17–4–7(A).

{7} Defendant urges a plain meaning analysis of the statutory language, arguing that the phrase "any owner" includes government entities when they own land. Plaintiffs, on the other hand, urge us to look at the intent behind the statute and the context in which it was passed. Most notably, at the time the RUS was passed, governmental bodies enjoyed full immunity from suit under the common law doctrine of sovereign immunity. They bore no liability for injuries occurring on their land and therefore had no need for the protection offered under the statute. The legal landscape changed in 1975, however, when our Supreme Court abolished com-

mon law sovereign immunity, *see Hicks v. State,* 88 N.M. 588, 544 P.2d 1153 (1975), and again in 1976, when the legislature passed the Tort Claims Act, reinstating the government's immunity generally but waiving immunity in eight specific circumstances. *See* §§ 41–4–5–to–12. This case raises the question of how the RUS should be interpreted in light of modern circumstances, where government entities now face liability for injuries occurring on land that they own.

The RUS is Unclear as to Whether it Applies to State Lands

{8} To decide this issue, we would need to determine whether this is a case where we should apply a strict plain meaning analysis, or whether we should look beyond the words of the statute and consider the intent of the legislature that passed it. Interpretation of a statute is a question of law that is reviewed de novo. *State v. Rowell,* 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995). Our goal in interpreting a statute is to give effect to the intent of the legislature. *In re Extradition of Martinez,* 2001–NMSC–009, ¶ 14, 130 N.M. 144, 20 P.3d 126. Plain meaning is the primary indicator of legislative intent. *Mem'l Med. Ctr., Inc. v. Tatsch Constr., Inc.,* 2000–NMSC–030, ¶ 27, 129 N.M. 677, 12 P.3d 431. Our Supreme Court, however, has advised that

> courts must exercise caution in applying the plain meaning rule. Its beguiling simplicity may mask a host of reasons why a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate (i.e., nonfrivolous) differences of opinion concerning the statute's meaning. As a result, we must examine the context surrounding a particular statute, such as its history, its apparent object, and other statutes in pari materia, in order to determine whether the language used by the Legislature is indeed plain and unambiguous.

State v. Cleve, 1999–NMSC–017, ¶ 8, 127 N.M. 240, 980 P.2d 23 (internal quotation marks and citations omitted), *modified on other grounds by State v. Guilez,* 2000–NMSC–020, 129 N.M. 240, 4 P.3d 1231.

{9} In this case, there is a legitimate difference of opinion as to whether the phrase "any owner" should be construed to include government entities when the statute would not have applied to public lands at the time it was passed. The differences of opinion on this issue are dramatically illustrated by the split of authority among jurisdictions that have grappled with the same question. "In spite of its conciseness and apparent simplicity, [the RUS] has managed to weave a tortured tapestry of decisional law in a multitude of jurisdictions in which it has been enacted." *Redinger,* 615 A.2d at 746. Many jurisdictions, like New Mexico, adopted their recreational use statutes while their state governments still enjoyed sovereign immunity, and most states, like New Mexico, subsequently modified the law to allow suits against the government in at least limited circumstances. Thus, many other states similarly have RUS provisions that apply obliquely to "owners of land," without specific language indicating whether that includes government entities or only private landowners. These courts, for a variety of reasons, have come to opposite conclusions on the question of whether that phrase includes government entities. Those jurisdictions extending the RUS's protections to public lands note that nothing in the statutory language limits the application to private lands. *See, e.g., Kimsey v. City of Myrtle Beach,* 109 F.3d 194, 196 (4th Cir.1997). Jurisdictions limiting the statute's reach to private landowners have focused more on the intent of the legislature passing the statute. *See, e.g., Conway v. Wilton,* 238 Conn. 653, 680 A.2d 242, 253 (1996). In addition, some state legislatures have modified the language of the RUS to specify whether or not limited liability provisions in the RUS extend to the public sector. *Compare* 745 Ill. Comp. Stat. 65/2(b) (2000) (" 'Owner' includes the possessor of any interest in land, whether it be a tenant, lessee, occupant, *the State of Illinois and its political subdivisions,* or person in control of the premises.") (emphasis added), *with* Haw. Rev.Stat. § 520–2 (1993) (" 'Land' means land, roads, water, water courses, private ways and buildings, structures, and machinery or equipment when attached to realty,

other than lands owned by the government.") (emphasis added).

{10} We could adopt the reasoning of any of these courts to decide the question at hand. We could turn also to a number of canons of construction. For example, our courts have held that statutes, when expressed in general terms, will apply to changing conditions. *See Ashbaugh v. Williams,* 106 N.M. 598, 599, 747 P.2d 244, 245 (1987). Applying this principle, we could say that liability protections available to private landowners in 1965 would naturally extend to public landowners once they became subject to tort liability. On the other hand, there are a number of principles that would lead to the opposite conclusion. First, our courts have held that a statute is to be interpreted as the legislature understood it at the time of enactment. *State v. Morrison,* 1999 NMCA 041, ¶ 9, 127 N.M. 63, 976 P.2d 1015. Since the legislature that passed the RUS would not have understood the statute to impact the liability of public landowners, we could decline to extend the statute beyond its original meaning. In addition, the RUS is a statute in derogation of the common law, limiting the common law right of tort victims to seek compensation from tortfeasors. As such, we could adopt the narrower of the alternative constructions, resolving ambiguity against a legislative intent to deny citizens those rights.

{11} Also, absent express words to the contrary, neither the state nor its subdivisions are included within general words of a statute. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765, 780, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) (holding that the provisions of the False Claims Act allowing suit imposing liability on "any person" who presented false claims to the federal government did not allow suits against state governments); *Borgen v. Fort Pitt Museum Assocs.,* 83 Pa. Cmwlth. 207, 477 A.2d 36, 39 (1984) (applying state statute to public lands), *overruled by Pennsylvania Dep't of Envtl. Res. v. Auresto,* 511 Pa. 73, 511 A.2d 815, 816–17 (1986). Our courts cited this proposition the very year the legislature passed the RUS, providing some evidence that the legislature would not have understood the word "owner" to include government entities, even if they were subject to tort liability at the time. *See State ex rel. State Highway Comm'n v. City of Aztec,* 77 N.M. 524, 526, 424 P.2d 801, 803 (1967) (holding that constitutional provision requiring municipalities to pass an ordinance in order to incur debt applied to debt to the state as well as private entities but acknowledging the canon of construction that "a sovereign is presumptively not intended to be bound by its own statute unless included by the clearest implication"); *see also S. Union Gas Co. v. N.M. Pub. Serv. Comm'n,* 82 N.M. 405, 406, 482 P.2d 913, 915 (1971) ("When the legislature has wanted to include sovereigns or other governmental bodies in its statutes, it has known how to do so."), *overruled on other grounds by De Vargas Sav. & Loan Ass'n v. Campbell,* 87 N.M. 469, 471, 535 P.2d 1320, 1322 (1975). The provisions of the RUS apply to "[a]ny owner, lessee or *person* in control of lands who . . . grants permission . . . for use of *his* land. . . ." If we were to interpret the word owner to include the state, but the word person to exclude the state, then the statute would apply to government entities only when they owned land, but to private entities when they either owned or controlled lands. It seems unlikely the drafters intended such an awkward construction. In addition, the use of the word "his" supports a construction of the word owner in the same manner we would construe the word person.

{12} Though these tools of statutory interpretation provide some guidance, there is no overwhelming evidence as to whether or not the statute was meant to extend to publicly held land under these circumstances. Because we need not decide the question today, we take this opportunity only to make the legislature aware of the possible interpretations of the statute, so that if the legislature sees fit, it can amend the statute to demonstrate its true intent.

The Tort Claims Act's Preemption of the Application of the RUS to Public Lands

{13} Even if we were to read the word "owner" in the RUS to include government public entities, we would still need to deter-

mine the impact of the Tort Claims Act. Defendant argues that public entities may assert the defense available under the RUS even in situations where the Tort Claims Act waives sovereign immunity. To support its argument, Defendant points to Section 41–4–14, which authorizes government entities to assert any defense available under New Mexico law. Under such a construction, however, municipal governments across the state would be immune from liability for injuries occurring in any park open to the public free of charge, even though the Tort Claims Act expressly waives immunity for public parks. Tort victims would only have the right to sue public entities for injuries occurring in public parks when there is a fee for admission. It would be unusual for our legislature to have taken such an indirect and underhanded route to avoid liability when it had the more direct and obvious option of maintaining its immunity for public parks and building within the Tort Claims Act. "It is ... unlikely that the Legislature, had it desired to confer immunity ... would do so by such an imprecise, indefinite and indistinct vehicle as a statute limiting the liability of the 'owners of land.' " *Borgen,* 477 A.2d at 39.

{14} As a result, Plaintiffs' argument that the Tort Claims Act preempts the application of the RUS would seem to be more compelling. In passing the Tort Claims Act, "the Legislature's attention [was] more particularly directed to the relevant subject matter" of governmental liability for torts upon public land. *Cleve,* 1999–NMSC–017, ¶ 17, 127 N.M. 240, 980 P.2d 23. The Tort Claims Act is also the most recent expression of legislative intent as to the extent of governmental liability. *See Abbott v. Armijo,* 100 N.M. 190, 191, 668 P.2d 306, 307 (1983) ("[A] later statute, as the most recent expression of legislative intent, will control over an earlier statute to the extent of any inconsistency."). Under this construction of the two statutes, however, the RUS would only apply to public landowners when its protections are not needed-when the government is already protected from suit by sovereign immunity. This would have been equally true, however, before the abrogation of sovereign immunity, when the RUS may have technically been applicable to public lands, but the government would have had no need to rely on its protections since it was protected by its broader sovereign immunity.

{15} Defendant proposes an alterative construction, one that would apply the RUS only to public lands that are not already open to the public, and the public entity therefore has discretion whether to allow public use or not. Immunity would then be limited to those few instances where a public entity allows recreational users onto land that would otherwise be unavailable to them. This interpretation has some appeal, in that the goal of the statute was to open land to the public that was otherwise unavailable. Some states have taken this approach. *See Sena v. Town of Greenfield,* 91 N.Y.2d 611, 673 N.Y.S.2d 984, 696 N.E.2d 996, 999 (1998) ("Where a municipality has already opened land for supervised recreational use, the statute's intended purpose of encouraging the landowner to make its property available for public use would not be served."). This is also the construction the district court seemed to adopt. Where a public entity has discretion as to whether or not to allow public access, the statutory protection may provide needed incentive to encourage that entity to open up its land for public use, just as it does for private landowners. On the other hand, for lands that are dedicated for public use, such as parks, the government is not free to prevent public access.

{16} Nothing in the RUS, however, limits its application to land that was not otherwise open to the public. Certainly a landowner who allowed the free public access to land for recreational use before the passage of the statute would be entitled to its protections. If there is such a limitation on the application to public lands, it is not found in the words of the statute. In addition, the passing legislature never considered such an application of the statute to the status of public land. This Court would risk imposing its own policy judgments by adopting such a construction.

{17} We have some doubts, therefore, as to whether the RUS protects government entities from liability. We do not decide that question today, however, because we conclude that the RUS extends only to a limited

range of activities, and that organized team sports such as Little League baseball are not included within that range of activities.

The Protections of the RUS Do Not Extend to Activities Such as Little League Baseball

{18} The RUS limits the liability of landowners who allow the public to use their land for "hunting, fishing, trapping, camping, hiking, sightseeing or any other recreational use." Section 17–4–7(A). Defendant urges a broad interpretation of the phrase "any other purpose," and therefore argues the statute applies to any type of recreational activity. In this instance, however, we do not believe a broad interpretation is warranted. We have long followed the doctrine of ejusdem generis. "[W]here general words follow an enumeration of persons or things of a particular and specific meaning, the general words are not construed in their widest extent but are instead construed as applying to persons or things of the same kind or class as those specifically mentioned." *State v. Foulenfont,* 119 N.M. 788, 791, 895 P.2d 1329, 1332 (Ct. App.1995) (quoting *State v. Bybee,* 109 N.M. 44, 46, 781 P.2d 316, 318 (Ct.App.1989)). In applying this doctrine, we look to the specific terms employed and seek the common characteristics among them, excluding anything that does not share those characteristics. *See Hartman v. Texaco,* 1997 NMCA 032, ¶ 10, 123 N.M. 220, 937 P.2d 979. In *Hartman,* for example, in interpreting the language "buildings, structures, trees, shrubs or other natural features," we determined that other natural features included only aboveground, not subsurface, features, since all the features listed existed above ground. *Id.*

{19} In the RUS, none of the listed activities are organized, competitive team sports. They are activities pursued in wilderness areas or "the true outdoors," a phrase some other jurisdictions have employed as a descriptive term. *See Adams v. Louisiana,* 525 So.2d 55, 57 (La.Ct.App.1988); *Boileau v. De Cecco,* 125 N.J.Super. 263, 310 A.2d 497, 499–500 (App.Div.1973). While this might not be the most artful description, we think the distinction is clear. It is the difference, for example, between those activities covered by *Outside Magazine* and those discussed in *Sports Illustrated.* The activities listed in the statute can be pursued alone, or in small groups. They are activities that allow people to enjoy the far-ranging beauty of our state on their own time and at their own pace. They are not activities that require scorekeepers, coaches, or uniforms. They are not activities that start at a set time in a set place or that are governed by an extensive set of rules.

{20} We do not see the list of activities included in the statute as broad enough to encompass every leisure activity enjoyed outdoors. We think Plaintiffs correctly note that if the legislature had wanted the statute to apply generally to any recreational activity, it would have been unnecessary to list the six activities included in the statute, rendering those words surplusage. We also agree with Plaintiffs that the legislature would not have needed to pass the Off Highway Motor Vehicles Act, NMSA 1978, § 66–3–1013 (1985), a similar statute providing immunity to landowners who allow access to off-highway vehicles, if the RUS could be read so broadly.

{21} Our limited construction of the phrase "recreational activities" is also supported by the statute's placement within the Game and Fish Acts. Nothing else in those statutes regulates baseball or any other team sport, while several of the statutes address the specific activities listed in the RUS. We also note that our legislature adopted a more narrow list of recreational activities than included within the Model Statute, eliminating swimming, boating, picnicking, pleasure driving, nature study, waterskiing, and winter sports, while adding only trapping. *Compare* § 17–4–7, *with* MODEL STATUTE at 151. We find it difficult to infer legislative intent to adopt a broad interpretation when the legislature acted to narrow the activities included within the purview of the statute.

{22} Defendant points us to case law from jurisdictions that have specifically found baseball, softball, and even T-ball to be recreational activities within the meaning of their recreational use statutes. Two of the cases Defendant cites are inapplicable. Defendant cites to a case from South Carolina, but that state's statute includes summer

sports among the listed recreational activities. *See* S.C.Code Ann. § 27–3–20(c) (1991). The South Carolina Court found that the statutory language "invites judicial expansion." *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 489 S.E.2d 647, 651 (App. 1997). The same cannot be said for New Mexico's statute. In addition, in the case Defendant cites from Idaho, *Ambrose v. Buhl Joint School District No. 412*, 126 Idaho 581, 887 P.2d 1088, 1090–92 (App.1994), even though the activity involved was T-ball, the only question before the court was the extent of trespasser liability. *See id.*

{23} In the other two cases cited by Defendant, the courts read statutory language similar to ours broadly enough to encompass baseball. *See Cunningham v. Bakker Produce, Inc.*, 712 N.E.2d 1002, 1006 (Ind.Ct. App.1999); *LiCause v. City of Canton*, 42 Ohio St.3d 109, 537 N.E.2d 1298, 1300 (1989). We simply disagree with this construction. A number of other jurisdictions have similarly rejected an expansive view of the statutory list of activities. Some have specifically excluded baseball or softball. *See, e.g., Torres v. City of Bellmead*, 40 S.W.3d 662, 665 (Tex. Ct.App.2001) (excluding baseball from the purview of the statute because the statutory list of activities did not include competitive team sports); *Johnson v. Rapid City Softball Ass'n*, 514 N.W.2d 693, 695–96 (S.D.1994) (excluding softball where the legislature included winter but not summer sports). Others have more generally applied the ejusdem generis doctrine to limit the scope of the statute to outdoor recreational activities. *See, e.g., Herman v. City of Tucson*, 197 Ariz. 430, 4 P.3d 973, 977–78 & n. 1 (App.1999); *Matthews v. Elk Pioneer Days*, 64 Wash. App. 433, 824 P.2d 541, 543–44 (1992). Some jurisdictions have imposed similar limits on the scope of the statute by focusing on the type of land, rather than the type of activity. *See, e.g., Redinger*, 615 A.2d at 749 (extending statutory protection only to unimproved land); *Boland v. Nevada Rock & Sand Co.*, 111 Nev. 608, 894 P.2d 988, 991 (1995) (limiting application of statute to rural, open land). Our focus today, however, is on the types of activities covered by the statute, not the types of land, although we doubt that people injured playing catch, or even an informal game of baseball, on a camping trip would be able to recover under the reasoning of our opinion. *Cf. Cunningham*, 712 N.E.2d at 1006.

{24} There is no doubt that baseball is a recreational activity in the sense that it is "pursued ... for the pleasure or interest it gives." 2 NEW SHORTER OXFORD ENGLISH DICTIONARY 2508 (4th ed.1993). Recreational team sports provide countless benefits to children and adults alike. From our reading of the statute, however, we cannot discern a legislative intent to include such activity within the purview of the RUS. Courts in other jurisdictions have speculated as to the reason for this legislative choice. The owners of large, remote tracts of land would face a heavy burden if required to inspect, monitor and maintain their lands sufficiently to prevent injuries. *See Monteville v. Terrebonne Parish Consol. Gov't*, 567 So.2d 1097, 1104 (La.1990) (limiting the application of Lousiana's statute to activities pursued in the true outdoors). In contrast, when an owner of land installs equipment or makes improvements to the land, making it suitable for more organized recreational activities that take place within a limited area, its users may expect that the premises will be properly maintained and inspected. *See id.; Redinger*, 615 A.2d at 748. In addition, the policy behind the RUS was to open "large acreages of private land" for public use without having to invest public resources for the acquisition of lands. MODEL STATUTE at 150. There is no evidence that the legislature was equally concerned about either a shortage of baseball diamonds or other sporting facilities within urban areas or about governmental expenditures to acquire ballfields. Defendant's argument that the statute should be expanded to cover recreational sports because they have become increasingly popular is equally unpersuasive. We will not judicially expand a thirty-four year old statute because sporting activities have become more popular. That decision is left to the legislature.

{25} Because we hold that the RUS does not apply when a landowner provides access for organized team sports, we need not address Plaintiffs' arguments that the fee the

Luceros paid to Zia Little League constitutes a "charge" for the purposes of the statute and that the Defendant would still owe a duty of care to Ms. Lucero as a trespasser under the RUS.

CONCLUSION

{26} We hold only that New Mexico's Recreational Use Statute, Section 17-4-7, does not extend to organized team sports. As a result, Defendant did not enjoy immunity from liability for any injuries occurring on its land when it allowed a Little League baseball team to use its fields free of charge. We therefore reverse the district court's grant of summary judgment in favor of APS and remand this case to the district court for further proceedings. Although we cast some doubt on the merits of Defendant's argument that the protections offered by the RUS extends to government entities as landowners, we discuss this issue only to alert the legislature to an apparent gap within this state's statutory scheme.

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

WE CONCUR: MICHAEL D. BUSTAMANTE, Judge and IRA ROBINSON, Judge.

2002-NMCA-016

39 P.3d 747

STATE of New Mexico, Plaintiff-Appellee,

v.

Filmon MORALES, Defendant Appellant.

No. 22,024.

Court of Appeals of New Mexico.

Dec. 18, 2001.

Certiorari Denied, No. 27,304, Jan. 30, 2002.

Patricia A. Madrid, Attorney General, Patricia Gandert, Assistant Attorney General, Santa Fe, NM, for Appellee.

Phyllis H. Subin, Chief Public Defender, Samantha J. Fenrow, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

PICKARD, Judge.

{1} This case raises issues concerning the meaning of, and procedures to be applied under, NMSA 1978, § 33–2–34 (1999), which is known as New Mexico's Earned Meritorious Deductions Act (EMDA). The EMDA provides in Subsection (A) that prisoners convicted of nonviolent offenses may earn up to 30 days per month of credit for participation in programs, but that prisoners convicted of serious violent offenses may earn only four days per month of credit. Subsection (L)(4)(a) through (m) lists 13 offenses that are serious violent offenses subject to the four-day limit as a matter of law; Subsection (L)(4)(n) lists another 13 offenses that, if judged to be serious violent offenses, may also be used to limit credit to four days per month. We hold that it is constitutional, under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), for the judge to make the requisite finding qualifying the offense as a serious violent one. We also hold that the judge must find either an intent to do serious harm or knowledge that one's acts are reasonably likely to result in serious harm in order for an offense listed in Subsection (L)(4)(n) to be considered a serious violent offense.

FACTS, ISSUES, AND PROCEEDINGS

{2} Defendant was charged with second degree kidnaping and fourth degree criminal sexual contact for offenses committed upon his daughter. He pleaded guilty to second degree kidnaping in a plea agreement that contained notice that the State would seek to aggravate the sentence under NMSA 1978, § 31–18–15.1 (1993), as well as seek to have the judge declare the offense to be a serious violent one under Section 33–2–34(L)(4)(n). The facts elicited at sentencing indicated that Defendant, while drunk, touched his crying daughter's chest and vaginal area while dragging her into his bedroom until he was stopped by his nephew. The trial judge increased Defendant's sentence by one-third because of Defendant's lack of remorse, continuing threat to society, and inability to be rehabilitated due to long-term alcohol abuse. He also found the offense to be a serious violent one because "the victim is the Defendant's own daughter for purposes of § 33–2–34."

{3} Upon a first appeal, this Court summarily reversed and remanded because the fact that the victim was Defendant's daughter alone was insufficient to find the offense a serious violent one under the statute. During the proceedings on remand, Defendant contended that both the factors used to aggravate and the nature of the offense as a serious violent one had to be determined by a jury using the reasonable doubt standard under *Apprendi*. The trial judge disagreed and resentenced Defendant to the same term, this time finding in support of the serious violent offense determination that "Defendant is violent when drinking, Defendant was intoxicated when he committed the present offense . . . , Defendant is unwilling or unable to control his drinking[, and] Defendant is a Danger to Society and has proven that he is not rehabilitatable."

{4} On this appeal, Defendant raises the same three issues raised in the trial court: that *Apprendi* requires (1) aggravation and (2) serious violent offense to be found by the jury beyond a reasonable doubt, and that (3) the findings relating to serious violent offense are insufficient. We disagree with Defendant's *Apprendi* arguments. The aggravation issue has been decided against him in *State v. Wilson*, 2001–NMCA–032, 130 N.M. 319, 24 P.3d 351, *cert. granted*, 130 N.M. 459, 26 P.3d 103 (2001). Accordingly, we discuss below whether *Apprendi* applies to EMDA and what the trial judge needs to find in order to determine a serious violent offense. Since the trial judge's findings were for the most part not related to the offense for which Defendant was convicted, we remand for the

trial judge to make the requisite findings, if the trial judge finds that they exist.

DISCUSSION

Application of *Apprendi* to EMDA

{5} In *Apprendi*, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 120 S.Ct. at 2362–63. We evaluated New Mexico's sentencing scheme, which allows a trial judge to increase or decrease a basic sentence by up to one-third of its amount, in *Wilson*, 2001–NMCA–032, 130 N.M. 319, 24 P.3d 351. In that case, we upheld New Mexico's scheme against an *Apprendi* challenge because we ruled that the legislature intended New Mexico's scheme to provide the judge with a range of sentences from which the judge could decide the appropriate sentence by applying what appeared to be sentencing factors. *Wilson*, 2001–NMCA–032, ¶ 13, 130 N.M. 319, 24 P.3d 351. In this case, we have a similar focus and must answer two questions: (1) In enacting Section 33–2–34, did the legislature intend to allow a sentence above the statutory maximum? and (2) Are the factors the judge is to consider more like elements of a different crime or more like sentencing factors?

{6} Defendant's sentence was aggravated, which aggravation we uphold under *Wilson*. Thus, his sentence for the second degree offense of kidnaping was 12 years. In rejecting Defendant's *Apprendi* challenge to applying the EMDA serious violent offense category to him, the trial judge made a simple ruling with which we are hard pressed to disagree. The trial judge stated that the EMDA simply "does not add years to Defendant's sentence." Defendant's sentence before application of the EMDA was 12 years, and it was still 12 years after application of the EMDA.

{7} We have located two cases analyzing *Apprendi* arguments in the context of state laws similar to our EMDA. *See People v. Garry*, 323 Ill.App.3d 292, 257 Ill.Dec. 64, 752 N.E.2d 1244, 1249 (2001) (holding that *Apprendi* does not require a jury determination of facts beyond a reasonable doubt prior to imposing Illinois' truth-in-sentencing provision limiting amount of good-conduct credit that can be earned to 4.5 days per month); *State v. Johnson*, 166 N.J. 523, 766 A.2d 1126, 1138 (2001) (holding that *Apprendi* creates doubts about the constitutionality of New Jersey's No Early Release Act, which requires people convicted of violent crimes to serve at least 85% of their overall sentence). We are more persuaded by the Illinois case. We believe that its reasoning is most consonant with our own reasoning in *Wilson*. We also find the New Jersey case to be distinguishable.

{8} The Illinois statute, like our own, lists certain offenses and requires a court finding prior to application of the truth-in-sentencing provision. *See Garry*, 257 Ill.Dec. 64, 752 N.E.2d at 1249. The requisite finding is one of great bodily harm resulting from the commission of those offenses. *See id.* In ruling that *Apprendi* concerns were not implicated, the Illinois court stated,

> the court's finding ... that defendant's conduct leading to his convictions [of enumerated crimes] resulted in great bodily harm to [the victim] did *not* trigger *any* penalty for those crimes much less increase the maximum penalty. Instead, the finding of great bodily harm simply had an impact upon the amount of time by which defendant through his own "good conduct" could *decrease* his sentence.

Garry, 257 Ill.Dec. 64, 752 N.E.2d at 1250.

{9} The New Jersey statute, by contrast, did not require a court finding, it being silent about the exact procedure by which the mandatory minimum term of 85% was imposed, whether by judge or jury. *See Johnson*, 766 A.2d at 1128, 1135–36. In the face of this silence, the New Jersey court distinguished *McMillan v. Pennsylvania*, 477 U.S. 79, 86, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). *Johnson*, 766 A.2d at 1136. *McMillan* was not overruled in *Apprendi*. *Johnson*, 766 A.2d at 1134. The statute in *McMillan* expressly committed to the trial court the task of making a particular finding that triggered a mandatory minimum sentence. *See id.* at 1130–31. In distinguishing *McMillan*, the *Johnson* court ruled that since New Jersey's stat-

ute could be equally construed to require a court finding, making it possibly unconstitutional, or a jury finding, making it undoubtedly constitutional, the doctrine of constitutional doubt required the court to construe the statute to require a jury finding. *Id.* at 1136.

{10} The New Jersey court also based its ruling on what it termed the "real time," "realistic," or "practical" effect of a sentence embedded in its jurisprudence. *Id.* at 1137 (internal quotation marks and citations omitted). We do not have similar jurisprudence, and we are quite unsure about the practical effects of changes in sentencing laws such as are anticipated by so-called truth-in-sentencing provisions. *See* New Mexico Criminal and Juvenile Justice Coordinating Council, *CJJCC Drafted Legislation, 1999 Session, Earned Time Act, available at* http://www.cjjcc.org/eta.php (indicating that public perception that day-for-day credit results in sentences served being approximately 50% of the announced sentence is incorrect, and that actual sentences are not expected to increase by passage of the EMDA because judges and prosecutors factor likely credit for time served into their decisions as to appropriate sentence).

{11} Additionally, cases such as *Johnson* that appear to require anything potentially impacting on sentencing to be decided by a jury appear to us to be ignoring the essential holding of and limitations stated in *Apprendi* itself. We have interpreted *Apprendi* narrowly in *Wilson*, 2001–NMCA–032, ¶¶ 11–29, 130 N.M. 319, 24 P.3d 351, and also in *State v. Gonzales*, 2001–NMCA–025, ¶¶ 21–32, 130 N.M. 341, 24 P.3d 776, *cert. granted*, 130 N.M. 254, 23 P.3d 929 (2001). We believe our ruling herein is consistent with our discussion of the issues in those cases, and we also believe that the result easily follows from those cases. The EMDA does not increase a maximum sentence, and limiting credit upon findings made by the court and concerning the general nature of the offense's characteristics appears more like sentencing factors. For these reasons, we hold that the trial judge may make the findings concerning serious violent offense required by Section 33–2–34(L)(4)(n).

Findings Required by Section 33–2–34(L)(4)(n)

{12} Section 33–2–34(L) appears to have been enacted in response to the Violent Crime Control and Law Enforcement Act of 1994, as amended through 1996. 42 U.S.C. § 13704(a) (2001) provides that states are eligible for "[t]ruth-in-sentencing incentive grants" if they require persons convicted of "part 1 violent crime[s]" to serve 85% of the sentences imposed. Part 1 violent crimes are defined in 42 U.S.C. § 13701(2) (2001) as "murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault as reported to the Federal Bureau of Investigation for purposes of the Uniform Crime Reports." States such as New Jersey, Illinois, and New Mexico appear to have responded by passing laws requiring certain persons convicted of certain crimes to serve 85% of their sentences.

{13} New Mexico has broadened the number and type of crimes beyond those strictly required to qualify for the federal grants. The question we must address is what a trial judge must find to qualify an offense as a serious violent one for purposes of Section 33–2–34(L)(4)(n). The statute requires the trial court to consider "the nature of the offense and the resulting harm." *Id.* Inasmuch as the list of offenses includes several that result in death, which can be viewed as the greatest harm imaginable, the legislature could not have intended amount of harm alone to qualify an offense as a serious violent one. Otherwise, it would have included those offenses resulting in death in the list of offenses that are serious violent ones as a matter of law under Section 33–2–34(L)(4)(a)(m). *See Methola v. County of Eddy*, 95 N.M. 329, 333, 622 P.2d 234, 238 (1980) (indicating that courts' main concern is to determine legislative intent and, in doing so, all sections of a statute are to be read together). Rather, resulting harm must be considered along with the nature of the offense to determine if a listed offense qualifies.

{14} Reviewing the list of offenses that are serious violent ones as a matter of law, we are struck that they all involve an intent to

do the harm prohibited by the statute, or a specific intent to kill or injure, or knowledge that one's acts are reasonably likely to cause serious harm. Thus, for example, in the case of murder and manslaughter, there is an intent to kill or knowledge that one's acts create a strong probability of death or great bodily harm. *See* UJI 14–211 NMRA 2001; 14–221 NMRA 2001. The sex offenses are committed in violent ways, many required to result in injury beyond that necessarily involved in every forced sexual contact, and there is a required intent to do them. Shooting at a dwelling or occupied building necessarily requires a knowledge that one's acts are reasonably likely to result in serious harm due to the nature of the weapon and the nature of the object shot.

{15} In contrast, many of the offenses listed in Section 33–2–34(L)(4)(n) are characterized by multiple ways of committing the offense, some intentional and some not, and some utilizing physical force and some not. For example, child abuse can result in death or it can result in no injury whatsoever. *See* NMSA 1978, § 30–6–1 (2001). Similarly, it can be committed intentionally by torture or negligently without an intent to harm whatsoever. *See id.* The crime of which Defendant was convicted provides another example. Kidnaping may be committed by deception with the intent to hold for ransom when the victim is tricked out of his or her office and into a perpetrator's car, but is released immediately without harm, or can be committed by physical force with the intent to inflict sexual offenses which are actually inflicted. *See* NMSA 1978, § 30–4–1 (1995). Likewise, homicide by vehicle always results in death, but it can be committed by one who had only one drink but is thereby less able to drive safely, or it can be committed by one who intentionally and habitually gets drunk to the point of being several times over the legal limit, knowing that he or she must drive in a crowded area and is in no shape to do so, but does so nevertheless.

{16} These are the differences in the ways of committing the offenses listed in Section 33–2–34(L)(4)(n), and a trial judge must have some way of measuring which ways amount to serious violent offenses and which do not. Our comparison of the offenses listed in Subsections (a) through (m) on the one hand and (n) on the other leads us to the conclusion that the legislature wanted to reserve the serious violent offenses for those found by the trial judge to be committed in a physically violent manner either with an intent to do serious harm or with recklessness in the face of knowledge that one's acts are reasonably likely to result in serious harm. Of course, the statutory factor of actual "resulting harm" may be considered in determining a defendant's intent.

{17} In this case, the trial court made no findings about the actual resulting harm to the victim, and most of the findings related to Defendant's past violence and his drinking habits, not to his intent or knowledge in regard to this offense. Based on our analysis of the statute, we believe that the trial court's findings are insufficient. Accordingly, we must remand this case once again.

{18} Although the facts in the record are sparse, it appears that Defendant used physical force with his daughter in a manner that indicated an intent to do so. It also appears that she may have been at least mentally harmed, although that is certainly less clear from the record. Finally, it appears that any father ought to know that grabbing and sexually abusing his crying young daughter is reasonably likely to cause serious harm. Thus, it appears that there could be a factual basis for the requisite findings under Section 33–2–34(L)(4)(n). However, it is for the trial court in the first instance to make the required findings. *See Winrock Inn Co. v. Prudential Ins. Co.*, 1996–NMCA–113, ¶ 35, 122 N.M. 562, 928 P.2d 947. We, therefore, remand for the trial court to have the opportunity to do so if it concludes that such findings should be made under the standard we have set forth herein.

CONCLUSION

{19} Defendant's twelve-year sentence is affirmed. The finding that Defendant's offense was a serious violent one is reversed, and this case is remanded for the trial court to reconsider whether the offense was a serious violent one in accordance with this opin-

ion. The State may present additional evidence if it wishes. *See State v. Freed*, 1996-NMCA-044, ¶ 10, 121 N.M. 569, 915 P.2d 325 (holding that double jeopardy does not prevent the state from seeking to enhance sentence based on allegations that were not previously asserted).

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

I CONCUR: RICHARD C. BOSSON, Chief Judge.

MICHAEL D. BUSTAMANTE, Judge (specially concurring).

BUSTAMANTE, Judge (specially concurring).

{21} I agree that the aggravation issue is controlled by this Court's decision in *State v. Wilson*, 2001-NMCA-032, 130 N.M. 319, 24 P.3d 351. I also agree that the EMDA violent offense finding is not subject to *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). I disagree, however, with the path taken by the majority to reach this result. I would affirm on the much narrower basis that the United States Supreme Court in *Apprendi* refused to overrule *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), a case which, in my view, presents an issue substantively indistinguishable from ours. *Apprendi*, 530 U.S. at 487 n. 13, 120 S.Ct. 2348.

{22} *McMillan* involved a challenge to a statute which imposed a mandatory minimum sentence of five years imprisonment if the judge found, by a preponderance of the evidence, that the accused "visibly possessed a firearm" in the course of committing one of certain specified felonies. 477 U.S. at 81-82, 106 S.Ct. 2411. Each of the specified felonies carried maximum sentences in excess of five years. In upholding the Pennsylvania statute against a due process challenge, the Supreme Court noted that the statute did not alter the "maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty." Thus, in the Supreme Court's view it simply limited the court's "discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." *Id.*, 477 U.S. at 87-88, 106 S.Ct. 2411.

{23} As I have noted before, the core principle of *Apprendi* is that any fact-finding which affects the length of a defendant's sentence must be made by the jury applying the normal beyond-a-reasonable-doubt standard of proof. 530 U.S. at 483-84, 120 S.Ct. 2348. Recognizing the potential impact of the decision's core principle on *McMillan*, the dissent in *Apprendi* accused the majority of overruling *McMillan*. The *Apprendi* majority was careful to note that it was not overruling *McMillan*, but it also made clear that *McMillan* would be limited to "cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict." *Apprendi*, 530 U.S. at 487 n. 13, 120 S.Ct. 2348. The majority also noted that it was reserving the question whether the rule of *McMillan* was subject to challenge under the principles laid down in *Apprendi*.

{24} The EMDA has a similar effect as the firearm mandatory minimum sentence statute on a defendant's sentence. Absent a finding that a crime is a serious violent offense, a person convicted and sentenced for a crime in New Mexico is eligible to receive meritorious deductions equal to thirty days per month while in prison. NMSA 1978 § 33-2-34(A)(2) (1999). If the crime is a serious violent offense, meritorious deductions are limited to a maximum of four days per month. The practical effect of this is that the real time a defendant can expect to be incarcerated is increased by a significant factor. Despite the increase in real incarceration time, a defendant's nominal sentence is not increased. The practical net effect of the EMDA is to impose a mandatory increased minimum sentence. The EMDA and Pennsylvania statutes are not precisely the same, but their effect is substantively identical.

{25} Given that the United States Supreme Court believes that the *McMillan* mandatory minimum sentence statute still passes muster under *Apprendi*, the EMDA limitation on merit deductions must also.

{26} I disagree also with the majority's reliance on *People v. Garry*, 323 Ill.App.3d 292, 257 Ill.Dec. 64, 752 N.E.2d 1244 (2001). The portion of the *Garry* opinion quoted by

the majority is simply unrealistic when it asserts that limitation of merit deductions does not trigger any penalty for a crime. *Id.* 257 Ill.Dec. 64, 752 N.E.2d at 1250. More importantly, however, the entire discussion concerning the constitutionality of the Illinois statute in *Garry* is dicta. In *Garry,* the finding required to trigger Illinois' truth-in-sentencing provision was in fact made by a jury under a "beyond a reasonable doubt" standard. Thus, there was no need for the court in *Garry* to undertake the constitutional analysis.

{27} The approach taken by the New Jersey court in *State v. Johnson,* 166 N.J. 523, 766 A.2d 1126 (2001), to the extent that it recognizes the real and practical consequences of imposing limitations on merit deductions on sentences, is preferable to the *Garry* analysis, though I fully recognize that the holding in *Johnson* does not control our decision because of statutory differences.

2002-NMCA-014

40 P.3d 442

The BANK OF SANTA FE, a New Mexico banking corporation, Trustee of the Walter L. Goodwin, Jr. Trust in the name of Ban San Co., a partnership nominee, Plaintiff–Appellant,

v.

MARCY PLAZA ASSOCIATES, a New Mexico general partnership, Defendant–Appellee.

No. 21,389.

Court of Appeals of New Mexico.

Dec. 14, 2001.

Certiorari Denied, No. 27,289, Jan. 28, 2002.

Steven L. Tucker, Tucker Law Firm, P.C., Santa Fe, NM, for Appellant.

John M. Eaves, Derek V. Larson, Eaves, Bardacke, Baugh, Kierst & Kiernan, P.A., Albuquerque, NM, for Appellee.

OPINION

CASTILLO, Judge.

{1} This case requires us to determine whether, under principles of res judicata, Marcy Plaza Associates' (Marcy Plaza) claim

that it overpaid rent is barred by a prior arbitration between the parties. Marcy Plaza is the lessee of property in Santa Fe, on which it operates a retail and office complex. The Bank of Santa Fe (Bank) is the lessor. Under the lease, Marcy Plaza's lease payments are calculated based on its "net profit." In July 1996 the parties arbitrated Marcy Plaza's claim that refinancing costs are deductible costs in determining "net profit" (1996 arbitration).

{2} In October 1996 three months after the 1996 arbitration, Marcy Plaza informed the Bank of its claim that it had overpaid rent by mistakenly including expenses that were passed through to tenants, such as utilities. In September 1997 Marcy Plaza notified the Bank that it intended to seek another arbitration. The Bank brought this declaratory judgment action alleging that Marcy Plaza's overpayment claim was barred by res judicata because Marcy Plaza did not raise it in the 1996 arbitration between the parties. After trial, the district court ruled that Marcy Plaza's claim that it overpaid rent was a different claim, not decided in the 1996 arbitration, and it was not barred by res judicata. We affirm.

BACKGROUND

{3} The retail and office complex is partially on real estate owned by the Walter Goodwin Trust; the Bank is trustee. As trustee, the Bank entered into two ground leases, one in 1982 and one in 1984. Marcy Plaza now holds the leases. For purposes of this opinion the two leases, which are similar in all material respects, are referred to as "the lease."

{4} The lease provides for base rent, and contains two provisions for increasing the rent over time. The first increase began in year six of the lease:

> Beginning with the sixth year of the lease term, the base rent shall be increased by an amount equal to ten percent (10%) of the amount, if any, by which Lessee's gross rental income from all property covered by the lease on the commencement of the year of the term exceeds Lessee's gross rental income from all property covered by the lease on the base date.

{5} The lease also provides for a second increase to occur with the thirteenth year of the lease. It was to equal twenty-five percent of the net profit received by Marcy Plaza as rent from the leased property. Paragraph 4B of the lease defines "net profit," and provides for arbitration by accountants in case of a dispute over net profits:

> Net profit means the gross amount received as rent by Lessee, less all bona fide costs, expenses and payments related to operation, management, maintenance, financing, depreciation, assessments and real and personal property taxes.... Any dispute as to net profit shall be resolved by the parties each choosing an accountant, and the two so chosen choosing a third accountant, in the same manner as hereinafter set forth for the selection of arbitrators or appraisers pursuant to the procedures for arbitration....

{6} In addition to the specific arbitration provision for any dispute as to net profit, the lease also contains a general arbitration provision:

> Any controversy which shall arise between Lessor and Lessee, ... shall be settled by arbitration. Such arbitration shall be before one disinterested arbitrator if one can be agreed upon, otherwise before three (3) disinterested arbitrators, one named by Lessor, one by Lessee, and one by the two (2) thus chosen.

{7} In 1990, the sixth year of the lease, Marcy Plaza's first supplemental rent payment became due. To calculate the supplemental rent payment, Marcy Plaza had to calculate its "gross rental income." Marcy Plaza did so and beginning in 1990 submitted checks to the Bank.

{8} In April 1996 Marcy Plaza notified the Bank about a proposed refinancing of the Industrial Revenue Bond debt which would increase the indebtedness against the property from approximately $3,300,000 to $4,500,000. In May 1996 the Bank requested arbitration on three issues, including "[w]hether or not the financing cost, including interest on the new loan, are deductible as an expense for calculation of rentals based upon net profits." The two other issues were settled, but the net profit issue went to arbi-

tration before three accountants in July 1996. Ultimately, the panel of accountants decided this issue in favor of Marcy Plaza, ruling that costs associated with the refinancing were a deductible expense in calculating net profits.

{9} In October 1996 and again in September 1997, Marcy Plaza notified the Bank that Marcy Plaza believed it had overpaid rent since 1990. The notification letter in 1997 informed the Bank that Marcy Plaza intended to seek another arbitration. According to Marcy Plaza, the overpayments occurred because it had mistakenly calculated gross rental income to include pass-through expenses such as utilities and other expenses paid by its tenants. The overpayments totaled approximately $34,000 and, at trial, Marcy Plaza admitted the mistake was caused by its own carelessness. In November 1997 the Bank filed this declaratory judgment action seeking to establish that Marcy Plaza was barred by res judicata from pursuing any overpayments. The Bank also alleged that Marcy Plaza was barred from pursuing a claim about payment of costs and expenses associated with the 1996 arbitration. In December 1997 Marcy Plaza sent the Bank a formal demand for arbitration.

{10} After a bench trial, the district court ruled in favor of Marcy Plaza on the overpayment issue. The district court found that the cause of action determined in the 1996 arbitration was different from the cause of action now asserted by Marcy Plaza: "[t]he concept of 'gross rental income' was only tangential to the net profit issue presented at the July 19, 1996 Arbitration," and "[t]he calculation of 'gross rental income' was not [before] the July 19, 1996 Arbitration." The district court dismissed the Bank's complaint insofar as it requested that Marcy Plaza's overpayment claim was res judicata. Rule 1-041(B) NMRA 2001.

{11} The district court ruled in favor of the Bank regarding payment of costs and expenses related to the 1996 arbitration; the issue was not appealed and is not before us.

STANDARD OF REVIEW

{12} We review this issue as a mixed question of law and fact. The facts are reviewed to see if they are supported by substantial evidence, but the legal conclusions flowing from those facts are reviewed de novo. *State v. Attaway,* 117 N.M. 141, 144-46, 870 P.2d 103, 106-08 (1994); *Anaya v. City of Albuquerque,* 1996-NMCA-092, ¶ 5, 122 N.M. 326, 924 P.2d 735; *Wolford v. Lasater,* 1999-NMCA-024, ¶ 4, 126 N.M. 614, 973 P.2d 866 (applying claim preclusion by court reviewed de novo).

DISCUSSION

{13} Claim preclusion, or res judicata, precludes a subsequent action involving the same claim or cause of action. *Wolford,* 1999-NMCA-024, ¶ 5, 126 N.M. 614, 973 P.2d 866. It applies where there is "(1) identity of parties or privies, (2) identity of capacity or character of persons for or against whom the claim is made, (3)[the] same cause of action, and (4)[the] same subject matter." *City of Las Vegas v. Oman,* 110 N.M. 425, 432, 796 P.2d 1121, 1128 (Ct.App.1990) (quoting *Three Rivers Land Co. v. Maddoux,* 98 N.M. 690, 694, 652 P.2d 240, 244 (1982), *overruled on other grounds by, Universal Life Church v. Coxon,* 105 N.M. 57, 58, 728 P.2d 467, 469 (1986)).

{14} Res judicata precludes a claim when there has been a full and fair opportunity to litigate issues arising out of that claim. *Myers v. Olson,* 100 N.M. 745, 747, 676 P.2d 822, 824 (1984). Res judicata bars not only claims that were raised in the prior proceeding, but also claims that could have been raised. *State ex rel. Martinez v. Kerr-McGee Corp.,* 120 N.M. 118, 121, 898 P.2d 1256, 1259 (Ct.App.1995). This principle ensures finality, advances judicial economy, and avoids piecemeal litigation. *First State Bank v. Muzio,* 100 N.M. 98, 101, 666 P.2d 777, 780 (1983), *overruled on other grounds by, Huntington Nat. Bank v. Sproul,* 116 N.M. 254, 263, 861 P.2d 935, 944 (1993); *Myers,* 100 N.M. at 747, 676 P.2d at 824. If the causes of action are different, res judicata is inapplicable. *DiMatteo v. County of Dona Ana,* 109 N.M. 374, 380, 785 P.2d 285, 291 (Ct.App. 1989). The Bank, as the party seeking to bar Marcy Plaza's claims, has the burden of establishing res judicata. *Anaya,* 1996-NMCA-092, ¶ 5, 122 N.M. 326, 924 P.2d 735.

{15} The parties disagree on whether res judicata applies to arbitration awards. Although we recognize that collateral estoppel generally applies to arbitration awards, *Rex, Inc. v. Manufactured Hous. Comm. of N.M.*, 119 N.M. 500, 505, 892 P.2d 947, 952 (1995) we need not decide whether res judicata should apply to arbitration awards. Assuming, but not deciding, that res judicata would apply to an arbitration award, we hold that the requisites necessary to prove res judicata are not present in this case.

A. Comparison of Claims

{16} In this case, we have the same parties, so the dispositive factors are whether the overpayment claim involves the same cause of action and the same subject matter as that decided at the 1996 arbitration. *City of Las Vegas*, 110 N.M. at 432, 796 P.2d at 1128. *Anaya* requires us to determine whether the facts underlying the first and subsequent claim are "so interwoven as to constitute a single claim for purposes of res judicata." *Anaya*, 1996–NMCA–092, ¶ 11, 122 N.M. 326, 924 P.2d 735. In making this determination, we look at three factors: "(1) the relatedness of the facts in time, space, origin, or motivation; (2) whether, taken together, the facts form a convenient unit for trial purposes; and (3) whether the treatment of the facts as a single unit conforms to the parties' expectations or business understanding or usage." *Id.* ¶ 12; *see also Three Rivers Land Co.*, 98 N.M. at 695, 652 P.2d at 245 (discussing that res judicata is not determined by a mechanical test but by a process made up of well-established rules), *overruled on other grounds by, Universal Life Church v. Coxon*, 105 N.M. at 58, 728 P.2d at 469.

1. Relatedness of Facts

{17} The 1996 arbitration addressed only whether financing expenses were deductible as costs in determining "net profit." The claim Marcy Plaza now seeks to arbitrate is whether pass-through expenses, such as utilities, are included or excluded in determining "gross rental income." The Bank argues that the calculation of net profits requires a calculation of gross rental income; therefore, "the issue in the second proceeding was necessarily included in the [1996 arbitration]." We agree with the district court that these are different claims. Granted, gross rental income is a calculation in determining net profit, but it was not necessary to calculate gross rental income to decide whether financing expenses should be deducted in determining net profit. The 1996 arbitration focused on a narrow issue concerning "net profit" and whether costs associated with financing expenses were deductible. It did not focus on how pass-through expenses were to be treated in calculating "gross rental income," or on overpayments.

{18} The Bank argues that the claims arise from a "common nucleus of operative facts." We disagree. The facts underlying the two claims are different in time and origin. They are interrelated only because they both fall under the general category of a dispute concerning rental payments under the lease, but the claims involve different calculations and arose at different times. The "net profit" issue considered at the 1996 arbitration was based on an isolated refinancing arrangement in 1996. In contrast, the overpayment issue is an ongoing issue that spans from 1990 into future decades. *See Albuquerque Broad. Co. v. Bureau of Revenue*, 54 N.M. 165, 168, 216 P.2d 698, 700 (1950) (recovering taxes for a different period of time not barred by res judicata). Here, because Marcy Plaza's overpayment claim is based on different facts, res judicata is inapplicable. *See Silva v. State*, 106 N.M. 472, 474, 745 P.2d 380, 382 (1987) ("Where the ultimate facts necessary for the resolution of two suits are different, ... *res judicata* is inapplicable."); *Runge v. Fox*, 110 N.M. 447, 450, 796 P.2d 1143, 1146 (Ct.App.1990) (stating that prior action involving past due rent and restitution of premises did not bar suit alleging that defendant was liable with respect to the manner of executing the writ of restitution).

2. Convenient Trial Unit

{19} The second factor, whether the facts form a convenient unit for trial, also calls for a conclusion that res judicata does

not apply. Under the terms of the lease, "[a]ny dispute as to net profit" was to be decided by a panel of accountant arbitrators. The district court found that the panel of accountants could only consider issues related to net profits, and they would have no authority to consider the overpayment issue now raised under gross rental income.

{20} The Bank argues that the district court's finding is mistaken, and that because the concept of gross rental income "is an essential part of the [net profit] calculation," the accountant arbitrators had the authority to consider the overpayment issue. We disagree. The lease specifically provides that "[a]ny dispute as to net profit" was to be arbitrated by accountant arbitrators. This provision is unambiguous, and we interpret it as written. *See Christmas v. Cimarron Realty Co.*, 98 N.M. 330, 332, 648 P.2d 788, 790 (1982) (stating that when arbitration agreement is unambiguous, courts will apply its plain meaning). We disagree with the Bank that, under the plain language of the arbitration provision, the 1996 arbitration before a panel of accountants could be expanded to include the overpayment claim. Consequently, res judicata would not apply. *Martinez*, 120 N.M. at 122, 898 P.2d at 1260 ("Claims are not precluded . . . where a plaintiff could not seek a certain relief or rely on a certain theory in the first action due to limitations on the subject matter jurisdiction of the first tribunal."). The two claims cannot be a "convenient trial unit" when they could not both be presented at the 1996 arbitration. We therefore disagree with the Bank's argument.

3. Parties' Expectations

{21} The third factor, the parties' expectations, also calls for a conclusion that res judicata does not apply. It would be unreasonable for the Bank to assume that, having addressed the narrow issue of whether finance expenses are deductible in determining "net profit," it would never have to arbitrate any dispute concerning rental payments ever again. *See Anaya*, 1996–NMCA–092, ¶ 17, 122 N.M. 326, 924 P.2d 735(considering reasonableness of party's expectation in finality).

{22} Under the third factor, *Anaya* instructs us that we also consider whether the policy of finality outweighs Marcy Plaza's interest in vindication of its claims. *Id.* ("Nor can we say that the courts' and Defendants' interests in bringing litigation to a close outweigh Plaintiff's interest in the vindication of his claims."). The consequences of barring Marcy Plaza's claim are significant. The lease may be extended until the year 2037. If Marcy Plaza has no avenue for addressing the overpayments, it cannot attempt to recover existing alleged overpayments of $34,000, and it may be required to make overpayments for decades into the future. On this record, any interest the district court and the Bank may have in finality does not outweigh Marcy Plaza's interest in vindicating its claims. *Id.*

{23} Applying all of the *Anaya* factors, we hold that the overpayment claim is a different claim from the claim that was the subject of the 1996 arbitration; consequently, the claim is not barred by res judicata. *DiMatteo*, 109 N.M. at 380, 785 P.2d at 291 (holding that res judicata does not apply when causes of action are different).

B. Other Res Judicata Considerations

{24} The Bank argues that Marcy Plaza should have known of its overpayment claim and is barred from raising it because it could have been raised during the prior proceeding. We disagree. Where, as here, the new claim is different from the claim presented at the 1996 arbitration, Marcy Plaza may bring it now. *See Anaya*, 1996–NMCA–092, ¶ 18, 122 N.M. 326, 924 P.2d 735 (noting that res judicata applies to claims that could have been raised in the first proceeding is inapplicable when the claims are different).

{25} Moreover, the evidence does not establish that Marcy Plaza knew of the overpayment claim before the 1996 arbitration. The Bank cites to evidence it suggests indicates that Marcy Plaza knew of the overpayment claim before the 1996 arbitration, but our review of the evidence relied on by the Bank does not definitively establish that fact. Asked when he learned of the problem, Arnold Horowitz, one of the principals in Marcy Plaza, stated, "At some time during the pro-

ceedings for the arbitration." It is unclear from this testimony, and the Bank never established a definite date when Marcy Plaza became aware of the overpayments. The record establishes with certainty only that by October 1996, several months after the arbitration, Marcy Plaza was aware of the problem. Other citations to the evidence by the Bank simply establish that the overpayment issue was not raised at the 1996 arbitration, not that Marcy Plaza knew of the overpayment problem before the arbitration. The record does not establish that Marcy Plaza was aware of the overpayment claim before the July 1996 arbitration, and we reject the Bank's argument that the overpayment claim is barred because it could have been brought in July 1996. *Sanders v. Estate of Sanders,* 122 N.M. 468, 473, 927 P.2d 23, 28 (Ct.App. 1996) (stating that wife was bound by amended divorce decree's resolution of mineral, oil and gas interests when she signed the decree knowing that she had a potential claim but signed the decree anyway; consequently, the matter was res judicata). We agree with the district court that the Bank did not meet its burden to establish res judicata. *See Anaya,* 1996-NMCA-092, ¶ 5, 122 N.M. 326, 924 P.2d 735.

{26} The Bank also argues that res judicata should apply because Marcy Plaza had a full and fair opportunity to litigate its overpayment claim at the July 1996 arbitration. The Bank is correct that res judicata is applicable where a party has had a full and fair opportunity to present its claim. *City of Las Vegas,* 110 N.M. at 432, 796 P.2d at 1128 (noting that the parties must have had a full and fair opportunity to litigate the issue before claim preclusion applies); *Myers,* 100 N.M. at 747, 676 P.2d at 824. However, we disagree that Marcy Plaza had a full and fair opportunity to present its overpayment claim in July 1996. As we have discussed previously, under the terms of the lease, the panel of accountant arbitrators convened in the 1996 arbitration only had the authority to consider disputes concerning "net profits." Therefore, we disagree that Marcy Plaza had a full and fair opportunity to present its overpayment claim then. *Martinez,* 120 N.M. at 122, 898 P.2d at 1260 (showing that claims are not precluded when a party could not seek a certain relief in the first action due to limitations on the subject matter jurisdiction of the first tribunal). As we have also discussed, the Bank failed to introduce sufficient proof showing that Marcy Plaza was aware of the overpayment claim prior to the July 1996 arbitration. *Myers,* 100 N.M. at 748, 676 P.2d at 825 (applying res judicata where husband had the advice of counsel and the opportunity to raise any issue concerning the division of property before he entered into the stipulated final divorce decree). For these reasons, we reject the Bank's argument that Marcy Plaza had a full and fair opportunity to raise its overpayment claim in the 1996 arbitration.

{27} Finally, the Bank argues that all breaches of a lease should be brought at the same time. While that may be true as a general proposition, we find it inapplicable here, because the Bank did not establish that the second "breach" was discovered before the 1996 arbitration and more importantly because the overpayment claim involves different facts and a different claim.

CONCLUSION

{28} We need not and do not decide whether Defendant's claim for overpayments is meritorious. We decide only that it is not barred by res judicata and may be presented for arbitration. Nothing in this opinion is intended to express our view on whether Marcy Plaza should prevail on the merits of its overpayment claim, nor should this opinion be used to attempt to influence the arbitrators.

{29} The decision of the district court is affirmed.

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

WE CONCUR: A. JOSEPH ALARID, Judge, and IRA ROBINSON, Judge.

2002-NMCA-015

40 P.3d 449

Mary E. WALTA, Plaintiff–Counterdefendant–Appellee,

v.

GALLEGOS LAW FIRM, P.C., a New Mexico professional corporation, and J.E. "Gene" Gallegos, Defendants–Counterclaimants–Appellants.

No. 20,913.

Court of Appeals of New Mexico.

Dec. 14, 2001.

Certiorari Denied, No. 27,281, Jan. 28, 2002.

K. Stephen Royce, Maureen A. Sanders, Sanders & Westbrook, P.C., Philip B. Davis, Albuquerque, NM, for Appellee.

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OPINION

BUSTAMANTE, Judge.

{1} This case involves the contested restructuring of a professional corporation engaged in the practice of law. J.E. "Gene" Gallegos (Gallegos) appeals the jury's award of punitive damages in favor of Mary E. Walta (Walta) for breach of fiduciary duties with respect to the purchase of Walta's stock in the corporation. Gallegos argues that the award of punitive damages cannot be supported for three reasons: (1) he fulfilled his fiduciary duties as a majority stockholder of a close corporation in purchasing the stock of a minority shareholder by disclosing all material information bearing on the value of the stock, (2) the "economic loss rule" bars recovery in tort when damages flow from a breach of contract, and (3) punitive damages cannot be awarded absent proof of a culpable state of mind coexistent with the conduct that constitutes the breach of legal duty. We affirm and address the nature of the fiduciary duties shareholders and directors of close corporations owe to each other.

{2} Our discussion of the scope of fiduciary duty will inform our examination of the standard of conduct necessary to support the award of punitive damages in this context.

{3} We decline to address the economic loss rule argument. This argument was not made in any manner or form to the trial court. Gallegos acknowledges this issue was not preserved below, but urges us to apply a fundamental error analysis to reach the issue. We do not believe the issue is appropriate for application of fundamental error. *Gracia v. Bittner*, 120 N.M. 191, 196, 900 P.2d 351, 356 (Ct.App.1995). In fact, given our holding in this case, there was likely no error at all.

BACKGROUND

{4} The Gallegos Law Firm, P.C. (GLF), is a New Mexico professional corporation engaged in the practice of law. Gallegos founded GLF in 1987 and has always served as the corporation's president. Walta joined GLF in January 1990. As of November 1994, GLF had five attorney-shareholders: Gallegos, Walta, Michael Condon, David Sandoval, and Glenn Theriot. At that time, Gallegos owned 4,000 shares (50%) of GLF's stock. Walta owned 2,000 shares (25%) of GLF's stock. The balance of the corporation's 8,000 issued and outstanding shares were held by Condon (1,000 shares), Sandoval (900 shares), and Theriot (100 shares).

{5} While GLF enjoyed reasonable financial success, it experienced sporadic financial pressures during 1993 and 1994. This resulted in some dissension among its shareholders. As early as June 1992, Walta had spoken in opposition to GLF's acceptance of certain contingency fee cases. On a number of occasions, Walta told Gallegos that the manner in which GLF accepted contingency fee cases should be reformed. Walta thought GLF was becoming too indebted on its line of credit because of its contingency case load. Gallegos responded with annoyance at Walta's concerns because he believed his experience made him more qualified than Walta to evaluate such cases.

{6} Walta felt Gallegos often singled her out as the source of his irritation. By 1993 GLF had become heavily involved in several contingent fee matters taken on by Gallegos that were taxing GLF's resources. Despite this, Gallegos had GLF spending heavily, including a corporate aircraft with added pilot and hangar expense. Expenses remained high and the bank lines of credit were heavily utilized. During an April 1993 shareholder meeting, Gallegos abruptly cut off Walta's efforts to discuss GLF's finances, saying:

> [H]e didn't need [her] to tell him how to do—how to manage a firm. That he had been practicing law for 35 years. He didn't need [her] input. He didn't need [her] to tell him how to take cases.... And then he said to [her] "I am sick and tired of you nagging at me. You remind me of one of my ex-wives, and the same

thing is going to happen to you that happened to her if you don't be quiet."

Later in 1993, Gallegos wanted Walta and Condon to sign a personal guarantee for GLF's burgeoning line of credit. When they disagreed with his demand, Gallegos discontinued their stock purchase rights.

{7} In early November 1994, Gallegos invited Walta to lunch. Walta characterized this as an unusual event. He questioned Walta about her future plans, referenced Walta's growing practice, and specifically asked her whether she planned to leave GLF soon. Walta, surprised, said she had no plans to leave. Gallegos then repeated to Walta his "five year plan" to phase out of the practice of law and his desire to implement it. Gallegos indicated to Walta that he did not expect the GLF structure to change as he phased out of active practice.

{8} A few days later on November 27, 1994, Gallegos circulated a memorandum to each of GLF's four other shareholders, including Walta, proposing that GLF purchase their stock, leaving Gallegos the sole shareholder. The memorandum was left on each shareholder's desk on the Sunday evening following Thanksgiving. As an alternative, Gallegos suggested Walta and the other three shareholders could purchase Gallegos' stock with Gallegos departing from the firm if any of the shareholders believed that the proposal was not reasonable and acceptable. The memorandum implied that Gallegos' desire to dissolve GLF was motivated by his wish to devote more time to his family and personal interests, and by a desire to change the manner in which he practiced law.

{9} Walta testified that, immediately upon reading the memorandum, she believed the memorandum "fired" her, that it was directed at getting her out of GLF, and that her departure was a "done deal" over which she had no control. Walta concluded that Gallegos' proposals violated the GLF's by-laws, and she obtained legal advice concerning her rights. Walta kept all this to herself; she did not inform Gallegos that she objected to either proposal set forth in the memorandum until her last day at GLF, four months later on March 31, 1995. Walta testified that she did not talk to Gallegos about the memorandum because of the "angry tone" of the memorandum, and because she feared that Gallegos would retaliate against her for doing so.

{10} The terms of the proposal included that "stock will be surrendered and valued in accordance with the corporate by-laws as of December 31, 1994 and your employment terminated at that time." The firm's by-laws distinguished between "vested" and "non-vested" stock when valuing a departing shareholder's stock surrendered to the corporation. Walta's 2,000 shares of GLF stock included both vested and non-vested stock. For non-vested stock, generally, the shareholder would be paid the equivalent of the purchase price of the stock or no less than "the exact cost of the stock to him or her." Walta and the other shareholders had paid $10 per share. Vested stock was not so easily valued.

{11} Stock became "vested" only if a shareholder had at least three years of employment commencing from "the date that he or she first acquired shares in the corporation." A shareholder surrendering vested stock would receive "present book value ... as of the effective date of termination." The by-laws defined "present book value" as follows:

> [T]he calculation of per share value resulting from total[ ]ing the assets of the corporation, subtracting the liabilities of the corporation, and dividing the net sum, if any, by the number of shares issued and outstanding. For this valuation, the corporate assets shall not include unbilled work in progress, but shall include collectible accounts receivable, including those billed for the month in which the shareholder's termination or disqualification is effective. Present book value shall be calculated as of the effective date of the shareholder's termination or disqualification.

If the computation of "present book value" yielded a negative value, or a value of less than $10 per share, the value of the vested stock would nevertheless be deemed to be the shareholder's acquisition price; $10 per share.

{12} GLF's shareholders met on December 15, 1994. All five shareholders, including

Walta attended. Gallegos solicited responses to the November 27, 1994, memorandum. Walta commented on several aspects of the proposal, such as the need to extend the transition period, the effect of the proposal on the firm's clients, and the need to have time for the clients to decide whether their matters would stay with GLF or go with departing shareholders. It is uncontradicted that, during this meeting, Walta did not raise any concerns about valuation and buy-out of her stock or about the termination of her employment by the firm. At the conclusion of the meeting, Gallegos stated that he was open to extending the shareholders' transition until March 31, 1995; this was eventually done.

{13} On January 4, 1995, GLF's shareholders sent Gallegos a memorandum authored by Walta raising "[a] number of questions ... as to the proposed buy-out," and suggesting a shareholders' meeting to discuss the buy-out. The first of the multiple questions in the memorandum was "[t]iming. Unofficially set for 3/31/95. Is this now a firm date?"

{14} Gallegos responded on January 6, writing "The end of the transition period is firmly March 31, 1995." His memorandum further stated:

> The operative date for stock evaluation is December 31, 1994. While the by-laws provide for options to purchase additional shares in January 1995, it is apparent that would be inappropriate given what I take to be all shareholders' agreement to sell out to the firm. On the same basis that December 31, 1994 is the operative date for buy-out of shares, departing shareholders have no concern regarding 1995 profit or loss. Payment for a departing shareholder's stock will be made on April 1, 1995 in full.

{15} From December 15, 1994, until Walta's departure from GLF on March 31, 1995, Walta and Gallegos met on a number of occasions to discuss year-end firm finances with the firm's accountant, to discuss the transition of client files, to work on pending cases and other matters. Gallegos testified Walta did not ask him about the buy-out of her stock or the financial information for valuing the stock, and she did not venture an estimate of her own as to the value of the stock.

{16} There was evidence that during this time GLF's working atmosphere was very strained. Gallegos communicated with Walta only on a "need to" basis, frequently in writing. Gallegos refused Walta access to GLF's monthly financial statements. Walta had to point out that Condon had access to them to get Gallegos to relent. Gallegos excluded Walta from GLF's presentations to prospective clients, although Condon and Sandoval continued to be included. Though GLF clearly promised to be busy in the months ahead, Gallegos offered Walta no contract work to assist her in her transition. When Walta attempted to purchase office furniture and books from GLF before she left, Gallegos refused, contrary to the offer in his November 27, 1994, memorandum. Walta was permitted to take only the furniture in her office, as was her right under the Shareholder's Agreement, and a few small items for which she paid book value. Walta testified she received no help from Gallegos in finding another job.

{17} Due to her tenure, Walta felt that 1000 shares of her stock was vested. Only Walta and Gallegos owned vested stock. Gallegos had represented in his November 27, 1994, letter that he would proceed under the by-laws in valuing the stock of departing shareholders under his proposed stock buy-out. However, on March 28, 1995, Walta received a copy of a letter from Gallegos to another shareholder, Theriot. As a new shareholder, Theriot was not vested and was not entitled to receive more than par value; ten dollars ($10) per share. Gallegos' letter to Theriot stated that under the "present book value" formula in the by-laws Gallegos had circulated, the stock had a "negative value" on December 31, 1994, and therefore, vested stock would only be valued at par, or $10 per share. Gallegos admitted to the jury that the letter was intended to deliver a message to Walta that she would only be paid $10 per share as well. Gallegos did not disclose that, in arriving at a "negative value" for GLF's stock, he had omitted certain accounts receivable from the calculation be-

cause he thought at that time they were not "collectible accounts receivables" within the definition of present book value in the by-laws.

{18} To value Walta's vested stock, Gallegos testified he used a substitute for GLF's "collectible accounts receivable," and used December 31, 1994, as Walta's termination date. Gallegos testified he did not use actual "collectible accounts receivable" as stated in the by-laws' definition of "present book value" because GLF business practices did not and had never included preparation of a report that provided such information. GLF accounting was on a cash basis, rather than an accrual basis; accordingly no amount for accounts receivable was entered on the regularly produced balance sheets. Gallegos felt that whether or not an account receivable was, in the words of the by-laws "collectible," had to be a judgment call for management to make by manually examining each account and forming an estimate of future collectibility. Gallegos opined that it would have required considerable time and subjective judgment to collect information on accounts receivables and determine whether they were collectible.

{19} Gallegos testified he valued Walta's stock using the same method used by the directors, including Walta, to value vested stock the only other time a shareholder with vested stock had left GLF. That shareholder, Michael Oja, resigned in February 1993. When valuing Oja's vested stock in April 1993, the directors used the dollar amount of accounts billed to clients for February 1993, the month of the shareholder's departure, as a substitute for "collectible accounts receivable." Although that procedure did not comply with the letter of the by-laws, all the directors, including Walta, had agreed to it. That method could result in an amount either more or less than the actual collectible accounts receivable; *e.g.*, billings from the first of the month could be paid and no longer "receivable" but would be included.

{20} Gallegos' method of calculation resulted in a stock value for both vested and nonvested stock of $20,000—the amount Walta had paid for the stock.

{21} At trial, experts for Gallegos, GLF, and Walta had the advantage of hindsight in totaling accounts actually collected after Walta left. Gallegos' expert concluded that as of December 31, 1994, the GLF had accounts receivable of $657,989, and that even under his conservative estimate, the value of Walta's vested shares as of December 31, 1994, was $41,275, not $20,000, as contended by Gallegos. The jury ultimately decided that all of Gallegos's stock was worth $62,550, the amount calculated by Gallegos's expert.

{22} On March 31 Walta left a letter on Gallegos' desk informing him that "I believe my termination of employment with the firm is wrongful and without cause." Walta's letter also stated that she had retained an attorney "as my legal counsel" to whom she had delivered her GLF stock to "work out the surrender of the stock." She wrote: "You have indicated that the value which you will assign to my stock is $10 per share, the cost of the stock. I dispute your valuation, as well as your determination that December 31, 1994 is to be the date upon which the valuation is based."

{23} Walta testified that between the time of Gallegos' stock buyout memorandum and her departure from GLF, it became apparent to her that Gallegos' actual intention in the stock buyout was to convert GLF to a corporation with a sole shareholder—Gene Gallegos, and to restructure the firm to remove only one attorney—Walta. Contrary to Gallegos' prior representations that going forward GLF would be comprised of only himself and a young associate, Walta discovered that before the end of 1994, Gallegos had offered shareholder Michael Condon continued full-time employment as a salaried associate with GLF after March 31, 1995. Condon accepted and was given a salary increase. Gallegos misrepresented to Walta that Condon was only working on contract. Walta also learned that shareholder David Sandoval had been offered continued full-time salaried employment, even though prior to the November 27, 1994, memorandum, Sandoval had already announced his resignation from GLF. Sandoval declined the offer. Walta also learned that Gallegos had offered shareholder Theriot contract employment in-

definitely, without shareholder status. It was only Walta who was not asked to continue at GLF.

{24} In sum, based primarily on her testimony, if believed by a jury, Walta's evidence and theory of the case was to the effect that Gallegos disliked her, was angry at her, was dictatorial in his management of GLF, and that the firm's buy-out of the four attorney-shareholders was accomplished solely to get rid of her.

{25} In a June 6, 1995, letter, Walta's attorney valued her stock at $52,000, based on the valuation set for shareholder Oja in 1993, and the view that Walta's stock was 100% vested. Gallegos testified he disagreed with the amount claimed in the letter because her stock could not have been 100% vested. Gallegos understood the letter as demanding in excess of a half million dollars to settle all of Walta's claims, and not offering to settle any single claim. Walta herself was unsure if she would have accepted payment for her stock unless all of her claims were settled in a package deal. At no point did Walta surrender her stock to GLF, the requisite to being paid for it. Although the by-laws included a provision for arbitration of disputes concerning stock value, no one demanded arbitration. Gallegos' response to these settlement demands, was that he wanted the stock valuation and other issues to be resolved by a court.

PROCEDURAL POSTURE

{26} In July 1996 Walta sued GLF and Gallegos for money damages, alleging six separate claims for relief, including breach of employment contract, breach of obligations owed to shareholders under the shareholder agreement, breach of fiduciary duties, retaliatory discharge, promissory estoppel, and intentional interference with contractual relationship. GLF and Gallegos answered the complaint and counterclaimed. GLF and Gallegos later filed an amended counterclaim against Walta asserting malicious abuse of process.

{27} The trial court directed a verdict against Walta on her retaliatory discharge and promissory estoppel claims and against Gallegos on his malicious abuse of process claim. Thereafter, Gallegos withdrew all of his remaining counterclaims and the matter was submitted to the jury only on Walta's surviving claims.

{28} The jury found in favor of GLF and Gallegos on Walta's breach of employment agreement and interference with contract claims. The jury found in favor of Walta, and against GLF, only on her claim for breach of the shareholder agreement, and in favor of Walta and against Gallegos alone for "breach [of] his fiduciary duties with respect to the Plaintiff's shareholder agreement and to Plaintiff Mary Walta." The jury awarded Walta compensatory damages in the amount of $62,550 against both GLF and Gallegos for the value of her stock. Though Walta requested punitive damages against both Defendants, the jury awarded them only against Gallegos individually, in the amount of $100,000.

{29} Gallegos does not appeal the award of compensatory damages. He makes a two-pronged argument for reversal of the punitive damages award against him. First, he asserts that the fiduciary duty claims should not have been submitted to the jury at all because—if the duty is defined correctly—there was no question he fulfilled his obligations. As a backstop, he also argues that the fiduciary duty instruction given was incomplete and did not provide sufficient guidance to the jury. Second he argues that in the wake of the jury's verdict against Walta on her breach of employment contract and interference with contract claims, there is no evidence of the kind of culpable state of mind necessary to support punitive damages.

SCOPE OF FIDUCIARY DUTY

{30} The parties agree that some sort of fiduciary duty exists between them. They disagree as to its scope.[1]

1. Gallegos posits a four-factor test which is simply too narrow and is incompatible with the high standard of good faith we believe should apply. Gallegos' proposed test is: (a) an officer or director of a close corporation is dealing with a minority shareholder, (b) the purchaser withholds information that if made known would bear materially on the value of the stock, (c) the minority owner sold their stock, and (d) the price received was less than actual value. The test

{31} Gallegos correctly asserts that the nature of the fiduciary duty owed between shareholders and directors of close corporations is a matter of first impression in New Mexico. We have a few cases involving small corporations in conflict, but they do not address this issue. For example, *Schwartzman v. Schwartzman Packing Co.*, 99 N.M. 436, 439, 659 P.2d 888, 891 (1983), involved the common law and statutory duty to allow examination of corporate books, but the court there had no reason to explore the contours of other shareholder's duties. In *McCauley v. Tom McCauley & Son, Inc.*, 104 N.M. 523, 529, 724 P.2d 232, 238 (Ct.App.1986), this Court examined the concept of "oppressive conduct" sufficient to support judicial intervention in corporate affairs under the New Mexico corporation statute in effect at that time. *See also* NMSA 1978, § 53–16–16(A)(1)(b) (1967). *McCauley* is useful to us for its general approach and observations about the characteristic features of close corporation, but it does not address the idea of an enforceable fiduciary duty between shareholders outside the context of the corporation statute's provision for relief from illegal, oppressive or fraudulent conduct. *Id.*, 104 N.M. at 526–29, 724 P.2d at 235–38.

{32} We start by examining the close corporation. In a widely cited opinion, the Massachusetts Supreme Judicial Court defined a close corporation as one "typified by: (1) a small number of stockholders; (2) no ready market for the corporate stock; and (3) substantial majority stockholder participation in the management, direction and operations of the corporation." *Donahue v. Rodd Electrotype Co.*, 367 Mass. 578, 328 N.E.2d 505, 511 (1975). *See generally* O'Neal & Thompson, *O'Neal's Close Corporations* § 1.02 (3rd ed.) (hereafter O'Neal's).

{33} These characteristics of close corporations may sometimes be abused to allow majority shareholders to take advantage of minority shareholders. Minority shareholders are vulnerable to a variety of oppressive devices. These devices include refusing to declare dividends, draining of corporate earnings in the form of exorbitant salaries and bonuses paid to majority shareholders, denying minority shareholders corporate offices and employment, and selling corporate assets to majority shareholders at reduced prices. *Donahue*, 328 N.E.2d at 512–13. This Court noted the same phenomenon as the potential for the "freeze out' or squeeze out' of minority shareholders by use of oppressive tactics." *McCauley*, 104 N.M. at 527, 724 P.2d at 236; *see* O'Neal's §§ 9.02, 9.03.

{34} To combat such tactics, courts have, over the years, recognized various versions of fiduciary duties that majority or controlling shareholders owe to minority shareholders. *See generally* 3 William Meade Fletcher, *Cyclopedia of the Law of Private Corporations* § 838 (rev. perm. ed. 1994 & Cum.Supp. 2000) (asserting that all jurisdictions now recognize a fiduciary duty between officers and shareholders); O'Neal's § 9.19 (same). The general rule has been sufficiently developed by appellate opinions to establish that the fiduciary duty does not depend on shareholder control, but rather arises out of the nature of a closely held corporation. For example, some courts have explicitly recognized that the duty extends to minority shareholders in close corporations. *Zimmerman v. Bogoff*, 402 Mass. 650, 524 N.E.2d 849, 853 (1988); *A.W. Chesterton Co. v. Chesterton*, 128 F.3d 1, 6 (1st Cir.1997). As the *Donahue* court noted "the minority may do equal damage through unscrupulous and improper sharp dealings' with an unsuspecting majority." *Donahue*, 328 N.E.2d at 515 n. 17 (citing *Helms v. Duckworth*, 249 F.2d 482 (1957)).

{35} Starting with its observation that "the close corporation bears striking resemblance to a partnership," *Id.* at 512, the *Donahue* court's formulation stands today as the purest expression of the fiduciary duties owed by shareholders:

> Because of the fundamental resemblance of the close corporation to the partnership, the trust and confidence which are essential to this scale and manner of enterprise, and the inherent danger to minority inter-

imposes an improper requirement when it presupposes an actual sale before a breach can occur. Further, the test does not adequately address the effect of breaches of the shareholders' agreements with regard to stock purchases.

ests in the close corporation, we hold that stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another. In our previous decisions, we have defined the standard of duty owed by partners to one another as the "utmost good faith and loyalty." Stockholders in close corporations must discharge their management and stockholder responsibilities in conformity with this strict good faith standard. They may not act out of avarice, expediency or self-interest in derogation of their duty of loyalty to the other stockholders and to the corporation.

Id. at 515. (Footnotes and citations omitted).

{36} Since the *Donahue* decision, the Massachusetts court has refined its notion of fiduciary duty. Recognizing that self-interest is not necessarily synonymous with improper motivation, the court held that controlling groups should be allowed to demonstrate a legitimate business purpose for their actions. *See Wilkes v. Springside Nursing Home, Inc.*, 370 Mass. 842, 353 N.E.2d 657, 663 (1976). Upon demonstration of such a purpose, the court then determines "the practicability of a less harmful alternative" to the minority interest. *Id.* This common sense approach alleviated the court's concern that "untempered application of the strict good faith standard" could unduly hamper corporate management. *Id.* at 663. This approach provides equilibrium to the majority's need to pursue legitimate business actions and the minority's vulnerability to oppression in a close corporation.

{37} Though formulated somewhat differently, other courts have followed the *Donahue/Wilkes* lead. For example, the Mississippi Supreme Court characterized *Donahue* and other cases as decisions which "evince the evolving awareness by courts of the distinctive characteristics and needs of close corporations." *Fought v. Morris*, 543 So.2d 167, 171 (Miss.1989). The court in *Fought* stated that majority action must be "intrinsically fair" to minority interests and observed that the relationship between shareholders in close corporations was of trust and confidence—the same relationship which prevails in partnerships. *Id.* The Minnesota courts have similarly analogized close corporations to partnerships as a basis for the recognition of fiduciary duties owed between shareholders. *See Berreman v. West Publ'g Co.*, 615 N.W.2d 362, 367 (Minn.Ct.App.2000) and cases cited therein.

{38} We agree with the reasoning and approach of these cases. While the analogy to partnership principles is incomplete because partners are provided more protection by statute from freeze-out tactics than corporate shareholders, it is still useful. *See* NMSA 1978, § 54–1A–401(f), (h), (i), (j) (1997). The analogy recognizes the nature of close corporation organization and, because our partnership case law is reasonably well-developed, it provides a ready source of precedent helping to provide content to the concept of fiduciary duty.[2] *See McCauley*, 104 N.M. at 529, 724 P.2d at 238. Thus, we hold that Gallegos owed Walta a fiduciary duty in his efforts to restructure GLF, including the purchase of her GLF stock. And, drawing on our partnership case law, we hold that breach of this fiduciary duty can be asserted as an individual claim separate from the remedies available under our statutory corporate law for oppressive conduct. *See Fate v. Owens*, 2001–NMCA–040, ¶¶ 23–25, 130 N.M. 503, 27 P.3d 990; Restatement (Second) of Torts § 874 (1977).

{39} Of course, recognizing the fiduciary nature of a relationship does not give it content in any given context. As we noted in *McCauley* with regard to the concept of oppressive conduct, no specific catalog of elements is necessary or perhaps even appropriate. Too narrow a definition of an expansive term would be ossifying. *McCauley*, 104 N.M. at 537, 724 P.2d at 246. We can, however, place this duty in the context of other standards of right conduct recognized

2. We recognize that the legislature has now imposed a statutory fiduciary standard on partnerships. NMSA 1978 § 54–1A–405 (1997). We do not believe the statutory standard affects the common law principles which we cite. However, the statute has not been interpreted by the courts and is not before us directly. Thus, it would be inappropriate for us to opine on its meaning or its effect, if any, in this context.

by the law, and we can provide guidance for analogous cases where restructuring a close corporation includes termination of shareholder/employer and corporate purchase of shares.

{40} First, it seems self-evident that a fiduciary duty is inconsistent with standards of conduct typically at play in arm's-length commercial or business transactions. As Chief Judge Cardozo noted: "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties.... Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 546 (1928). The standard for a fiduciary, in this context, is thus higher than the duty of good faith and fair dealing imposed on all contractual relationships. *Watson Truck & Supply Co. v. Males*, 111 N.M. 57, 60, 801 P.2d 639, 642 (1990).

{41} The duty between shareholders of a close corporation is similar to that owed by directors, officers, and shareholders to the corporation itself; that is, loyalty, good faith, inherent fairness, and the obligation not to profit at the expense of the corporation. *DiLaconi v. New Cal Corp.*, 97 N.M. 782, 788, 643 P.2d 1234, 1240 (Ct.App.1982); *Donahue*, 328 N.E.2d at 515–16.

{42} In adopting the Massachusetts approach, we are clearly aligning ourselves with the line of cases which impose a high duty of candor and good faith when majority shareholders are dealing with minority shareholders. *See, e.g., Orchard v. Covelli*, 590 F.Supp. 1548, 1556–57 (W.D.Penn.1984) (recognizing an enhanced fiduciary duty for directors and officers when dealing with minority shareholders in a close corporation); *cf. Van Schaack Holdings, Ltd. v. Van Schaack*, 867 P.2d 892, 897 (Colo.1994) (en banc) (adopting the "special facts" doctrine to impose an enhanced fiduciary duty to fully disclose material information bearing on the value of stock when purchased by the close corporation). While some commentators would label the approach we adopt as the "minority view," our review of the case law informs us that it is actually the prevalent view among those courts which have addressed the issue. *See* P.A. Agabin, Annotation, *Duty and Liability of Closely Held Corporation, its Directors, Officers or Majority Stockholders, in Acquiring Stock of Minority Shareholder*, 7 A.L.R.3d 500 (1966 & 2000 Supp.); 3A *Fletcher Cyclopedia of the Law of Corp., supra*, §§ 1167–71; O'Neal's § 9.21.

{43} Having generally defined the rigor of the fiduciary duty, one must apply it to specific aspects of the legal relationship between shareholders in a close corporation. Issues are most likely to arise in connection with valuation of the stock, the related matter of disclosure of material facts relating to corporate officers, and adherence to contractual obligations between the shareholders.

{44} The duty of full disclosure of material facts affecting the value of stock has been dealt with often by the courts. The majority of the cases impose a duty of full, voluntary disclosure. *Van Schaack*, 867 P.2d at 898; *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 435 (7th Cir.1987) ("Close corporations buying their own stock, like knowledgeable insiders of closely held firms buying from outsiders, have a fiduciary duty to disclose material facts."); *Thorne v. Bauder*, 981 P.2d 662, 664 (Colo.Ct.App.1998); *Shermer v. Baker*, 2 Wash.App. 845, 472 P.2d 589, 594 (1970); *Berreman*, 615 N.W.2d at 371. The requirement of full disclosure felicitously acts to equalize bargaining positions where valuation is typically difficult. The cases are clear that the duty requires disclosure beyond mere access to the books and records of the corporation. *Van Schaack*, 867 P.2d at 898–99; *Michaels v. Michaels*, 767 F.2d 1185, 1200 (7th Cir.1985). Our cases have consistently held that partners, as fiduciaries, are "required to fully disclose material facts and information relating to partnership affairs to the other partners, even if the other partners have not asked for the information." *Fate*, 2001–NMCA–040, ¶ 25, 130 N.M. 503, 27 P.3d 990.

{45} In accordance with these authorities, we hold as a matter of New Mexico law that a majority shareholder, as well as an officer or director of a close corporation,

when purchasing the stock of a minority shareholder, has a fiduciary obligation to disclose material facts affecting the value of the stock which are known to the purchasing shareholder, officer, or director by virtue of his position, but not known to the selling shareholder. We adopt the standard for what information is material established by the United States Supreme Court in *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct. 2126, 48 L.Ed.2d 757, (1976) (An omission or misstatement is material if there is a "substantial likelihood that, under all the circumstances, the omitted [or misstated] fact would have assumed actual significance in the deliberations of the reasonable shareholder.")

{46} This case—as perhaps most cases of this kind will—includes a shareholder agreement. It is undisputed that Gallegos and GLF did not follow the letter of the shareholder agreement embodied in the GLF by-laws, either as to Walta's termination as an employee or the valuation of her shares in connection with the proposed buy-out.[3] What is the nature of the fiduciary duty arising from shareholder agreements and when may non-compliance with such agreements be deemed a breach of the duty? This case is similar to *Fought v. Morris.* There, one of the shareholders wanted to sell his shares. Morris bought all of the departing shareholders' stock—contrary to the stock redemption agreement controlling such events between them. Thereafter, Morris "froze out" Fought and offered to buy his shares at an improperly reduced price which was calculated contrary to the formula set forth in their agreement. *Fought,* 543 So.2d at 171–72. The Mississippi court held that breach of the shareholder agreement could also be a breach of the majority's fiduciary duty. The Court went on to hold that both the improper purchase and the improper value calculation were actionable breaches of Morris' fiduciary duty.

{47} We adopt the *Fought* court's reasoning, noting, however, that not every noncompliance with a shareholder agreement is necessarily a breach of fiduciary duty—but in appropriate circumstances may be. As with most matters of judgment, whether a breach of fiduciary duty has occurred will normally be a question of fact for the jury.

{48} We pause to note that the fiduciary duty we define here is a default standard applicable in the absence of a contrary agreement between shareholders. Shareholders are free to agree to different standards as long as the essence of right conduct is preserved.

ADEQUACY OF JURY INSTRUCTIONS

{49} Gallegos also argues that under any standard the jury was not properly instructed as to the scope of Gallegos' fiduciary duty. We disagree. The jury was given the following instructions:

INSTRUCTION NO. 33

Each shareholder in a closely-held corporation such as the Gallegos Law Firm occupies a fiduciary relationship with each other.

INSTRUCTION NO. 34

A fiduciary relationship exists whenever a special confidence is reposed in one person who in equity and good conscience is bound to act in good faith and with due regard to the interests of the person reposing the confidence.

Gallegos' requested instruction read as follows:

DEFENDANTS' AND COUNTERCLAIMANTS' REQUESTED JURY INSTRUCTION NO. 34

Each shareholder in a closely-held corporation such as [the] Gallegos Law Firm occupies a fiduciary relationship with each

3. The jury found against Walta on her breach of employment contract claim. Thus, the jury decided that non-compliance with the by-laws as to her employment status was not actionable. The basis for that decision need not detain us since Walta has not appealed the verdict against her. However, resolution of the employment status says nothing about the jury's resolution of the issues surrounding Walta's status as a shareholder.

other shareholder. These fiduciary duties of each shareholder include:

1. the duty of loyalty to each other;
2. the duty to fully disclose material facts regarding transactions and dealings with each other;
3. the duty to deal openly, honestly and fairly with other shareholders;
4. the duty to avoid self-seeking conduct and self-dealing; and
5. the duty of good faith and fair dealing with respect to other shareholders.

Failure to comply with any of these duties is a breach of fiduciary duty.

Donahue v. Rodd Electrotype Co., 367 Mass. 578, 328 N.E.2d 505 (1975); *Evans v. Biesi,* 345 N.W.2d 775 (Minn.Ct.App. 1984); *American Federal Group, Ltd. v. Rothenberg,* 136 F.3d 897 (2nd Cir.1998).

Four observations emerge from our examination of Gallegos' requested instruction. First, it does not match the standard he now argues for in this appeal. Second, it does not address in any adequate way one of the aspects of fiduciary duty most relevant here; that is, adherence to the shareholder agreement and fair pricing. Third, to the extent paragraph five of the instruction refers to the standard duty of good faith, it is incorrect and could have been misleading and harmful to jury consideration of the case.

{50} Fourth, the instruction is drawn from the *Donahue* formulation we rely upon in part for our decision. Thus, we do not disagree with the numbered duties that the instruction includes, with the exception of number five. These illustrative duties may well in the future become parenthetical alternatives in a general fiduciary duty uniform jury instruction. The question for us, however, is whether the failure to give them here requires reversal. We do not believe so. The instructions given adequately covered the subject. Instructions 33 and 34 conveyed the essence of the honest right conduct required of close corporation shareholders. Specific application of the general principle of right conduct could be, and was, dealt with in argument by counsel.

{51} Finally, we fail to see how giving the requested instruction could have been of any help to Gallegos in swaying the jury to his position. If anything, the four *Donahue* factors would in our view make it easier for the jury to find against Gallegos. Thus, we see no prejudice to Gallegos even if we assume that refusing his instruction was somehow erroneous.

{52} In this case there was evidence to support a jury conclusion that Gallegos breached his fiduciary obligations owed to Walta. As majority shareholder of a close corporation, as well as an officer and director, Gallegos had a duty of openness to disclose material facts affecting the value of the stock in regard to the proposed buy-out. The shareholder agreement defined that duty in more detail. At the very least, that duty included compliance with the valuation formula set forth in the shareholder agreement, or a full and frank disclosure of any deviation from that formula and the reasons why.

{53} The record supports a conclusion that Gallegos did neither. He purposely omitted a valuation for the collectible accounts receivables and did not disclose that fact to Walta. Then, when confronted by Walta, Gallegos continued to refuse to perform his obligations under the shareholder agreement. The jury found the corporation liable for breach of the shareholder agreement. That breach was a direct result of Gallegos' failure to respect Walta's rights as a minority shareholder, in the particular context of a buy-out, and, as the jury also found, to fulfill his obligations to her as a fiduciary. We conclude that both the law, as previously discussed, and the facts, as elicited at trial, support a jury verdict that Gallegos breached his fiduciary obligations in his dealing with Walta.

STANDARD OF CONDUCT FOR PUNITIVE DAMAGES

{54} Gallegos' evidentiary challenge to the award of punitive damages has two aspects. First, he argues that evidence of conduct unrelated to the stock valuation cannot be used to support punitive damages. Second, he asserts that the evidence left, after clearing the chaff, is not sufficient to support a finding of the sort of culpable mental state required by our case law to impose punitive

damages. Walta disagrees with Gallegos' effort to parse the evidence so closely. Walta further argues that separate proof of a culpable mental state is not required to impose punitive damages, and that proof of the conduct required to support the basic tort of breach of fiduciary duty is sufficient to support punitive damages.

{55} We hold that New Mexico's general approach to punitive damages applies to breach of fiduciary duty cases such as this. Thus, a finding of a culpable mental state is necessary in order to impose punitive damages. However, we disagree with Gallegos' approach to consideration of the evidence.

{56} Our Supreme Court's decision in *Paiz v. State Farm Fire & Cas. Co.,* 118 N.M. 203, 211, 880 P.2d 300, 308 (1994) signaled a new approach to the imposition of punitive damages in New Mexico. Reaffirming the limited purpose of punitive damages—to punish and deter—*Paiz* required a showing of "evil motive" or a "culpable mental state." *Id.* That standard has been applied and refined thereafter in different contexts, but the requirement remains the same. There must be evidence of culpable conduct beyond that necessary to establish the underlying cause of action. *See Jones v. Lee,* 1999-NMCA-008, ¶¶ 26-27, 126 N.M. 467, 971 P.2d 858 (involving breach of contract to purchase residence); *Allsup's Convenience Stores v. N. River Ins. Co.,* 1999-NMSC-006, ¶¶ 26-27, 127 N.M. 1, 976 P.2d 1 (involving claim against insurance company for failure to properly administer a worker compensation policy); *Teague-Strebeck Motors, Inc. v. Chrysler Ins. Co.,* 1999-NMCA-109, ¶¶ 76-90, 127 N.M. 603, 985 P.2d 1183 (noting distinction between "bad faith" sufficient to support compensatory damages and "bad faith" meriting punitive damages in first party insurance bad faith cases).

{57} We see no reason why this principle should not apply in the context of this case. The underlying purpose of punitive damages as punishment and deterrence remains the same. We can conceive of breaches of fiduciary duty sufficient to support compensatory, but not punitive, damages. Even in this area, culpability can and should be "measured on a continuum of reasonableness imposed in light of" a shareholder's fiduciary obligation. *Id.* ¶ 88. The continuum is influenced by the standard of conduct imposed on the actor. The more stringent the standard of conduct, the more likely that breach of the standard will demonstrate a culpable mental state. *Id.*

{58} Our holding is consistent with cases outside of New Mexico which consider the issue. *See In re Estate of Wernick,* 127 Ill.2d 61, 129 Ill.Dec. 111, 535 N.E.2d 876, 886-87 (1989) (noting that punitive damages are available in breach of fiduciary cases but that appropriate imposition of punitives is dependent on the specific facts of each case and whether those facts can be characterized as wanton, malicious or aggravated); *Bresnahan v. Bresnahan,* 115 Md.App. 226, 693 A.2d 1, 7-9 (1997) (noting distinction between proof sufficient to support compensatory award and proof of actual malice to support punitive damages and holding that this general rule applied to case of breach of fiduciary duty).

EVIDENCE IN SUPPORT OF A CULPABLE MENTAL STATE

{59} The question remains whether there is substantial evidence supporting the punitive damages award here. As with challenges to factual findings, our review resolves all disputes in favor of the jury's finding, indulging all reasonable inferences in favor of the verdict. *Pub. Serv. Co. of N.M. v. Diamond D Constr., Inc.,* 2001-NMCA-082, ¶ 36, 131 N.M. 100, 33 P.3d 651.

{60} Gallegos argues that the only evidence relevant to the breach of the shareholder agreement and his attendant fiduciary duty is: "that the law firm did not have accounts receivable information; that Gallegos followed the method used to value Oja's vested stock by substituting the available current billing accounts for the unavailable collectible accounts receivable amounts; that Walta had approved this method when the departing shareholder was Oja."

{61} Gallegos asks us to disregard all of the other evidence in the case because, in his view, it is only relevant to the employment claims which were decided in his favor. We disagree with Gallegos' approach. Our

case law makes clear that conduct in a given context should not be unduly compartmentalized when analyzing the sufficiency of evidence to support a verdict. *See Clay v. Ferrellgas, Inc.,* 118 N.M. 266, 269–71, 881 P.2d 11, 15–16 (1994) (holding that consideration of individual employee acts without consideration of the aggregate circumstances is improper); *Hinger v. Parker & Parsley Petroleum Co.,* 120 N.M. 430, 445, 902 P.2d 1033, 1048 (Ct.App.1995) (same).

{62} Here we are not dealing with different persons. Rather, we are dealing with distinguishable relationships involving the same persons. Gallegos asserts that his acts can be neatly severed, one from the other, and then deemed relevant to one cause of action or solely to another. We do not think the evidence can be so neatly separated. And, we think it is improper to attempt to do so. The events surrounding the restructuring of GLF were interconnected. Termination of Walta as an employee and as a shareholder occurred and were dealt with by Gallegos and Walta simultaneously in the same meetings and the same writings. It would be sheer speculation for us to say that a particular act or writing—much less Gallegos' personal motivation—should or can be ascribed to one cause of action or another.

{63} It would be even more speculative and improper to attempt to divine how the jury saw and analyzed the evidence. We cannot know the basis for the jury decision in favor of Gallegos on the employment claims on even the grossest level. Therefore, that verdict cannot be used to say—as Gallegos does—that all evidence conceivably pertinent to the employment claims were resolved in Gallegos' favor and cannot be considered to support the punitive damage award.

{64} Viewing the record in the light most favorable to support the jury verdict, we believe a rational jury could conclude that Gallegos misrepresented his intentions with regard to the restructuring of the firm and that his actions detailed above were motivated by a desire to rid himself only of Walta. Thus, a rational jury could conclude that he improperly exercised his power as the majority shareholder to squeeze the minority shareholder out of her ownership and employment position. A rational jury could find that Gallegos deliberately, improperly, and for no acceptable reason undervalued her shares using a method of valuation clearly contrary to the corporate shareholder agreement while asserting he was following the agreement. A rational jury could find that Gallegos did not properly disclose either his method of valuation or the information material to a proper valuation of the shares until required to do so in this litigation. A rational jury could find that even under his method, Gallegos knowingly undervalued the amount of reasonably collectible accounts receivable. A rational jury could find that Gallegos knowingly failed to conduct himself in a manner consistent with the fiduciary duty he owed to minority shareholders, instead using "hard-ball" tactics more in keeping with arm's-length transactions. Viewing the evidence cumulatively in light of the fiduciary duty applicable, a rational jury could find that Gallegos' conduct was sufficiently culpable to merit punishment. We will not second-guess that assessment.

{65} Finally, Gallegos' argument that ambiguities in the shareholder agreement preclude punitive damages is unavailing. The ultimate question was whether Gallegos' interpretation of the agreement was reasonable, thus precluding a finding of a culpable state of mind. *Pub. Serv. Co. of N.M.* ¶ 43. Gallegos' use of the Oja valuation method would not necessarily be a breach of his duty in the first instance. But, his use of it contrary to his statement that he would follow the by-laws, and his continued adherence to it after Walta voiced her objection, create at least a question of fact for the jury about Gallegos' state of mind.

CONCLUSION

{66} Finding no error in the trial court's submission of punitive damages to the jury, and finding substantial evidence to support the jury's verdict, we affirm.

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

WE CONCUR: RICHARD C. BOSSON, Chief Judge, and A. JOSEPH ALARID, Judge.

2002-NMSC-003
40 P.3d 1002

STATE of New Mexico, Plaintiff–Respondent,

v.

Michael TONEY, Defendant–Petitioner.

No. 26,618.

Supreme Court of New Mexico.

Feb. 1, 2002.

Gary C. Mitchell, P.C., Gary C. Mitchell, Ruidoso, NM, Garza Law Firm, Carmen E. Garza, Las Cruces, NM, Susan Gibbs, Santa Fe, NM, for Petitioner.

Patricia A. Madrid, Attorney General, Joel Jacobsen, Assistant Attorney General, Santa Fe, NM, for Respondent.

OPINION

SERNA, Chief Justice.

{1} Defendant Michael Toney was convicted following a jury trial of two counts of false imprisonment and one count of tampering with evidence. Defendant appealed a single issue, relating to a single count of false imprisonment, to the Court of Appeals: whether the trial court erred in admitting hearsay

testimony, either under the Rules of Evidence or under the Confrontation Clause of the Sixth Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment. The Court of Appeals affirmed by memorandum opinion based on this Court's opinions in *State v. Gonzales,* 1999–NMSC–033, 128 N.M. 44, 989 P.2d 419, *cert. denied,* 529 U.S. 1025, 120 S.Ct. 1434, 146 L.Ed.2d 323 (2000), and *State v. Torres,* 1998–NMSC–052, 126 N.M. 477, 971 P.2d 1267. This Court then granted Defendant's petition for writ of certiorari. We affirm.

I. Facts

{2} The State charged Defendant with murder, false imprisonment, tampering with evidence, and various other crimes for his role in Ty Lowery's death. Defendant and several others were involved in an altercation with Lowery at Defendant's house. Lowery was shot at close range. Two witnesses, including Robert Aragon, an employee of Defendant, testified that Claudia Moreno shot Lowery. Adam Montoya, another employee of Defendant, took the wounded Lowery to a remote area and left him to die. Lowery's body was found at the remote location the following day. At trial, the State advanced the theory that Defendant ordered Moreno to shoot Lowery and then ordered Montoya to leave Lowery in an isolated area to die. The jury returned a verdict of guilty on two counts of false imprisonment and one count of tampering with evidence.

II. Discussion

{3} The sole issue presented to this Court is whether the trial court erred in admitting an out-of-court statement. Specifically, Defendant complains about Aragon's testimony concerning an out-of-court statement made to him by Montoya. Aragon had been at Defendant's house on the night of the shooting and left after witnessing the shooting. Aragon encountered Montoya the following day and testified that he asked Montoya what happened after he, Aragon, had left Defendant's house following the shooting. Aragon testified: "[Montoya] proceeded to tell me that he had driven [the victim] to the river on the direction from [Defendant], to leave [the victim] at the river." We note that this testimony implicitly contains two out-of-court statements: (1) Defendant's statement to Montoya to leave the victim at the river; and (2) Montoya's statement to Aragon that he took the victim to the river on Defendant's direction on the previous night. The first statement is not hearsay. Defendant's statement to Montoya was a directive or a command and was offered not for its truth but for the fact that it was made. *See* Rule 11–801(C) NMRA 2002; *Jim v. Budd,* 107 N.M. 489, 491, 760 P.2d 782, 784 (Ct.App.1987) (stating that "statements or conduct which are non-assertive are not hearsay," that "implied assertions are not hearsay," and that "[t]he words, 'let the gates down against the chain,' is a direction and not an assertion that would either be true or false"); *see also* Fed.R.Evid. 801 advisory committee's note; *cf. State v. Ross,* 1996–NMSC–031, 122 N.M. 15, 20 n. 2, 919 P.2d 1080, 1085 n. 2 (concluding that a statement did not raise a "hearsay within hearsay" issue because the statement made by another to the declarant was not offered for its truth). Moreover, as the Court of Appeals observed, this statement would have been an admission by a party-opponent rather than hearsay even if it had been offered for its truth. Rule 11–801(D)(2)(a). The second statement identified above, however, is hearsay. Rule 11–801(C). The State offered Montoya's statement to Aragon under an exception to the hearsay rule, Rule 11–804(B)(3) NMRA 2002, and the trial court admitted the statement on this basis. Rule 11–804(B)(3) provides that a statement is not excluded by the hearsay rule if the declarant is unavailable and the statement "so far tended to subject the declarant to ... criminal liability ... that a reasonable person in the declarant's position would not have made the statement unless believing it to be true."

{4} Defendant does not challenge Montoya's unavailability. Defendant limits his claim of error to his contention that Montoya's statement was not a statement against penal interest. In particular, Defendant claims that Montoya's statement to Aragon shows blame shifting and is therefore inherently unreliable. According to Defendant,

this statement shows that Montoya was asserting a duress defense to Montoya's involvement in the crime. Defendant also claims that Aragon had a motive to lie because he made a deal with the State, which also made the statement unreliable. Thus, Defendant claims that the trial court abused its discretion in finding that this was a statement against penal interest admissible under Rule 11–804(B)(3).

{5} As an initial matter, we point out that Aragon's motive to lie, as opposed to the declarant Montoya's, is wholly irrelevant to the question of the admissibility of Montoya's statement as an exception to the hearsay rule. Aragon testified in court and was subject to full and complete cross-examination. The hearsay rule is not concerned with the veracity of the testifying witness. "The test under the catch-all rules is whether the out-of-court statement—not the witness's testimony—has circumstantial guarantees of trustworthiness. The credibility of the witness, who is subject to cross-examination, is irrelevant to the trustworthiness analysis." *State v. Williams,* 117 N.M. 551, 561, 874 P.2d 12, 22 (1994).

{6} With respect to Defendant's argument that the statement was not against Montoya's penal interest, we believe that the trial court correctly ruled that the statement is admissible under Rule 11–804(B)(3). Montoya's reference to his own involvement in the crime clearly falls within the parameters of this exception to the hearsay rule. Montoya admitted his involvement in serious crimes, including murder, and a reasonable person acting under similar circumstances would not have done so unless believing the statement to be true. Defendant argues, however, that Montoya's specific reference to acting on Defendant's direction is not against Montoya's penal interest. Defendant's argument is contrary to this Court's holdings in *Torres* and *Gonzales.* Montoya's reference to Defendant is a "facially-neutral but contextually-incriminating detail[ ] [that] may be admitted if a reasonable person in the declarant's position would not have revealed [it] unless believing [it] to be true due to [its] strong tendency to subject the declarant to criminal liability." *Torres,* 1998–NMSC–052, ¶ 14, 126 N.M. 477, 971 P.2d 1267. As with the statements at issue in *Torres* and *Gonzales,* Montoya's statement implicated him in serious crimes. The part of the statement referring to Defendant would provide necessary context to explain Montoya's motive for taking the victim to the river. This part of the statement also supports a conspiracy between Montoya and Defendant. The detail of Defendant's involvement "would significantly aid law enforcement officials in securing criminal liability" against Montoya, the declarant. *Torres,* 1998–NMSC–052, ¶ 17, 126 N.M. 477, 971 P.2d 1267; *accord Gonzales,* 1999–NMSC–033, ¶ 11, 128 N.M. 44, 989 P.2d 419. Further, as with the declarant in *Gonzales,* Montoya "made his statement to an acquaintance in casual conversation. There is no indication that [he] did not understand his statement to be disserving or that [he] made his statement pursuant to self-interest or some other countervailing motive." 1999–NMSC–033, ¶ 34, 128 N.M. 44, 989 P.2d 419. Contrary to Defendant's assertion, there is no indication from Montoya's statement that Montoya believed that he acted under duress. Furthermore, there is no apparent reason for Montoya to have made a false assertion of duress to an acquaintance before becoming a suspect in the killing. We do not believe that Montoya's statement can reasonably be interpreted as shifting blame to Defendant.

{7} In short, Montoya's statement "so far tended to subject [him] to . . . criminal liability . . . that a reasonable person in [Montoya's] position would not have made the statement unless believing it to be true." Rule 11–804(B)(3). Montoya's statement contains none of the dangers associated with out-of-court statements because his statement was unambiguous, it was genuinely contrary to his penal interest, it described events occurring on the night before the statement, and it concerned actions taken directly by Montoya. *See Williams,* 117 N.M. at 560–61, 874 P.2d at 21–22 (discussing "the four primary dangers of hearsay," including the danger that the witness misinterpreted the declarant, the danger that the declarant consciously lied, the danger that the declarant had a faulty memory, and the danger that the declarant

misperceived events). The trial court did not abuse its discretion in admitting the statement under Rule 11–804(B)(3).

{8} Defendant also contends that the admission of Montoya's statement violates the Confrontation Clause in the Sixth Amendment to the United States Constitution, as applied to New Mexico through the Fourteenth Amendment. Although Defendant references the right of confrontation in the New Mexico Constitution, he neither cites the specific provision in the Constitution providing this protection nor argues that the New Mexico Constitution should be interpreted more broadly than the Sixth Amendment in this context. *See State v. Gomez,* 1997–NMSC–006, ¶¶ 22–23, 122 N.M. 777, 932 P.2d 1 (discussing preservation requirements for a state constitutional argument). In any event, this Court's opinion in *Torres* adequately addresses Defendant's reference to the state constitution. *Torres,* 1998–NMSC–052, ¶¶ 25, 26 n. 3, 32, 126 N.M. 477, 971 P.2d 1267. Therefore, we limit our discussion to Defendant's right of confrontation under the Sixth and Fourteenth Amendments to the United States Constitution.

{9} In order to protect a defendant's right of confrontation, the United States Supreme Court has indicated that an out-of-court statement made by an unavailable declarant which is offered against an accused must "bear[ ] 'adequate indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Ohio v. Roberts,* 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). In *Torres,* this Court held that Rule 11–804(B)(3) is a firmly rooted exception to the hearsay rule for Confrontation Clause purposes, largely because we had limited the reach of Rule 11–804(B)(3) in accordance with the United States Supreme Court's interpretation of Federal Rule of Evidence 804(b)(3) in *Williamson v. United States,* 512 U.S. 594, 599–604, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994). *See Torres,* 1998–NMSC–052, ¶¶ 29–32, 126 N.M. 477, 971 P.2d 1267. However, Defendant contends that Montoya's statement must be viewed as inherently unreliable pursuant to the plurality opinion of the United States Supreme Court in *Lilly v. Virginia,* 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999). Defendant's contention is inconsistent with our discussion of *Lilly* in *Gonzales.*

{10} In *Lilly,* the plurality stated that the category of declarations against penal interests, as interpreted under Virginia's rules of evidence, is too broad to make generalizations for purposes of a Confrontation Clause analysis and that accomplices' confessions to police inculpating a criminal defendant do not fall within a firmly rooted hearsay exception and therefore must be examined under the "particularized guarantees of trustworthiness" prong of the Confrontation Clause inquiry. *Id.* at 127, 134–36, 119 S.Ct. 1887 (plurality opinion). The defendant in *Gonzales,* like Defendant in the present case, argued that our Confrontation Clause analysis in *Torres* was in conflict with *Lilly. Gonzales,* 1999–NMSC–033, ¶ 32, 128 N.M. 44, 989 P.2d 419. We unanimously rejected this argument for two reasons. First, we believed that *Lilly* was distinguishable on its facts. *Gonzales,* 1999–NMSC–033, ¶ 34, 128 N.M. 44, 989 P.2d 419. *Lilly* involved a statement given to the police during a custodial interrogation in response to leading questions, and the declarant asserted that the defendant killed the murder victim. *Id.; see United States v. Shea,* 211 F.3d 658, 669 (1st Cir.2000) ("*Lilly's* main concern was with statements in which, as is common in police-station confessions, the declarant admits only what the authorities are already capable of proving against him [or her] and seeks to shift the principal blame to another (against whom the prosecutor then offers the statement at trial)."), *cert. denied,* 531 U.S. 1154, 121 S.Ct. 1101, 148 L.Ed.2d 973 (2001). By contrast, like the present case, *Gonzales* involved a statement made to an acquaintance in casual conversation, and the declarant acknowledged an active role in the killing. *Gonzales,* 1999–NMSC–033, ¶ 34, 128 N.M. 44, 989 P.2d 419.

{11} Second, we rejected the defendant's reliance on *Lilly* in *Gonzales* because we concluded that *Lilly* did not preclude a de-

termination that New Mexico's Rule 11–804(B)(3) is a firmly rooted exception. *Gonzales,* 1999–NMSC–033, ¶ 36, 128 N.M. 44, 989 P.2d 419. Beyond the fact that the firmly rooted exception discussion in *Lilly* was contained in a plurality opinion, and thus is not binding on this Court, *see Shea,* 211 F.3d at 669 (stating that "*Lilly's* full reach may be unclear [because] there was no single 'majority' opinion"); *Taylor v. Commonwealth,* 63 S.W.3d 151, 167 (Ky.2001) ("As a plurality opinion, [*Lilly*] is not binding precedent on the issue of whether statements against penal interests are 'firmly rooted' for Confrontation Clause purposes."), we noted in *Gonzales* that "the co-conspirator's confession in *Lilly* would have failed to qualify as a statement against penal interest in New Mexico under Rule 11–804(B)(3), because the confession in that case did not inculpate the declarant as to the murder." *Gonzales,* 1999–NMSC–033, ¶ 37, 128 N.M. 44, 989 P.2d 419. Thus, *Lilly* concerned a broader exception to the hearsay rule than New Mexico's Rule 11–804(B)(3). As a result, based on our more restrictive construction of Rule 11–804(B)(3) in accordance with the Supreme Court's opinion in *Williamson,* we determined that New Mexico's Rule 11–804(B)(3) is a firmly rooted exception to the hearsay rule because "the 'particularized guarantees of trustworthiness' imposed by the federal Confrontation Clause are inherently and necessarily a part of the statement-against-interest analysis under our Rule 11–804(B)(3)." *Gonzales,* 1999–NMSC–033, ¶ 39, 128 N.M. 44, 989 P.2d 419; *accord United States v. Gallego,* 191 F.3d 156, 167 n. 5 (2d Cir.1999) (declining to decide whether Federal Rule of Evidence 804(b)(3), as interpreted in *Williamson,* is a firmly rooted exception but noting that *Lilly* "does not foreclose [that] possibility" because "any hearsay statement admitted consistent with the requirements of Rule 804(b)(3) . . . is considerably more reliable than the largely 'non-self-inculpatory' declaration disapproved by the plurality in *Lilly* "). In a recent unanimous opinion, we "reaffirm[ed] that, in New Mexico, a statement against penal interest within the meaning of Rule 11–804(B)(3) is a firmly rooted exception to the hearsay rule." *State v. Martinez–Rodriguez,* 2001–NMSC–029, ¶ 27, 131 N.M. 47, 33 P.3d 267.

{12} As we determined in *Gonzales, Lilly* is distinguishable from this case because Montoya made his statement to an acquaintance in a casual conversation rather than to the police during a custodial interrogation. For Confrontation Clause purposes, this distinction is critical. *See, e.g., Denny v. Gudmanson,* 252 F.3d 896, 903 (7th Cir.), *cert. denied,* — U.S. ——, 122 S.Ct. 311, 151 L.Ed.2d 232 (2001); *United States v. Westmoreland,* 240 F.3d 618, 627–28 (7th Cir. 2001); *United States v. Boone,* 229 F.3d 1231, 1234 (9th Cir.2000), *cert. denied,* 531 U.S. 1170, 121 S.Ct. 1138, 148 L.Ed.2d 1002, *and cert. denied,* 532 U.S. 1013, 121 S.Ct. 1747, 149 L.Ed.2d 669 (2001); *Shea,* 211 F.3d at 669; *Stevens v. People,* 29 P.3d 305, 312–13 (Colo.2001); *State v. Henderson,* 620 N.W.2d 688, 697–98 (Minn.2001); *State v. Issa,* 93 Ohio St.3d 49, 752 N.E.2d 904, 919 (2001). Because Montoya's statement is admissible under Rule 11–804(B)(3) and was not made during a custodial interrogation, Montoya's statement necessarily contains particularized guarantees of trustworthiness, and it is unnecessary for us to undertake any further inquiry into Defendant's Confrontation Clause argument.

III. Conclusion

{13} The trial court did not abuse its discretion in finding the statement was admissible under Rule 11–804(B)(3) as a statement against penal interest. The admission of the statement did not violate the Confrontation Clause. We affirm Defendant's convictions of two counts of false imprisonment and one count of tampering with evidence.

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

WE CONCUR: JOSEPH F. BACA, Justice, PAMELA B. MINZNER, Justice, PETRA JIMENEZ MAES, Justice.

GENE E. FRANCHINI, Justice (dissenting).

FRANCHINI, Justice (dissenting).

{15} I respectfully dissent.

{16} Adam Montoya did not testify at trial and therefore was not subject to cross-examination. However, over objection, Robert Aragon testified that Montoya told him that Defendant instructed Montoya to "leave [the victim] at the river." Montoya's statement to Aragon was hearsay and could not be admitted unless, pursuant to Rule 11–804(B)(3) NMRA 2002, it "so far tended to subject [Montoya] to ... criminal liability ... that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." It is my opinion that because Montoya's statement attempted to shift blame from himself to Defendant, it was more exculpatory than inculpatory, and therefore lacked sufficient reliability to exempt it from the hearsay rule.

{17} Furthermore, I agree with Defendant that the United States Supreme Court, in a plurality opinion, has expressed distrust for precisely this sort of evidence. *Lilly v. Virginia*, 527 U.S. 116, 131, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999). In *Lilly*, the Court recognized that "accomplices' confessions that incriminate defendants" are "presumptively unreliable." *Id. See also Denny v. Gudmanson*, 252 F.3d 896, 903 (7th Cir.2001) (describing "a confession that shifts or spreads blame from the declarant to incriminate co-criminals" as the type of statement "whose reliability is particularly suspect"). The record is devoid of other indications of reliability that would overcome my initial distrust. It is my opinion that the trial court's admission of this evidence without the possibility of cross-examination violates the confrontation clauses of both the United States and New Mexico constitutions. Contrary to the majority's conclusion, I would reverse the Court of Appeals and remand for a new trial on one count of false imprisonment.

2002-NMCA-017

40 P.3d 1009

Cecilia SANCHEZ, *individually*, and Cecilia Sanchez, as parent and guardian of Justin Sanchez, a minor child, Plaintiff–Appellee,

v.

Paul KIRBY, Defendant–Appellant,

and

Infinity Insurance Company, Defendant.

No. 21,198.

Court of Appeals of New Mexico.

Nov. 27, 2001.

David J. Berardinelli, Berardinelli & Associates, Santa Fe, NM, for Appellee.

Nathan H. Mann, Nancy Franchini, Gallagher, Casados & Mann, P.C., Albuquerque, NM, for Appellant.

OPINION

SUTIN, Judge.

{1} Defendant Paul Kirby's motion for rehearing is denied. The opinion filed in this case is withdrawn and this opinion is substituted in its place.

{2} Plaintiff Cecilia Sanchez has filed two motions to dismiss Defendant Paul Kirby's appeal from a judgment against him for compensatory and punitive damages. The first asserts lack of jurisdiction; the second asserts the issues are moot. We grant the motion based on mootness and dismiss the appeal.

BACKGROUND

{3} In January 1998 Cecilia Sanchez filed an amended complaint individually and as the parent of Justin Sanchez against Paul Kirby for damages arising from a September 1996 accident involving an automobile purportedly owned by Diane Dubiel, Kirby's wife. Sanchez alleged Kirby was negligent and driving while intoxicated in a reckless and wanton manner. She also included a direct action against Infinity Insurance Company (Infinity), Kirby's insurer, pursuant to the New Mexico Mandatory Financial Responsibility Act, NMSA 1978, §§ 66–5–201 to –239 (1978, as amended through 2001).

{4} Attorney Nathan Mann filed an answer on behalf of Infinity. Sanchez, unable to serve Kirby personally, attempted service by publication and then sought a judgment

by default when Kirby did not answer. After a hearing on the default judgment motion, the district court in February 1999 determined Kirby was properly served by publication and allowed Kirby an extension of time to file an answer. Then, despite Kirby's apparent intentional, continued scarcity, Mann, as attorney for Infinity filed an answer for Kirby. In July 1999, still during Kirby's complete absence and total lack of communication with Mann and Infinity, Mann filed a motion seeking partial summary judgment on behalf of Infinity (against the interest of Kirby) on the grounds that Infinity owed no coverage for punitive damages. This motion was granted after trial and judgment by court order entered January 21, 2000.

{5} Mann presented no witnesses but did cross-examine those of Sanchez. In August 1999 the jury found the negligence of Kirby was a proximate cause of injuries and awarded damages of $30,219 to Sanchez and $2,426 to Justin Sanchez. The jury also awarded punitive damages of $150,000 to Sanchez. The total verdict was $182,645.

{6} After the jury verdict, Infinity paid its policy limits of $25,000 to Sanchez and $2,426 to Sanchez on behalf of Justin. A Partial Satisfaction of Judgment acknowledging these payments was filed in September 1999. In October 1999 attorney Mark Meiering entered his appearance for Infinity. The record does not reflect any withdrawal by Mann. In November 1999 Sanchez's attorney located Kirby at the Santa Fe County courthouse. The Santa Fe County Sheriff's Department served Kirby with copies of summons, complaint, and special verdict form filed in this case. Kirby assigned all his rights and claims against Mann and Infinity to Sanchez in exchange for a covenant by Sanchez not to execute the remainder of the judgment (that is, the excess of compensatory damages and the punitive damages not paid by Infinity) against him. Attached to that assignment was a copy of Kirby's New York driver license.

{7} On January 4, 2000, Sanchez filed a Notice of Settlement of All Claims Against Paul Kirby in which Sanchez stated that "Plaintiff[ ][has], for consideration received, reached a settlement with Defendant Paul Kirby disposing of all claims remaining in this case against him over and above the amounts voluntarily paid by Defendant Infinity Insurance Company, all as reflected by the Assignment and Settlement Agreement between the parties filed herein on November 30, 1999." On the same date, the district court entered judgment, incorporating the partial satisfaction of judgment, as follows: $180,219 to Sanchez, and $2,426 to Sanchez for Justin. No judgment was entered against Infinity. As to Infinity, the judgment read:

> [N]o judgment is entered against Defendant Infinity Insurance Company on the above verdicts by reason of the Partial Satisfaction of Judgment filed herein reflecting Infinity's payment of $25,000, the same being and representing Infinity's full liability coverage limits, in partial satisfaction of the verdict entered herein against Paul Kirby and in favor of Plaintiff Cecilia Sanchez, and its payment of $2,426 representing full payment of the verdict entered in favor of Plaintiff Cecilia Sanchez, as parent and guardian of Justin Sanchez. Such Partial Satisfaction of Judgment is incorporated herein by reference.

{8} Mann filed a Notice of Appeal on behalf of Kirby. The court, on Sanchez's motion, appointed attorney Paul Campos as Guardian ad Litem for Kirby to protect his interests with respect to the judgment entered against him in excess of the Infinity policy limits. Campos filed a Report of Guardian ad Litem concluding the November 1999 assignment from Kirby to Sanchez was in Kirby's best interests and recommending the district court appoint a Rule 11–706 expert "to guide the court on the issue of whether an appeal should be pursued on behalf of Mr. Kirby in light of the assignment and the prejudice that Mr. Kirby could suffer in the future." Campos explained in his report that he had been unable to speak with Kirby, but did speak with Kirby's wife, Diane Dubiel, and that he also had spoken with the attorney for Sanchez and with Mann. Campos also set out in his report the following question he posed to Mann: "In light of the assignment by Mr. Kirby, how

will the appeal benefit him? If the matter should be reversed and another trial held and another punitive judgment entered against Mr. Kirby, won't Mr. Kirby's interest be detrimentally affected?" On June 5, 2000, the district court entered an order accepting the report of the Guardian ad Litem.

DISCUSSION

{9} Sanchez argues the issues on appeal are moot (1) because Infinity voluntarily paid its limits and has not appealed, and (2) based on the assignment, and on Sanchez's Notice of Settlement of All Claims Against Paul Kirby stating that she has "reached a settlement with ... Kirby disposing of all claims remaining in this case against him over and above the amounts voluntarily paid by ... Infinity." According to Sanchez, "Kirby compromised and settled all Plaintiff's remaining claims against him [over and above Infinity's prior policy limits payment] by executing an Assignment of all his claims arising out of the handling of his defense against Mann and Infinity in consideration for Plaintiff's covenant not to execute against him on the unsatisfied portion of the Judgment." Mann disagrees, arguing the documents and facts are not material on a motion to dismiss.

{10} Sanchez characterizes the events as an accord and satisfaction, a settlement, that moots the appeal. She contends "an insurer [cannot] prosecute an appeal in the name of its insured under the guise of performing its contractual duty to defend when the insurer has already paid its policy limits and the insured has settled his excess liability by an assignment of rights and a covenant not to execute." All viable issues, according to Sanchez, have been settled. Mann contends the appeal is not moot because there has been no satisfaction or release as to punitive damages, an appeal of the punitive damages award has not been contractually barred, and the appeal protects the interests of the insured.

{11} There is an eerie incompleteness and feel of ulterior motive about this case as it presents itself on appeal. The appellant is nominally Kirby, an absent and disinterested judgment debtor, who has no concern about having to respond to the judgment sought to be reversed, and little, if any concern, about having the judgment reversed. The appellee is Sanchez, who must defend against reversal of her judgment, and who obviously wants to preserve her assigned claim so she may pursue Mann and Infinity in a bad faith action.

{12} Two layers of lawyers represented the elusive Mr. Kirby. One is Mann, a lawyer selected and presumably paid by Infinity to protect Kirby's interests. Mann, purportedly speaking for Kirby, asserts he has chosen to protect Infinity's insured by filing and prosecuting this appeal, but he (along with Infinity) obviously has a primary purpose of reversing the judgment in order to lessen the impact of or to moot a bad faith action against him and Infinity. The other lawyer was a court-appointed guardian ad litem, Campos, whose job was to protect Kirby's interests. The lawyers disagree on the major issue of perpetuation of this appeal.

{13} Kirby surfaces only when it appears to be in his own best interest to do so. While surfaced, he signed an agreement pursuant to which he assigned "all my rights and causes of action of any kind which I may have against Infinity Insurance Company and Nathan Mann arising out of the defense of the claims against me ... in exchange for the covenant of Cecilia Sanchez, acknowledged below by her attorney David J. Berardinelli, not to execute on any judgment entered ... against me." In his report, Campos concluded it was his opinion "the assignment is in Mr. Kirby's best interest."

{14} The Infinity insurance contract does not contain language expressly giving Infinity the right to file an appeal on Kirby's behalf or otherwise control the litigation beyond the trial process. Nor does the policy expressly obligate Infinity to do so. The policy in fact says that Infinity "will not defend or settle after our limit of liability has been paid." Infinity paid the limits and obtained a satisfaction of that aspect of the judgment for which it was responsible. No judgment exists against Infinity. Infinity has not appealed. The general rule appears to be that an insurer has a fiduciary duty to file and prosecute an appeal, absent a policy

provision to the contrary, where there are reasonable grounds to believe substantial interests of the insured may be served or protected thereby. *See, e.g., Truck Ins. Exch. of Farmers Ins. Group v. Century Indem. Co.,* 76 Wash.App. 527, 887 P.2d 455, 459 (1995).

{15} Yet, here, Kirby has not surfaced to contend he has a financial risk. He appears to have little, if any such risk. He must pay no money under the judgment. We have no evidence of any concern (*e.g.,* lien on real estate, credit problems) on his part about the judgment remaining of record. He has expressed no interest in this appeal. Mann nevertheless is continuing with the appeal contending that the continued representation on appeal is for Kirby's benefit. Arguably it would be in Kirby's interest to get the punitive damages and excess compensatory damages reversed in order to deflect any attempt to create a lien on real estate or to reverse clouded credit. Mann, presumably paid by Infinity, has protected Kirby's right to appeal.

{16} Other than to protect Kirby, we see no reason for this appeal to continue. However, based on Kirby's conduct and, if not knowledge of, then ability to know what is happening, based on his inaction and silence in this appeal and the action below, and based on his apparent indifference and lack of cooperation with Infinity, it is apparent that Kirby is not interested in having Mann or Infinity protect his rights. Mann and Infinity are keeping the appeal alive under the pretense of continuing to protect Kirby. We relieve Mann and Infinity of that burden. This appeal is dismissed as moot.

{17} The motion for rehearing implicitly expresses concern that this opinion may somehow preclude an adjudication of the validity of Kirby's assignment. Nothing in this opinion is intended in any way or to be construed to preclude an adjudication of the validity of Kirby's assignment in the separate litigation between Sanchez and Infinity and Mann. *See Paul Kirby, and through Cecilia Sanchez, as assignee v. Infinity Ins. Co. and Nathan Mann,* No. 00101–CV–2000–0121 (First Judicial District Court, State of New Mexico).

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

WE CONCUR: MICHAEL D. BUSTAMANTE, Judge, and CYNTHIA A. FRY, Judge.

2002-NMCA-018

40 P.3d 1025

STATE of New Mexico, Plaintiff–Appellee,

v.

Raymond Eric GAGE, Defendant–Appellant.

No. 22,099.

Court of Appeals of New Mexico.

Dec. 27, 2001.

Certiorari Denied, No. 27,315, Feb. 8, 2002.

Patricia A. Madrid, Attorney General, Joel Jacobsen, Assistant Attorney General, Santa Fe, NM, for Appellee.

Eric D. Dixon, Portales, NM, for Appellant.

OPINION

SUTIN, Judge.

{1} Defendant Raymond Eric Gage was convicted and sentenced in magistrate court for driving while intoxicated, and upon his trial de novo in district court, he was convicted and sentenced again. On the district court remand to magistrate court to enforce the district court sentence, Defendant asked the magistrate court to reconsider his district court sentence in yet another hearing. The magistrate court denied Defendant's request, and Defendant appealed from that denial, seeking a de novo hearing in district court. The district court quashed the notice of appeal from magistrate court on the ground that the magistrate court order was not an appealable order.

{2} We hold the magistrate court properly denied Defendant's motion for reconsideration because the magistrate court did not have lawful authority to modify or supersede the district court sentence. Having requested the magistrate court to exercise authority

it did not have, Defendant had no lawful basis on which to appeal the magistrate court's denial of his motion for reconsideration.

BACKGROUND

{3} Defendant was convicted by a jury in magistrate court for aggravated driving while intoxicated and speeding. He was sentenced by the magistrate court to the statutory term of 364 days incarceration with 184 days suspended, for a sentence of incarceration of 180 days or six months. Defendant appealed de novo to the district court and was again convicted by a jury for driving while intoxicated and speeding. He was sentenced by District Judge Gary Clingman to the statutory term of 364 days with all but 270 days suspended, resulting in a sentence of incarceration of 270 days or nine months.

{4} Defendant appealed to this Court the district court conviction and sentence. We affirmed in a memorandum opinion. The Supreme Court denied Defendant's certiorari petition. We issued a mandate to the district court on September 18, 2000, directing the clerk of the district court "to issue any commitment necessary for the execution of your judgment and sentence."

{5} Upon the district court's receipt of the mandate of this Court, the district court remanded the case to magistrate court. *See* Rule 6–703(J), (O), (P) NMRA 2001.[1] The magistrate court entered an order on December 22, 2000, stating:

> Upon the mandate received from the District Court. . . .
>
> [IT] IS HEREBY ORDERED, according to the mandate that the prior sentence . . . will be carried out as follows:
>
> . . . .
>
> Defendant is to report to the Lea County Detention Facility . . . [on] December 27, 2000 to serve 270 days incarceration.

{6} On December 27, 2000, Defendant filed a motion in magistrate court to reconsider the sentence. The motion, entitled Motion to Reconsider Sentence Imposed (motion to reconsider), sought a new sentencing hearing because

> [T]he District Court increased the sentence by three months without cause or justification based on the fact that Mr. Gage had requested a jury trial in the matter and apparently it was the District Court's policy at the time to enhance sentences whenever a jury trial was requested in the matter.

The magistrate court denied the motion to reconsider by a handwritten notation on the motion, "Motion Denied." The record does not reflect a hearing on the motion.

{7} Defendant appealed to the district court the magistrate court denial of his motion for reconsideration. He requested a jury trial. The State filed a response to the motion to reconsider in the district court. Without a hearing, on January 23, 2001, Judge Clingman entered an Order Quashing Notice of Appeal in which he determined the denial of Defendant's motion for reconsideration by the magistrate court did not constitute an appealable order.

The Intervening Supreme Court Opinion of *State v. Bonilla*

{8} Defendant's positions on appeal arise from an opinion of the New Mexico Supreme

1. Rule 6–703(J) states "[t]rials upon appeals from the magistrate court to the district court shall be de novo." Rule 6–703(O) requires the district court after it disposes of a de novo appeal by judgment or order to issue a mandate. If a notice of appeal from the district court judgment or order is filed, the mandate is to issue upon final disposition of the appeal. *Id.* Rule 6–703(P) states: "Upon expiration of the time for appeal from the judgment or final order of the district court, if the relief granted is within the jurisdiction of the magistrate court, the district court shall remand the case to the magistrate court for enforcement of the district court's judgment." Defendant in the present case does not question the authority of the district court to remand to the magistrate court with a mandate to enforce the district court's sentence of Defendant. The words in Rule 6–703(P), "Upon expiration of the time for appeal from the judgment or final order of the district court" do not clearly mean "upon exhaustion of all appeal right," which is the point at which the district court in the present case remanded the matter to the magistrate court to carry out the district court's sentence. Nevertheless, we think Rule 6–703(P) may appropriately apply under the circumstances of this case, and the district court acted pursuant to Rule 6–703(P) procedure.

Court issued in December 2000. The Supreme Court ruled unconstitutional a sentencing policy and practice of the very judge who sentenced Defendant. It is unclear when Defendant became aware of this Supreme Court opinion. We discuss the circumstances in more detail for a complete picture of the background of this case.

{9} On December 12, 2000, the Supreme Court filed *State v. Bonilla*, 2000–NMSC–037, 130 N.M. 1, 15 P.3d 491. In *Bonilla*, the trial judge, who was Judge Clingman, apparently just before sentencing the defendant, "announced that it was the general policy of the court that 'if a person is found guilty of a crime in this court by a jury, that the statutory penalty be imposed.' " *Id.* ¶ 4. The Supreme Court determined that the defendant was sentenced under that policy and held the sentencing unconstitutionally penalized him for exercising his Sixth Amendment right to a jury trial. *Id.* ¶¶ 10, 13, 15. *Bonilla* was first published in the January 11, 2001, issue of the State Bar Bulletin. 40 N.M. Bar Bul. 20 (Jan. 11, 2001).

{10} Defendant's reliance on *Bonilla* first surfaces in the record in Defendant's March 19, 2001, docketing statement filed in this Court. In the docketing statement, Defendant states Judge Clingman entered an order on January 23, 2001, quashing Defendant's notice of appeal, and then further states:

> It was learned by counsel for Defendant *much* later, that Judge Clingman had a "policy" of imposing the statutory penalty when the Defendant was found guilty by a jury. Mr. Gage's Magistrate Court sentence had been increased from six months to nine months by Judge Clingman. This three month increase in the sentence was not merited by the record. The District Attorney's office asked only that the six month sentence be imposed. Further, Mr. Gage indicated that he was required to aid his mother on a frequent basis and would not be able to render this aid while incarcerated. Mr. Gage also indicated that he had been going to Alcoholics Anonymous and was attempting to rehabilitate himself. The increased sentence was an apparent result of Judge Clingman's "policy" of punishing Defendant[s] who choose to exercise their constitutional right to trial by jury.

(Emphasis added.) It would appear from these statements Defendant and his counsel became aware of the *Bonilla* decision after Judge Clingman's January 23, 2001, order. It is unclear from the record and the briefs whether Defendant or his counsel were aware of the *Bonilla* decision when Defendant filed his motion to reconsider in magistrate court on December 27, 2000. He may not have been, since the decision did not appear in the Bar Bulletin until January 11, 2001.

{11} In his brief-in-chief on appeal, citing *Bonilla*, Defendant states, "[a]pparently, Judge Clingman had an oral policy of enhancing the sentence[ ]of any Defendant who chose to exercise his constitutional right to jury trial." Defendant argues that, based on the circumstances of the sentencing, including the prosecutor's "emphasis three different times in his statement to the court that Mr. Gage had exercised his constitutional right to trial by jury[,] [t]he implication was clear, the court should punish Mr. Gage for exercising his constitutional rights." Defendant suggests a court policy of sentencing based on exercising the right to demand a jury trial was enforced against Defendant, shown by the "enhanced sentence" imposed by Judge Clingman.

Defendant's Present Appeal to This Court

{12} Defendant appeals to this Court from three separate court actions: (1) this Court's September 18, 2000, mandate to the district court; (2) the magistrate court's December 22, 2000, denial of Defendant's motion to reconsider; and (3) the district court's January 23, 2001, order quashing Defendant's appeal. Defendant seeks reversal on two distinct points. His first point, unrelated to *Bonilla*, is that the district court erred in quashing the appeal on the ground the denial of his motion to reconsider was not an appealable order. This point necessarily raises the issue of whether the magistrate court had lawful authority to modify or supersede the district court sentence on remand under

a mandate from the district court to enforce the sentence of the district court.

{13} Defendant's second point is based on the policy and practice that existed when the defendant in *Bonilla* was sentenced in September 1997. *See id.* ¶ 4. Defendant suggests Judge Clingman employed the same or a similar policy in punishing Defendant for exercising his constitutional right to trial by jury, and Defendant wants an evidentiary hearing on that issue. In any such hearing, Defendant must rely either (1) upon evidence of the existence of such a policy when Defendant was sentenced on March 31, 2000, some two and one-half years after Mr. Bonilla was sentenced, or (2) from some presumption Defendant may contend should be applied based on *Bonilla.* Such a presumption would be that the policy that existed in 1997, or some similar policy, must have continued to exist up to and during Defendant's March 31, 2000, sentencing. Defendant nowhere elaborates on what proof or presumption he may rely if the issue of the existence of such a policy were to be heard as he requests.

DISCUSSION

Standard of Review

{14} "Interpretation and application of the law are subject to a de novo review." *State v. Roman,* 1998–NMCA–132, ¶ 8, 125 N.M. 688, 964 P.2d 852.

Defendant Failed to Seek Relief in the District Court

{15} Under Rule 5–801(B) NMRA 2001, Defendant had ninety days from this Court's September 18, 2000, mandate to the district court within which to seek a modification of his sentence in district court. His deadline, therefore, was December 17, 2000. Defendant missed that deadline.

{16} Defendant states in his brief on appeal, without citation to the record, that on December 27, 2000, after mandate from this Court, he asked the district court to reconsider its sentence of nine months. Nothing exists in the record to reflect or support a motion to reconsider at the district court level. Defendant implies that he asked the trial judge to have another judge hear the request and contends on appeal that the district court erred in refusing to have another judge hear his reconsideration request. Nothing exists in the record to reflect or support this implication. Nothing exists in the record showing any district court action on these alleged and implied requests. We do not have before us any transcript or tape of any district court hearing or discussion in regard to reconsideration by the district court of its sentence or in regard to having a different judge hear such a request. We therefore will not consider these statements. *See In re Aaron L.,* 2000–NMCA–024, ¶ 27, 128 N.M. 641, 996 P.2d 431 ("This Court will not consider and counsel should not refer to matters not of record in their briefs.").

The Mandate to the Magistrate Court and Defendant's Motion

{17} On appeal, Defendant appears to foresee, without directly addressing it, the question whether a magistrate court can modify the sentence of a de novo court. He is careful to say he "was not asking the [magistrate c]ourt to 'review' the decision of Judge Clingman"; rather, he says he was simply "request[ing] a new sentencing hearing." Relying on Rule 6–801 NMRA 2001, Defendant argues the magistrate court had the statutory authority to hold another sentencing hearing. Rule 6–801 gives the magistrate court authority to "modify . . . a sentence . . . at any time during the maximum period for which incarceration could have been imposed." Thus, what Defendant appears to be telling this Court is he did not specifically ask the magistrate court to modify the district court sentence, but rather asked the magistrate court to independently re-sentence without regard to the district court sentence.

{18} Were he to have obtained another sentencing hearing in magistrate court, Defendant presumably would have requested the magistrate court to impose a sentence of less served time than the 270–day incarceration imposed by the district court. To grant the relief Defendant sought, the magistrate court would have had either to ignore the sentence imposed and mandate issued by the district court or to modify the district court sentence. Whether Defendant's motion for

reconsideration was for an independent sentencing that would in effect supersede the district court's sentence, or for specific consideration and modification of the district court's 270–day incarceration, we hold the magistrate court lacked statutory or rule authority in this case to ignore the district court sentence and mandate or to modify the district court sentence.

{19} We read Rule 6–801 as authority for the magistrate court to modify a magistrate court sentence, not modify a district court sentence imposed after a trial de novo in the district court. The record does not reflect the reason why the magistrate court denied Defendant's motion for reconsideration. Whatever the magistrate court's reason, the motion was properly denied, because it asked the magistrate court to go beyond the mandate and to modify or supersede the district court sentence, and thereby asked the magistrate court to exercise jurisdiction it did not have and to act without lawful authority.

{20} Even the specific assertion that the district court's sentence of Defendant was unconstitutionally imposed pursuant to the policy outlawed in *Bonilla* would not, in our opinion, have given the magistrate court lawful authority in this case to entertain the motion asking it to ignore or modify the district court sentence and mandate and impose a different sentence. We do not think the magistrate court had the lawful authority to hear evidence regarding Judge Clingman's policy and then proceed to modify or supersede the district court sentence. The district court mandate required the magistrate court, on remand under Rule 6–703(P), to enforce the sentence of the district court. The magistrate court had no jurisdiction or authority to exceed that mandate. *See Vinton Eppsco Inc. v. Showe Homes, Inc.*, 97 N.M. 225, 226, 638 P.2d 1070, 1071 (1981); *Bd. of Educ. v. Rodriguez*, 79 N.M. 570, 571, 446 P.2d 218, 219 (1968); *State ex rel. Del Curto v. Dist. Ct.*, 51 N.M. 297, 298, 304, 308, 183 P.2d 607, 608, 612, 614 (1947); *see also* N.M. Const. art. VI, §§ 13, 26 (amended 1988); NMSA 1978, §§ 35–1–1 (1968), 35–3–4 (1985). While an intervening decision of a superior appellate court, such as our Supreme Court, might, under certain exceptional circumstances, allow the lower (magistrate) court discretion to disregard the mandate of an intermediate appellate court, *see, e.g., State v. Frank*, 2001–NMCA–026, ¶ 5, 130 N.M. 306, 24 P.3d 338, *cert. granted*, 130 N.M. 254, 23 P.3d 929 (2001); *State ex rel. Davis v. Cleary*, 77 Ohio App.3d 494, 602 N.E.2d 1183, 1185 (1991), the appearance of *Bonilla* did not, in the case before us, provide such an exceptional circumstance. Defendant was speculating, at best, as to whether the *Bonilla* policy or any modified remnant of that policy was still in existence two and one-half years after the defendant in *Bonilla* was sentenced. Defendant's avenue for reconsideration of his sentence was only by way of motion in the district court, pursuant to Rule 5–801, after this Court's mandate to that court.

{21} Defendant ignores New Mexico law. He attempts to support his position with three out-of-state cases, each of which is entirely consistent with New Mexico law and our holding in this appeal. Two of the cases simply say a lower court can more broadly act on remand from an appellate court when matters are left open by the appellate court and the lower court action is not inconsistent with the appellate court decision. *See Haines Pipeline Constr., Inc. v. Mont. Power Co.*, 265 Mont. 282, 876 P.2d 632, 637 (1994); *City of Detroit v. Gen. Motors Corp.*, 233 Mich.App. 132, 592 N.W.2d 732, 736 (1998). The third case, *Davis v. J.C. Nichols Co.*, 761 S.W.2d 735 (Mo.Ct.App.1988), strongly supports our holding here. The court in *Davis* did not vary from the hard-and-fast rule that the law of the case established on appeal binds the district court on remand under the appellate court mandate. *Id.* at 739–40. The aspect of *Davis* on which Defendant relies was a separate issue "not within the operation of the rule that the appellate decision is the law of the case in subsequent proceedings in the same cause." *Id.* at 741. The court in *Davis* approved the district court's dependency, in a permitted summary judgment proceeding on remand, on "new and controlling evidence not before the court in the first adjudication by directed verdict or *Davis* on the appeal." *Id.*

{22} In the present case, the magistrate court's jurisdiction and authority on remand was limited to that of carrying out the district court sentence, nothing more. The magistrate court was not given latitude to hold a re-sentencing hearing and take "new and controlling evidence." Rather, the only circumstance relating to the sentencing issue was that there may have been some doubt as to the legality of the district court sentence due to the later-issued *Bonilla* decision. Under the circumstances, Defendant should have filed a motion in district court to change its sentence.

{23} Based on the foregoing, we determine that the court orders from which Defendant appeals are appropriate and valid orders. Nevertheless, we note Defendant is not deprived of an opportunity to have an evidentiary hearing in the district court to determine if Judge Clingman's March 31, 2000, sentence was based on a policy meant to penalize Defendant for exercising his constitutional right to trial by jury. Defendant has that opportunity through a habeas corpus proceeding under Rule 5–802 NMRA 2001.

CONCLUSION

{24} We affirm. In accordance with *Bonilla,* 2000–NMSC–037, ¶ 15, 130 N.M. 1, 15 P.3d 491, and to avoid any appearance of impropriety, Defendant's habeas proceeding, should he file one, should be heard by a judge other than Judge Clingman.

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

WE CONCUR: LYNN PICKARD, Judge, and CYNTHIA A. FRY, Judge.

2002-NMCA-019

40 P.3d 1030

STATE of New Mexico, Plaintiff–Appellant,

v.

Bradley JONES, Defendant–Appellee.

No. 21,775.

Court of Appeals of New Mexico.

Dec. 27, 2001.

Certiorari Denied, No. 27,312, Feb. 6, 2002.

Patricia A. Madrid, Attorney General, James O. Bell, Assistant Attorney General, Santa Fe, NM, for Appellant.

Phyllis H. Subin, Chief Public Defender, Lisa N. Cassidy, Assistant Appellate Defender, Santa Fe, NM, for Appellee.

OPINION

ALARID, Judge.

{1} The State appeals from a trial court order suppressing cocaine and drug paraphernalia seized from Defendant's automobile without a search warrant. We hold that the State has failed to establish exigent circumstances justifying the warrantless seizure of evidence from inside Defendant's automobile. We therefore affirm the trial court's suppression order.

FACTS

{2} On June 5, 1999, at about 2 a.m., Alamogordo police officer Bruce Roberts was dispatched to investigate a suspicious automobile parked on a public street. Officer Roberts knew of a string of burglaries in the area and as he approached Defendant's automobile he also recognized Defendant as having been involved with narcotics in the past.

{3} Officer Roberts asked Defendant what he was doing. Defendant answered that he had stopped to blow his nose. Officer Roberts testified at the suppression hearing that this answer was suspicious because Defendant could have blown his nose at a stop sign at this time of night because of the light traffic. Officer Roberts' suspicions also continued because of the recent burglaries in the area and because he knew of Defendant's

past involvement in narcotics. Officer Roberts then asked Defendant if he had any weapons. Defendant replied that he had a folding pocketknife and placed it on the dashboard. Officer Roberts then asked Defendant to step out of the automobile for a weapons pat-down. No weapons were found in this pat-down.

{4} Officer Roberts next asked Defendant if he could search the automobile. Defendant refused to consent to a search. Officer Roberts testified that the refusal to consent and the refusal to maintain eye contact continued to arouse his suspicion because those who are involved in drugs will refuse consent to search 99.9 percent of the time because there is something in the vehicle that they do not want the officer to find.

{5} Officer Roberts then looked into the automobile and saw a brown paper bag. He asked Defendant what was in the bag. Defendant replied that the bag contained trash. Officer Roberts then moved to the passenger side of the automobile and shined his flashlight inside. He saw the plunger end of a hypodermic needle protruding from under a towel. Officer Roberts immediately placed Defendant under arrest. Without obtaining a warrant, Officer Roberts reached into the automobile and seized the syringe from under the towel. While moving the towel to seize the syringe, Officer Roberts saw a paper package. The package was wrapped "pharmaceutical" style in a folded envelope as is often utilized by persons who use drugs. The package was also seized and subsequent testing proved that it contained cocaine.

{6} Defendant was charged by criminal information for possession of cocaine and possession of drug paraphernalia. Defendant moved to suppress the evidence based upon the absence of exigent circumstances supporting the warrantless entry into the automobile. Officer Roberts testified that, in his opinion, the circumstances warranted a search incident to arrest. The trial court determined that ordering Defendant out of the automobile and patting him down for weapons was reasonable. The trial court also determined that Defendant denied consent for a search but that shining the flashlight in the window was permissible. The trial court suppressed the evidence on the ground that there were no exigent circumstances justifying the warrantless entry into the automobile and the seizure of evidence from inside. The trial court also denied the State's motion for reconsideration.

DISCUSSION

A. Preservation of Plain View Argument

{7} We initially note that Defendant argues that the State has failed to preserve its argument that the syringe was in plain view, and could therefore be seized without a warrant. Defendant indicates that the State relied entirely on the search incident-to-arrest theory of admissibility at the original suppression motion hearing. After losing on that theory, the State filed a motion to reconsider arguing the plain view exception to the warrant requirement. From our review of the record, the trial court initially granted the State's motion to reconsider the original suppression order and instructed the parties to brief the issue of whether the plain view exception applies under the facts of this case. After reviewing the parties' briefs, the trial court denied the motion to reconsider.

{8} In order to preserve an issue for appellate review, "it must appear that a ruling or decision by the district court was fairly invoked." Rule 12-216(A) NMRA 2001; *see also State v. Gomez,* 1997-NMSC-006, ¶ 14, 122 N.M. 777, 932 P.2d 1. The trial court addressed the merits of the State's motion to reconsider. The State has therefore fairly invoked a ruling of the trial court on the issue of whether the plain view exception applies in this case. The issue is therefore preserved for appellate review and we will address the merits of the State's appeal.

B. Whether the Trial Court Properly Suppressed the Evidence in This Case

1. Standard of Review

{9} In reviewing the trial court's decision to grant Defendant's motion to suppress, "[w]e review the district court's ruling . . . to determine whether the law was correctly applied to the facts, viewing the facts in the light most favorable to the prevailing

party." *State v. Cline,* 1998–NMCA–154, ¶ 6, 126 N.M. 77, 966 P.2d 785. "We review the legal issue of whether . . . evidence was properly seized pursuant to the plain view exception under a de novo standard of review." *State v. Steinzig,* 1999–NMCA–107, ¶ 27, 127 N.M. 752, 987 P.2d 409.

2. Applicability of the Plain View Doctrine to the Seizure of the Evidence from Defendant's Automobile

{10} The State argues that the trial court erred by granting Defendant's motion to suppress because the syringe was in plain view through the window of Defendant's automobile. The State cites *State v. Williams,* 117 N.M. 551, 556, 874 P.2d 12, 17 (1994), for the proposition that there was no Fourth Amendment search because the syringe was in plain view. Therefore, the State argues, Officer Roberts was justified in seizing the syringe from Defendant's automobile without a warrant.

{11} The State is correct that the mere looking at what is in plain view is not a search as long as the officer is using his natural senses and is in a place that he is lawfully entitled to be. *State v. Calvillo,* 110 N.M. 114, 117, 792 P.2d 1157, 1160 (Ct.App. 1990). "Seizures without a warrant, however, like searches without a warrant, are " 'per se unreasonable' " unless an exception to the warrant requirement is applicable." *State v. Vasquez,* 112 N.M. 363, 367, 815 P.2d 659, 663 (Ct.App.1991).

{12} In *State v. Valdez,* 111 N.M. 438, 441, 806 P.2d 578, 581 (Ct.App.1990), we held that, just because police officers may see evidence in plain view inside of a greenhouse attached to a residence without violating the Fourth Amendment, the officers may not enter the property in order to seize the evidence without a warrant, except upon a showing of exigent circumstances, or some other exception to the warrant requirement applicable to the facts of the case. *See also Calvillo,* 110 N.M. at 118, 792 P.2d at 1161 ("Even though we conclude there was no [F]ourth [A]mendment search, this does not necessarily lead to the conclusion that the police were justified in entering defendant's home and seizing the gun without a warrant."). *Valdez* holds that "seizure" of evidence from inside a constitutionally protected area, with no Fourth Amendment "search" based on evidence in plain view from outside the area, still requires either a warrant or an exception to the warrant requirement. *Valdez,* 111 N.M. at 441, 806 P.2d at 581. Under *Valdez,* plain view is therefore not a viable exception to the warrant requirement in order to justify the warrantless seizure of evidence when the evidence is seen in plain view from outside the constitutionally protected area. *Id.*

{13} We note, however, in the present case, we are dealing with a seizure of evidence from an automobile as opposed to the seizure of evidence from a residence. In addressing automobile search and seizure, our Supreme Court departed from established federal precedent interpreting the Fourth Amendment and held that, under the New Mexico Constitution, Article II, Section 10, there are no "automatic" exigent circumstances justifying the warrantless search of an automobile. *See Gomez,* 1997–NMSC–006, ¶ 44, 122 N.M. 777, 932 P.2d 1. Rather, the Court held that a warrantless search of an automobile is valid only where the officer has reasonably determined that exigent circumstances exist. *Id.* ¶ 40. The Court further defined exigent circumstances as " '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.' " *Id.* ¶ 39 (quoting *State v. Copeland,* 105 N.M. 27, 31, 727 P.2d 1342, 1346 (Ct.App.1986)). This is the same definition set forth in *Copeland* defining exigent circumstances to search a motel room without a warrant. *Copeland,* 105 N.M. at 31, 727 P.2d at 1346. It is also the same definition set forth by this Court in *State v. Corneau,* 109 N.M. 81, 89, 781 P.2d 1159, 1167 (Ct.App. 1989), defining exigent circumstances justifying the warrantless search of an apartment.

{14} In *Gomez,* our Supreme Court therefore extended to persons in automobiles the same search and seizure protections under Article II, Section 10, of the New Mexico Constitution that apply to dwellings with re-

gard to the exigent circumstances exception to the warrant requirement. We believe it logically follows that the same rule that applies to dwellings requiring a warrant prior to a seizure of evidence seen in plain view from outside the residence would also apply to automobiles under Article II, Section 10. *See Gomez,* 1997–NMSC–006, ¶ 44, 122 N.M. 777, 932 P.2d 1 ("Quite simply, if there is no *reasonable* basis for believing an automobile will be moved or its search will otherwise be compromised by delay, then a warrant is required."). Accordingly, we determine that the same distinction between the "search" and the "seizure" that was present in *Valdez* is present in automobile searches and seizures.

{15} We next apply this analysis to the present case. We need not decide whether Officer Roberts was legally where he had the right to be when he looked through the window of the car and saw the syringe because, even if he lawfully observed the syringe in plain view, absent exigent circumstances or another applicable exception to the warrant requirement, a warrant was required to enter the automobile and "seize" the evidence. *Gomez,* 1997–NMSC–006, ¶ 44, 122 N.M. 777, 932 P.2d 1 (requiring a warrant to enter a vehicle and seize contraband in plain view absent exigent circumstances); *Valdez,* 111 N.M. at 441, 806 P.2d at 581. Examples of other exceptions would be a proper inventory search and the inevitable discovery doctrine. *See State v. Shaw,* 115 N.M. 174, 176, 848 P.2d 1101, 1103 (Ct.App.1993) (inventory searches are a well-defined exception to the warrant requirement); *Corneau,* 109 N.M. at 90, 781 P.2d at 1168 (tainted evidence that would have been discovered through an independent source should be admissible if the State can prove that it would have inevitably been discovered anyway). Moreover, though exigent circumstances may be easier to show in cases in which an automobile, being movable, is involved, than in cases in which a residence is involved, the showing of exigent circumstances still must be made by the State. *See Gomez,* 1997–NMSC–006, ¶ 44, 122 N.M. 777, 932 P.2d 1.

{16} The burden falls to the State to show that the warrantless intrusion into Defendant's vehicle and the seizure of the syringe and cocaine were justified by exigent circumstances or another applicable exception to the warrant requirement. *Id.* at 366, 815 P.2d at 662. The State has set forth no facts in its brief-in-chief indicating that it argued to the trial court that exigent circumstances, or any other applicable exception to the warrant requirement, existed which would justify the warrantless seizure of evidence from Defendant's automobile. *See In re Estate of Heeter,* 113 N.M. 691, 694, 831 P.2d 990, 993 (Ct.App.1992) ("This court will not search the record to find evidence to support an appellant's claims."); *cf. State v. Arredondo,* 1997–NMCA–081, ¶ 19, 123 N.M. 628, 944 P.2d 276 (warrantless seizure of contraband in automobile in the course of search for weapons justified by exigent circumstances). The State has therefore failed in its burden to establish that an applicable exception to the warrant requirement existed.

CONCLUSION

{17} We hold under *Gomez* that before evidence in an automobile may be seized, a warrant is required to enter the automobile unless the State can satisfy its burden to show that exigent circumstances existed justifying the warrantless entry or another applicable exception to the warrant requirement applies. This rule applies even though the evidence may be in plain view through an open window. Officer Roberts did not have a warrant when he seized the evidence from Defendant's automobile and the State has not satisfied its burden to show exigent circumstances or any other applicable exception to the warrant requirement. Accordingly, we affirm the trial court's order suppressing the evidence obtained from Defendant's automobile.

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

WE CONCUR: RICHARD C. BOSSON, Chief Judge, and JONATHAN B. SUTIN, Judge.

2002-NMCA-020
40 P.3d 1035

**STATE of New Mexico,
Plaintiff–Appellee,**

v.

Kent CHRISTMAS, Defendant–Appellant.

No. 21,699.

Court of Appeals of New Mexico.

Dec. 28, 2001.

Certiorari Denied, No. 27,313,
Feb. 6, 2002.

Patricia A. Madrid, Attorney General, William McEuen, Assistant Attorney General, Santa Fe, NM, for Appellee.

Sigmund L. Bloom, Albuquerque, NM, D. Eric Hannum, Albuquerque, NM, for Appellant.

OPINION

BOSSON, Chief Judge.

{1} Defendant was convicted of driving under the influence of intoxicating liquor (DWI), contrary to NMSA 1978, § 66–8–102(A), (C) (1999). On appeal, Defendant argues (1) the trial court abused its discretion in admitting the results of breath-alcohol testing when the breathalyzer machine's internal calibration check may not have been operational at the time of testing, (2) the trial court abused its discretion in denying Defendant's motion for a mistrial in light of inadmissible testimony regarding the horizontal gaze nystagmus (HGN) test, (3) the evidence was insufficient to support Defendant's DWI conviction because the State did not introduce evidence relating Defendant's breath-

alcohol test results back to a particular breath-alcohol content at the time of driving, and (4) the trial court erred in declining Defendant's request for a special verdict form.

{2} As to Defendant's first three arguments, we affirm the trial court. Our disposition of the first three arguments makes it unnecessary to decide Defendant's fourth argument.

BACKGROUND

{3} Shortly before 1:00 a.m. on December 20, 1998, Officer Thomas Harzewski observed Defendant's vehicle driving on Interstate 25 and noticed that the license plate light was not operational. Officer Harzewski began to follow Defendant and observed Defendant's vehicle crossing the center line. When Officer Harzewski pulled Defendant over, he noticed the odor of alcohol. When Defendant was asked if he had been drinking, he acknowledged that he had consumed alcohol earlier, but said he had "slept some" in the interim before driving. Officer Harzewski conducted three field sobriety tests: the HGN test, the one leg stand test, and the walk and turn test.

{4} Officer Harzewski testified that Defendant did "fairly well" on the one leg stand test. Although the officer indicated at trial that there were some minor "clues" of possible intoxication in Defendant's performance, he decided to give Defendant the benefit of the doubt and passed him on that test.

{5} Defendant did not perform as well on the walk and turn test. Officer Harzewski testified that: Defendant failed to follow instructions, he had to ask how many steps he had taken so far, he failed to walk a straight line, and he failed to place his heel near his toe at almost every step. The officer gave Defendant two chances to perform the walk and turn before determining that he had failed that test. Additionally, Officer Harzewski testified that Defendant appeared "agitated," displayed an "aggravated attitude," and seemed "a little bit nervous."

{6} Defendant was arrested and brought to the Truth or Consequences police station, where a breath-alcohol test was administered by Officer Harzewski utilizing a breathalyzer machine. Defendant registered a .09 breath-alcohol concentration (BAC) at 1:44 a.m., and a .08 level at 1:47 a.m., about an hour after Defendant had stopped driving. At 1:45 a.m., in the interval between the two tests administered to Defendant, the machine's internal calibration check produced a reading of .000.

{7} Defendant was charged with DWI and eventually convicted by a jury. He now appeals that conviction.

DISCUSSION

Admissibility of the Breath-Alcohol Test

{8} We review the trial court's evidentiary rulings for abuse of discretion. *See State v. Woodward*, 1996-NMSC-012, ¶ 6, 121 N.M. 1, 908 P.2d 231, *rev'd on other grounds by Woodward v. Williams*, 263 F.3d 1135 (10th Cir.2001). " 'An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason.' " *Id.* (quoting *State v. Apodaca*, 118 N.M. 762, 770, 887 P.2d 756, 764 (1994); *accord State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829.

{9} In the interval between the two breath tests taken by Defendant, the breathalyzer machine registered .000 on an automatic internal calibration check. This reading was an anomaly. The automatic calibration check involved a .08 simulator and should have yielded a reading of between .07 and .09. The anomalous internal calibration reading was the subject of a pretrial defense motion to suppress all breathalyzer test results, which was denied by the court.

{10} Because an issue was raised regarding the validity of the breathalyzer test results, the State was required to make some threshold showing regarding the proper functioning of the machine. *See Bransford v. State Taxation & Revenue Dep't*, 1998-NMCA-077, ¶ 7, 125 N.M. 285, 960 P.2d 827; *Plummer v. Devore*, 114 N.M. 243, 245, 836 P.2d 1264, 1266 (Ct.App.1992). In response, the State put on evidence that the

machine had been properly calibrated within one week of Defendant's test. *See State v. Cavanaugh,* 116 N.M. 826, 829, 867 P.2d 1208, 1211 (Ct.App.1993) (stating foundation for admission of breathalyzer may be established by evidence that machine had been calibrated within one week of a defendant's breath test). A certified key operator had checked the calibration of the breathalyzer machine on December 14 and December 21 and had determined that it was within the tolerances allowed by the Scientific Lab Division of the New Mexico Department of Health. The Truth or Consequences police department regularly calibrated the machine every five to seven days. There was testimony that the Scientific Lab Division does not require an internal calibration check at the time a breathalyzer test is actually administered, as was done in this instance.

{11} The State also introduced evidence that the anomalous internal calibration reading did not affect the reliability of the test. *See State v. Smith,* 1999–NMCA–154, ¶ 10, 128 N.M. 467, 994 P.2d 47 (holding the state can meet threshold showing of a breathalyzer machine's validity by presenting evidence sufficient to support a finding that the particular test was capable of producing valid results). Officer Harzewski, who administered Defendant's breath-alcohol test, did not think the .000 reading was significant because the breathalyzer machine did not give a "fail" message, which appears when there is an internal failure, radio interference, or some other problem with the equipment. The certified key operator testified that the .000 reading was likely caused by one of the solution hoses not being hooked up to the machine at the time of the test. According to the key operator, the internal calibration system is separate from the system that administers the breath test and does not affect the results. Another officer testified that he likely left the hoses unattached after conducting a radio interference check on the machine two days before Defendant's test, and he believed this to be the cause of the .000 internal calibration reading. If the machine ran an internal calibration check while the hose to the simulator standard was disconnected, the machine would normally produce a result of .000 because it would be reading air from the room and not from the simulator.

{12} The trial court was satisfied with the evidence of proper calibration and functioning of the breathalyzer machine, and we agree that the court did not abuse its discretion in coming to that determination. We conclude that any discrepancy in regard to the validity of Defendant's breathalyzer results went to the weight of the evidence to be considered by the jury. *See, e.g., State v. Anderson,* 118 N.M. 284, 303, 881 P.2d 29, 48 (1994) (recognizing questions concerning test results or statistical probabilities go to the weight of the evidence and are the concerns of the fact finder); *State v. Vialpando,* 93 N.M. 289, 292, 599 P.2d 1086, 1089 (Ct.App. 1979) (same)

Defendant's Motion for Mistrial Regarding the HGN Test

{13} Defendant argues that the trial court abused its discretion in denying his motion for a mistrial after Officer Harzewski made an impermissible reference to the HGN test in his testimony. *See State v. McDonald,* 1998–NMSC–034, ¶ 26, 126 N.M. 44, 966 P.2d 752 (holding denial of mistrial will not be disturbed absent a showing of abuse of discretion). In *State v. Torres,* 1999–NMSC–010, ¶ 30, 127 N.M. 20, 976 P.2d 20, our Supreme Court held that the results of HGN testing constitute scientific evidence that must meet the standard of evidentiary reliability articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 587–89, 593–94, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (holding that scientific evidence must be shown to be not only relevant, but also reliable), and *State v. Alberico,* 116 N.M. 156, 167–68, 861 P.2d 192, 203–04 (1993). In the absence of evidence verifying the reliability of HGN testing, the results are inadmissible. *See Torres,* 1999–NMSC–010, ¶ 54, 127 N.M. 20, 976 P.2d 20.

{14} At Defendant's trial, Officer Harzewski testified that he administered three field sobriety tests, including the HGN test. At this point, the State specifically asked Officer Harzewski how Defendant had performed "with respect to the last [other] two tests."

In his reply, Officer Harzewski made an impermissible reference to the HGN test by stating that Defendant "didn't pass that one."

{15} At the bench, Defendant made a motion for mistrial, which was denied. The prosecutor indicated that she had not intended to elicit any testimony regarding HGN, and had sought to avoid doing so by specifically asking the officer how Defendant performed on the two admissible field sobriety tests. The trial judge promptly gave a curative instruction, admonishing the jury to disregard "any testimony relating to the so-called HGN test," and instructing them to "not ... take this into account in any way."

{16} Defendant argues that this curative instruction did not ameliorate the unfair prejudice resulting from Officer Harzewski's reference to the HGN test. We are not persuaded. We have previously held that a prompt admonition from the trial court to the jury to disregard an unsolicited reference to inadmissible evidence is generally sufficient to cure any prejudice. *State v. Newman*, 109 N.M. 263, 267, 784 P.2d 1006, 1010 (Ct.App. 1989); *State v. Gardner*, 103 N.M. 320, 323, 706 P.2d 862, 865 (Ct.App.1985). Defendant has not shown that he suffered any particular prejudice as a result of Officer Harzewski's momentary reference to the HGN test. Even if we deemed the judge's curative instruction ineffective to remedy any prejudice, there was so much other evidence probative of Defendant's intoxication that the officer's fleeting reference to the HGN test would have been mere harmless error. *See Sanchez v. State*, 103 N.M. 25, 27, 702 P.2d 345, 347 (1985) (stating the test for harmless error).

Breath-Alcohol Level at the Time of Driving

{17} In reviewing the sufficiency of evidence to support a conviction, this Court must "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." *State v. Foster*, 1999-NMSC-007, ¶ 42, 126 N.M. 646, 974 P.2d 140; *accord State v. Sanders*, 117 N.M. 452, 456, 872 P.2d 870, 874 (1994). "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. This standard does not require us to consider the " 'merit of evidence that may have supported a verdict to the contrary.' " *State v. Kersey*, 120 N.M. 517, 520, 903 P.2d 828, 831 (1995) (quoting *State v. Vigil*, 110 N.M. 254, 256, 794 P.2d 728, 730 (1990)). Rather, we must determine whether the evidence presented could justify, to a reasonable mind, a finding that each element of the crime charged has been established beyond a reasonable doubt. *See State v. Coffin*, 1999-NMSC-038, ¶ 73, 128 N.M. 192, 991 P.2d 477; *State v. Salgado*, 1999-NMSC-008, ¶ 25, 126 N.M. 691, 974 P.2d 661.

{18} Defendant was convicted of DWI, by general verdict, contrary to Section 66-8-102(A), (C). Subsection A of this statute provides that a person may commit DWI by being "under the influence of intoxicating liquor" while driving a vehicle. Subsection C describes the per se offense of driving with "an alcohol concentration of eight one-hundredths [.08] or more in his blood or breath." The jury was instructed that its verdict must be "unanimous as to the way or ways in which the offense was committed."

{19} Defendant does not argue that the evidence was insufficient to convict him under Subsection A; he contends only that the evidence was insufficient under Subsection C, the per se section of the statute. Defendant contends that the State did not relate his breath-alcohol test score back to the time of driving, an hour earlier. Because this was a general verdict and the jury might have convicted Defendant solely on the basis of Subsection C, we must determine the sufficiency of the evidence to support such a conviction.

{20} The per se offense under Subsection C relates to the time of driving. The Uniform Jury Instruction promulgated by our Supreme Court for Section 66-8-102(C) states that, to be convicted of per se DWI, the accused must have had a .08 level or greater "[a]t that time," referring to the time of driving. *See* UJI 14-4503 NMRA 2001. We have noted that "[t]iming is an essential

element of the crime ... [requiring that the State] prove a nexus between a BAC [blood or breath-alcohol concentration] of 0.08 or more and the time 'defendant operated a motor vehicle.' " *State v. Baldwin,* 2001-NMCA-063, ¶ 8, 130 N.M. 705, 30 P.3d 394 (quoting UJI 14-4503). As we stated in *Baldwin* with regard to marginal BAC results only at or slightly above the legal limit, "[t]he longer the delay between the time of [the] incident and [the] sample collection, the more difficult it becomes, scientifically, to draw reasonable inferences from one 'data point,' back to the 'driving' time." *Id.* ¶ 17 (quoting E. Fitzgerald & D. Hume, *Intoxication Test Evidence: Criminal and Civil* § 2:30 [Lawyer's Co-op (1987 & 1994 Supp.)]). In *Baldwin,* two hours and fifteen minutes elapsed from the time of driving until blood testing was completed, and we reversed. *See Baldwin,* 2001-NMCA-063, ¶¶ 2, 4, 130 N.M. 705, 30 P.3d 394; *cf. Cavanaugh,* 116 N.M. at 830-31, 867 P.2d at 1212-13. The question is whether a lapse of only an hour requires specific relation-back testimony or other corroborating evidence as in *Baldwin.*

{21} Other courts that have reversed DWI convictions based upon a lack of relation-back evidence have done so when there is a significant time lapse between the time of driving and the time of BAC testing, usually two hours or more. *See, e.g., State v. Gallow,* 185 Ariz. 219, 914 P.2d 1311, 1313 (App.1995) (stating when BAC level taken within two hours of driving and the State's criminologist could not testify that the defendant's BAC at the time of driving exceeded the statutory limit beyond a reasonable doubt, the jury was not permitted to make such an inference); *Haas v. State,* 597 So.2d 770, 775-76 (Fla.1992) (Kogan, J., concurring in part, dissenting in part) (holding that it would amount to a due process violation to allow the state to presume defendant's BAC at the time of driving from test results taken several hours later); *Commonwealth v. Barud,* 545 Pa. 297, 681 A.2d 162, 166-67 (1996) (holding that a statute permitting conviction based on a BAC taken three hours after driving was unconstitutional); *Commonwealth v. Modaffare,* 529 Pa. 101, 601 A.2d 1233, 1234-35 (1992) (reversing DWI conviction where a marginal BAC level was taken almost two hours after driving and there was no corroborating evidence probative of intoxication), *superceded by statute as stated in Commonwealth v. Brehm,* 444 Pa.Super. 138, 663 A.2d 712, 719 (1995).

{22} By contrast to this case law and pertinent New Mexico cases, Defendant's BAC level was measured only one hour after he was stopped by Officer Harzewski, making it less difficult to establish a relation-back nexus than if more time had elapsed. *See Baldwin,* 2001-NMCA-063, ¶ 18, 130 N.M. 705, 30 P.3d 394 (citing cases where longer delays in BAC testing, and insufficient relation-back evidence, resulted in DWI reversals). As we said in *Baldwin,* it would be preferable if the legislature would prescribe a relation-back period by statute so that a jury could rely on a subsequent, timely BAC test result as a presumptive surrogate for what the BAC likely was at the time of driving. *See id.* ¶ 19. In the absence of a statutorily defined relation-back period, we must look to legislative intent for guidance with regard to what the legislature envisioned when it presented a per se offense at the time of driving.

{23} It would be foolhardy to think that the legislature contemplated that BAC readings could be obtained simultaneously with the act of driving. Some reasonable delay is inevitable because of the time required to stop and question a suspect, conduct field sobriety testing, complete an arrest, transport the suspect to a testing site with a properly calibrated breathalyzer machine, and conduct the requisite twenty-minute observation period before breath testing. *See, e.g., State v. Gardner,* 1998-NMCA-160, ¶ 5, 126 N.M. 125, 967 P.2d 465 (holding breath-alcohol test results inadmissible unless officer complies with twenty-minute continuous observation period). We assume the legislature was aware of this fact. *See State v. Gutierrez,* 115 N.M. 551, 552, 854 P.2d 878, 879 (Ct.App.1993) (stating that statute must not be interpreted in a way that will produce an absurd result and may be construed to avoid such a result). We believe that both the legislature and our Supreme Court contemplated tolerance of some reasonable and

inevitable delay in testing, and intended that otherwise valid test results would be admitted into evidence notwithstanding such a delay.

{24} The delay in this case brings to bear the factors discussed in *Baldwin*, which should be considered on a sliding scale. These factors include: how long is the delay; how much the BAC test results exceed the statutory limit; and the existence of other corroborating behavioral evidence. *See Baldwin*, 2001–NMCA–063, ¶ 23, 130 N.M. 705, 30 P.3d 394; *Cavanaugh*, 116 N.M. at 826–30, 867 P.2d at 1208–12; *Commonwealth v. Osborne*, 414 Pa.Super. 124, 606 A.2d 529, 531 (1992) ("[T]he stronger the inference of guilt, the less significant is the necessity for evidence of relating back. Conversely, the weaker the inference of guilt, the more vital is the necessity for evidence of relating back an accused's BAC test result to the time of driving.").

{25} In the case at bar, the delay between the time of driving and the time of testing did not exceed one hour. It is difficult to envision a reasonable delay of anything less than an hour from the time of driving to the time of testing, given all the events that must usually take place in the interim. In addition, there was evidence at trial from which the jury could have drawn a rational inference that Defendant's BAC at the time of driving was actually higher than the .08 and .09 readings obtained at the time of testing. That evidence follows.

{26} Defendant's expert witness, Dr. Reyes testified about the physiological consequences of alcohol ingestion and how difficult it is to extrapolate backward in time from a BAC test administered at a later time. Dr. Reyes explained that when alcohol is ingested, it travels first to the stomach, and is eventually absorbed into the bloodstream. During this first stage, or "absorption stage," an individual's BAC continues to rise. However, absorption rates can vary tremendously, based on any number of anatomical, physiological, and situational factors. At some point, the alcohol level in a person's blood or breath reaches a second stage, or "peak level." After the BAC reaches a peak, an individual enters the so-called "elimination phase," as alcohol is metabolized by the body and the BAC level begins to decline. Dr. Reyes testified that these three phases can overlap, because the body begins the process of elimination even as it may still be absorbing alcohol, and described this phenomena as an "alcohol time response curve," that can vary greatly with the individual and the situation. Because it is not always possible to tell whether an individual's BAC was on the rise, at its peak, or on the decline at some earlier point in time, like the time of driving, Dr. Reyes warned against trying to use a subsequent BAC test score to calculate an individual's BAC at the time of driving.

{27} A jury is not, however, bound by an expert's conclusion. *State v. Chamberlain*, 112 N.M. 723, 732, 819 P.2d 673, 682 (1991). The jury was free to reject Defendant's version of the facts, while nonetheless being informed by Dr. Reyes' explanation of the alcohol time response curve. *State v. Huff*, 1998–NMCA–075, ¶ 11, 125 N.M. 254, 960 P.2d 342. We view the evidence in the light most favorable to support the verdict. *Foster*, 1999–NMSC–007, ¶ 42, 126 N.M. 646, 974 P.2d 140.

{28} Based on Defendant's own admission that he had "slept some" after drinking but before taking the wheel, coupled with the additional hour that passed before BAC testing, and based on Dr. Reyes' testimony, the jury could reasonably have inferred that Defendant's BAC had "peaked" earlier in the evening, and that he was well into the "elimination stage" at the time of BAC testing. If this was the case, then Defendant's BAC level at the time of driving would have been higher, not lower, than the BAC level recorded by the breathalyzer tests. This inference, fully supported by the evidence, would support a conclusion that Defendant was driving with a BAC over the legal limit. Defendant offered no specific evidence to support a theory that his blood-alcohol level may have "peaked" at some point after he actually operated his vehicle. *Cf. Modaffare*, 601 A.2d at 1236 (reversing conviction where physician testified that defendant's BAC may have peaked after the time of driving). In addition, the evidence was that Defendant

failed one field sobriety test, was given the benefit of the doubt on another on which his performance was marginal, was driving erratically, and responded in a nervous and agitated way when stopped.

{29} For all the foregoing reasons we conclude that the jury verdict is supported by substantial evidence. The evidence supports the DWI verdict regardless of whether the jury found Defendant guilty under Section 66–8–102(A) or (C), or both.

The Lack of a Special Verdict

{30} Defendant argues that the jury should have been given a special verdict form that would indicate the theory or theories upon which the jury convicted him of DWI—Section 66–8–102(A) or (C), or both. We agree that if the evidence in this case were insufficient to sustain a conviction under one statutory theory, but sufficient under the other theory, a special verdict would have been helpful to this Court on appeal. However, as previously discussed, we are satisfied that the evidence supports a conviction under either theory, and therefore the lack of a special verdict, if error, is inconsequential to this appeal.

CONCLUSION

{31} We affirm Defendant's conviction for DWI.

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

WE CONCUR: LYNN PICKARD, Judge, and CYNTHIA A. FRY, Judge.

2002-NMCA-022

40 P.3d 1042

Judilia TOSCANO, Plaintiff–Appellee,

v.

Augustin LOVATO and Dairyland Insurance Company, Defendants–Appellants.

No. 22,150.

Court of Appeals of New Mexico.

Jan. 2, 2002.

Narciso Garcia, Jr., Garcia Law Office, Albuquerque, NM, for Appellee.

Jeffrey E. Jones, Miller, Stratvert & Torgerson, P.A., Santa Fe, NM, for Appellants.

OPINION

PICKARD, Judge.

{1} In this case, we are asked to consider the implications, on the issue of venue, of *Raskob v. Sanchez,* 1998–NMSC–045, 126 N.M. 394, 970 P.2d 580, which held that a plaintiff may join a defendant's insurer in an action arising out of an automobile accident. After Plaintiff and Defendant Lovato, both residents of Bernalillo County, were involved in an automobile accident within that county, Plaintiff brought suit against Lovato and, pursuant to *Raskob,* Lovato's insurer, Dairyland Insurance Co. Plaintiff filed her action in Santa Fe County. Defendants moved to

dismiss, arguing that venue would be proper only in Bernalillo County. The district court denied Defendants' motion, but permitted an interlocutory appeal pursuant to NMSA 1978, § 39-3-4(A) (1999), and we granted Defendant's application for appeal.

{2} Defendants argue that under our venue statute, NMSA 1978, § 38-3-1 (1988), Plaintiff could bring this action only in Bernalillo County. Defendants argue that, in accordance with *Sunwest Bank v. Nelson*, 1998-NMSC-012, ¶¶ 12-13, 125 N.M. 170, 958 P.2d 740, out-of-state insurance companies are not foreign corporations for the purposes of the venue statute. As a result, they argue, Plaintiff was required to base her venue selection on the options available under Subsection A of the venue statute, rather than Subsection F, which governs actions brought against foreign corporations. If Subsection A governs this action, then venue will be proper only in Bernalillo County. In the alternative, Defendants argue that Plaintiff cannot rely on the residency of an insurance company joined pursuant to *Raskob* in selecting venue, because the insurer is not a necessary and indispensable party to the action.

{3} Addressing Defendant's second argument first, we do not agree that venue must be based on a necessary and indispensable party, and instead hold that Plaintiff could base her venue decision on the residence of any proper party. Moving on to interpret the venue statute, we agree with Defendants that, under *Sunwest Bank*, out-of-state insurance companies are not foreign corporations for the purposes of the venue statute, and therefore the provisions of Subsection F relating to suits brought against foreign corporations do not apply. Nonetheless, we do not agree with Defendants that Plaintiff's venue selection is governed by Subsection A. Instead, we hold that foreign insurers are to be treated as nonresidents for the purposes of the venue statute, and therefore are subject to suit in any county within the state.

{4} In summary, we hold that (1) Plaintiff could base her venue decision on the residence of any proper party; (2) out-of-state insurance companies are not foreign corporations for the purposes of the venue statute, and therefore the provisions of Subsection F relating to suits brought against foreign corporations do not apply to actions against foreign insurers; and (3) foreign insurers are to be treated as nonresidents for the purposes of the venue statute, and therefore are subject to suit in any county within the state. Because Dairyland, as a nonresident, is subject to suit in any county, venue for this action was proper in Santa Fe County. We therefore affirm the decision of the district court denying Defendants' motion to dismiss for improper venue.

FACTS AND PROCEEDINGS

{5} Dairyland is an insurance company organized under the laws of the State of Wisconsin and certified to do business in New Mexico. Plaintiff brought her action in Santa Fe County on the theory that Dairyland is a foreign corporation, and therefore her venue options are governed by Subsection F of the venue statute, Section 38-3-1. Subsection F provides:

> Suits may be brought against transient persons or non-residents in any county of this state, except that suits against foreign corporations admitted to do business and which designate and maintain a statutory agent in this state upon whom service of process may be had shall only be brought in the county where the plaintiff, or any one of them in case there is more than one, resides or in the county where the contract sued on was made or is to be performed or where the cause of action originated or indebtedness sued on was incurred or in the county where the statutory agent designated by the foreign corporation resides.

Plaintiff argues that, in this case, venue is proper in Santa Fe County because Dairyland, in compliance with NMSA 1978, § 59A-5-31(A) (1984), has appointed the Superintendent of Insurance as its statutory agent to receive service of process. Because the Superintendent of Insurance "resides" in Santa Fe County, Plaintiff argues that venue is proper there under Subsection F. There is no other basis for venue in Santa Fe County.

{6} In support of their motion to dismiss, Defendants argue that, under our Supreme Court's holding in *Sunwest Bank*, foreign insurers are not foreign corporations for the

purposes of the venue statute. As a result, they argue, the provisions of Subsection F providing venue options for actions against foreign corporations do not apply. Defendants contend that Subsection A of the venue statute should govern this action. Subsection A provides that:

> First, except as provided in Subsection F of this section relating to foreign corporations, all transitory actions shall be brought in the county where either the plaintiff or defendant, or any one of them in case there is more than one of either, resides; or second, in the county where the contract sued on was made or is to be performed or where the cause of action originated or indebtedness sued on was incurred; or third, in any county in which the defendant or either of them may be found in the judicial district where the defendant resides.

If Subsection A governs, then the action must be brought within Bernalillo County, because that is the place where both Plaintiff and Defendant Lovato reside and where the accident occurred. In the alternative, Defendants argued that Plaintiff cannot rely on the residence of Dairyland to determine venue because Dairyland is not a necessary and indispensable party to the action. The district court denied Defendants' motion on both grounds.

DISCUSSION

{7} A motion to dismiss for improper venue raises a question of law, which we review de novo. *Williams v. Bd. of County Comm'rs,* 1998–NMCA–090, ¶ 28, 125 N.M. 445, 963 P.2d 522. Our legislature has provided an expansive venue statute that gives plaintiffs wide latitude in choosing where to bring an action. *Sunwest Bank,* 1998–NMSC–012, ¶ 10, 125 N.M. 170, 958 P.2d 740. When there are multiple defendants, the residence of one defendant can determine the venue of the entire action. *See Cooper v. Amerada Hess Corp.,* 2000–NMCA–100, ¶ 32, 129 N.M. 710, 13 P.3d 68, *cert. granted,* 130 N.M. 154, 20 P.3d 811 (2000) (citing *Teaver v. Miller,* 53 N.M. 345, 349, 208 P.2d 156, 159 (1949)).

A Plaintiff Can Select Venue Based on the Residence of Any Defendant That Is a Proper Party to the Action

{8} We address first Defendants' argument that venue can be based only on a necessary and indispensable party. If we agreed with Defendants' position on this issue, there would be no need to go on to discuss what venue is proper in suits involving Dairyland. However, we do not agree with Defendants' position.

{9} Defendants find support for their argument in *Teaver.* In that case, our Supreme Court stated that, "It is essential . . . that the defendant whose residence is made determinative of the venue of the action be a necessary party to the action and not one joined solely to justify the bringing of the action in the county of his residence." *Id.* Defendants argue that Plaintiff cannot rely on the residence of Dairyland's statutory agent to select venue because Dairyland is not a necessary and indispensable party.

{10} A necessary and indispensable party is "one whose interests will necessarily be affected by the judgment so that complete and final justice cannot be done between the parties without affecting those rights." *Jemko, Inc. v. Liaghat,* 106 N.M. 50, 52, 738 P.2d 922, 924 (Ct.App.1987). Defendants acknowledge that Dairyland has an interest in the action, but they argue that judgment could be rendered without Dairyland being joined as a party. Prior to *Raskob,* they note, automobile accident cases were routinely litigated without insurance companies joined as parties. Clearly, then, judgment can be rendered without the presence of the insurance company.

{11} Defendants' logic is sound, but Defendants overstate the holding of *Teaver,* and apply too high a standard as a result. The *Teaver* Court held that venue must be based on necessary parties; it did not require those parties to be indispensable. *See Teaver,* 53 N.M. at 349, 208 P.2d at 158. For some time now, our courts have expressly drawn no distinction between necessary and indispensable parties. *Sellman v. Haddock,* 62 N.M. 391, 402, 310 P.2d 1045, 1052 (1957), *overruled on other grounds by Safeco Ins. Co. v. United States Fidelity & Guar. Co.,* 101

N.M. 148, 150, 679 P.2d 816, 818 (1984). The *Teaver* Court, however, deciding its case a decade before *Sellman*, did draw such a distinction. *See Teaver*, 53 N.M. at 349, 208 P.2d at 158. The *Teaver* Court defined necessary parties as "[p]ersons having an interest in the controversy and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it...." *Id.* (internal citation and quotation marks omitted). In contrast, the Court explained that when a party is indispensable, the action cannot proceed without that party and must be dismissed if that party cannot be joined. *Id.; see also* 4 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 19.02 (3rd ed.2001) (explaining that a case can proceed without a necessary party if joinder is not feasible, but a case cannot proceed without an indispensable party and must be dismissed if joinder is not feasible). Defendants misread *Teaver*, therefore, when they argue that venue cannot be based on Dairyland unless the insurer is a necessary *and indispensable* party, and their reliance on subsequent cases defining indispensable parties is misplaced.

{12} In addition, while the *Teaver* Court used the term necessary party, other language in the opinion indicates that venue can be based on any *proper* party to the action. The Court stated that:

> In every case the true test to determine whether or not the venue is proper, so that the summons may issue to another county, is whether the defendant served in the county where the suit is brought[ ] is a bona fide defendant to the action and whether his interest in the result of the action is in any manner adverse to that of the plaintiff with respect to the cause of action against the other defendants.

Teaver, 53 N.M. at 349, 208 P.2d at 159 (internal citation and quotation marks omitted). We think this language describes a proper party, rather than a necessary one, and we see no evidence that Defendants' broader interpretation of *Teaver* has been followed in this state. In the fifty-plus years since *Teaver* was decided, no other case has held that venue can only be based on a necessary party. In *Cooper*, we did note the holding in *Teaver*, but we relied on *Teaver* only for the proposition that the residence of one defendant determines venue as to the remaining defendants. *See Cooper*, 2000-NMCA-100, ¶ 32, 129 N.M. 710, 13 P.3d 68. Adopting a broad interpretation of *Teaver* at this time may open the door to additional procedural battles over which defendant is sufficiently "necessary" to determine venue.

{13} We think that the inquiry under *Teaver* is similar to the standard applied in federal court, where a defendant must have an actual interest in the litigation and not be a "straw man" brought in to manufacture diversity jurisdiction. *See* 28 U.S.C. § 1359 (1948); *Martinez v. United States Olympic Comm.*, 802 F.2d 1275, 1279 (10th Cir.1986). We hold that as long as a defendant has an interest adverse to the plaintiff and has not been joined solely to manipulate venue, a plaintiff can select any venue where an action against that party would be permitted by the venue statute. Under the clear holding of *Raskob*, a defendant's insurer is a proper party in an action arising from an automobile accident. *See Raskob*, 1998-NMSC-045, ¶ 6, 126 N.M. 394, 970 P.2d 580. Dairyland, therefore, is a proper party to this action, and Plaintiff was entitled to select any venue where an action against Dairyland would be permitted by the venue statute.

{14} Defendants argue, without support, that Plaintiff's sole reason for joining Dairyland was to manipulate venue. We think it is clear, however, that plaintiffs have other motivations for joining insurance companies as defendants. *See, e.g.*, David Berardinelli, *Direct Actions After Raskob: Brave New World or Business As Usual?*, 27 THE NEW MEXICO TRIAL LAWYER 1 (January 1999) (discussing the strategic advantage plaintiffs might gain from joining insurance companies as defendants); Roger H. Buelow, *The Direct Action Threat: Raskob v. Sanchez*, 8 NEW MEXICO DLA-NEWS 4 (Winter 1999) (same). Moreover, any inquiry into Plaintiff's motivation must be done by the district court, which can make the proper findings of fact necessary to reach such a conclusion.

Venue Is Proper in Santa Fe County

{15} Because Dairyland is a proper party to this action, and Plaintiff could validly select any venue where an action against Dairyland would be proper, we must now determine if her choice of Santa Fe County was permitted under the venue statute. Plaintiff first argues that Dairyland is a foreign corporation, and she can therefore rely on the provisions of Subsection F relating to suits brought against foreign corporations in determining venue. Defendants, on the other hand, argue that, under *Sunwest Bank*, out-of-state insurers are not foreign corporations for the purposes of the venue statute, and therefore the provisions of Subsection F relating to suits brought against foreign corporations do not apply. Plaintiff next argues that, if Defendants are correct in their assertion that Dairyland is not a foreign corporation, then Dairyland is a nonresident and, under Subsection F, is subject to suit in any county in the state. Defendants, however, argue that if we determine that Dairyland is not a foreign corporation, then Subsection A, not Subsection F, applies, and Plaintiff must select venue based on either her residence, Defendant Lovato's residence, or the place where the accident occurred, all of which are in Bernalillo County.

{16} To resolve this dispute over the interpretation of the venue statute, we must first determine whether or not Dairyland is a foreign corporation. If it is not, we must then determine whether Dairyland should be treated as a nonresident, such that it can be sued in any county in the state, or whether Plaintiff is limited to the options under Subsection A, and venue is therefore proper only in Bernalillo County.

1. Dairyland Is Not a Foreign Corporation Under the Venue Statute

{17} Defendants' argument that Dairyland is not a foreign corporation under the venue statute is based on our Supreme Court's holding in *Sunwest Bank*. In *Sunwest Bank*, the bank, acting as personal representative for a patient who died while undergoing treatment in Roswell, brought a medical malpractice action against the treating physician. *Sunwest Bank*, 1998–NMSC–012, ¶ 3, 125 N.M. 170, 958 P.2d 740. The bank brought the action in Bernalillo County, where it had its principal place of business. *Id.* There was no other basis for bringing the action in Bernalillo County. The physician objected to that venue, relying on *Aetna Finance Co. v. Gutierrez*, where the Supreme Court held that a foreign corporation, when bringing suit as a plaintiff and selecting among the venue options provided in Subsection A, cannot rely on the location of its local offices as the place where it "resides." 96 N.M. 538, 540–41, 632 P.2d 1176, 1178–79 (1981).

{18} The *Sunwest Bank* Court held that *Aetna Finance Co.* did not apply because Sunwest Bank, unlike Aetna, was not a foreign corporation as the term is used in our statutes. *Sunwest Bank*, 1998–NMSC–012, ¶ 13, 125 N.M. 170, 958 P.2d 740. In making this determination, the Court sought to define the term "foreign corporations." The Court first noted that the venue statute did not provide a definition for foreign corporations. The Court then turned to other statutes for guidance in defining the term. The Court looked to the Business Corporation Act, which defines a foreign corporation as "a corporation for profit organized under laws other than the laws of this state for a purpose or purposes for which a corporation may be organized under the Business Corporation Act." NMSA 1978, § 53–11–2(B) (2001). The Court next cited the portion of the Business Corporation Act, which provides that "[c]orporations may be organized under the Business Corporation Act for any lawful purpose or purposes, except banking [and] insurance." NMSA 1978, § 53–11–3 (1967). The Court then held that Sunwest Bank, which was organized for the purpose of banking, was not a foreign corporation under this definition. *Sunwest Bank*, 1998–NMSC–012, ¶ 13, 125 N.M. 170, 958 P.2d 740.

{19} Plaintiff urges us to disregard this portion of *Sunwest Bank* as dicta. Plaintiff argues that the discussion of Subsection F, which applies only to claims brought *against* nonresidents and foreign corporations, was not necessary to the Court's decision, because *Sunwest Bank* involved a suit brought *by* a national banking

association. We disagree. The Court's discussion of Subsection F was necessary to determine Sunwest Bank's residency. If Sunwest Bank was a foreign corporation under Subsection F, then it could not claim residency in Bernalillo County when bringing a suit, and the Court's further analysis would have been unnecessary. *See Aetna*, 96 N.M. at 540–41, 632 P.2d at 1178–79. Moreover, we should abide by our Supreme Court's clear statement in a recent opinion that appears to have carefully considered the issue presented. *Compare State v. Wilson*, 116 N.M. 793, 796, 867 P.2d 1175, 1178 (1994) (holding that Court of Appeals acted improperly in issuing opinion abolishing doctrine that Supreme Court had specifically declined to abolish), *with Weststar Mortgage Co. v. Jackson*, 2002–NMCA–009, ¶ 54–55, 131 N.M. 493, 39 P.3d 710 (refusing to follow a recent Supreme Court case that considered a narrower issue and relied on cases construing an earlier version of one of the pertinent statutes), *and State ex rel. Martinez v. City of Las Vegas*, 118 N.M. 257, 258–59, 880 P.2d 868, 869–70 (Ct.App.1994) (overruling doctrine that Supreme Court had not reaffirmed or revisited in more than thirty years).

{20} Insurance, like banking, is not a purpose for which a corporation may be organized under the Business Corporation Act. *See* § 53–11–3. Applying *Sunwest Bank*, we hold that foreign insurers are not foreign corporations for the purposes of the venue statute, and therefore the provisions of Subsection F relating to suits brought against foreign corporations do not govern actions brought against foreign insurers.

2. Foreign Insurers Are Nonresidents

{21} Having determined that Dairyland is not a foreign corporation, we must now decide whether Dairyland is a resident or nonresident of this state, in order to determine which venue provisions do govern actions against it. In *Sunwest Bank*, once the Court determined that the bank was not a foreign corporation, it then addressed the question of whether a national banking association, with its principal place of business in this state, is a resident of New Mexico for purposes of venue selection under Subsection A. *Sunwest Bank*, 1998–NMSC–012, ¶ 16, 125 N.M. 170, 958 P.2d 740. The Court determined that it was. *Id.* ¶¶ 15–16. The Court explained that the legislature treated banks that are organized under national banking laws, but have their principal places of business in New Mexico, as domestic banks. *Id.* ¶ 15 (citing NMSA 1978, § 58–1A–2(E) (1995)). The Court then concluded that those banks are residents of New Mexico. *Id.* ¶ 15.

{22} Unlike banks, insurance companies cannot be organized under national laws. *See* McCarran–Ferguson Act, 15 U.S.C. § 1011 (1945) (leaving regulation of insurance to the states except where Congress has clearly acted). As a result, the residency analysis for insurers will vary somewhat from the Court's analysis in *Sunwest Bank*. Our Insurance Code differentiates between domestic insurers, *see* NMSA 1978, § 59A–5–4 (1984), and foreign insurers, *see* NMSA 1978, § 59A–5–5 (1984). Domestic insurers are organized under the laws of New Mexico; foreign insurers are organized under the laws of other states. Drawing on this distinction, we think that the place of incorporation of an insurance company determines the company's residency status for purposes of the venue statute. Only domestic insurers are residents of this state for the purposes of venue selection; foreign insurers are nonresidents. In this case, it is undisputed that Dairyland is a foreign insurer, organized under the laws of the state of Wisconsin. Dairyland, then, is a nonresident for the purposes of our venue statute.

{23} Defendants' argument that Dairyland cannot be deemed a nonresident because Plaintiff failed to describe the company as such in her Complaint is without merit. We have decided, as a matter of law, that a foreign insurer is a nonresident for purposes of the venue statute. Plaintiff's Complaint described Dairyland as "a foreign corporation licensed to provide insurance coverage within the State of New Mexico." As a result, the Complaint stated the relevant facts necessary to determine Dairyland's residency status. This is all that is required under our Rules of Civil Procedure. *See Aetna Cas. & Sur. Co. v. Bendix Control*

Div., 101 N.M. 235, 680 P.2d 616 (Ct.App. 1984) (addressing pleading requirements to determine personal jurisdiction).

3. Suits Against Nonresidents Can be Brought in Any County

{24} We have determined that Dairyland is a nonresident, rather than a foreign corporation, for purposes of the venue statute. We must now determine where venue is proper in an action against Dairyland as a nonresident. Subsection F of the venue statute provides that, "[s]uits may be brought against transient persons or nonresidents in any county of this state." Defendants, however, argue that the provisions of Subsection A, rather than Subsection F, govern this action. Defendants explain that the provisions of Subsection F dealing with nonresidents are permissive, and therefore must yield to the mandatory provisions of Subsection A. *See United Nuclear Corp. v. Fort*, 102 N.M. 756, 761, 700 P.2d 1005, 1010 (Ct.App.1985) ("A permissive venue statute must yield to a mandatory venue provision.").

{25} Defendants' reliance on *United Nuclear Corp.* is misplaced. In *United Nuclear Corp.*, we were asked to choose between two different venue statutes to determine which one was applicable. One statute had mandatory language, while the other was permissive, and we held that the mandatory statute prevails. *Id.* Here, we are construing one statute, not two. We examine statutes in their entirety, construing each section in connection with every other section. *Romero Excavation & Trucking, Inc. v. Bradley Constr., Inc.*, 121 N.M. 471, 473, 913 P.2d 659, 661 (1996). No part of a statute should be construed so that it is meaningless. *Whitely v. N.M. State Pers. Bd.*, 115 N.M. 308, 311, 850 P.2d 1011, 1014 (1993). The plain language of Subsection F permits suits against nonresidents in any county. Under Subsection A, on the other hand, a plaintiff's choices are limited. If the permissive provisions of Subsection F always "yielded" to Subsection A when suits are brought against nonresidents, then the portion of Subsection F dealing with nonresidents would be meaningless.

{26} Nor do we read Subsection A as mandatory when a suit is brought against a nonresident defendant. Subsection A does contain mandatory language, providing that "all transitory actions shall be brought" in accordance with that subsection, but it also provides a clear exception: "except as provided in Subsection F of this section relating to foreign corporations." There are two ways to read this provision. It could be argued that only the provisions of Subsection F relating to foreign corporations, and not the provisions relating to nonresidents, provide an exception to Subsection A. On the other hand, it could be argued that the entirety of Subsection F, including the provisions relating to nonresidents, is an exception to Subsection A, and that the language "relating to foreign corporations" is descriptive only. We think the latter interpretation is correct. If not, plaintiffs bringing suit against nonresidents would always be required to choose from the options prescribed in Subsection A. Past cases have held directly to the contrary. *See Valley Country Club v. Mender*, 64 N.M. 59, 61, 323 P.2d 1099, 1100 (1958) ("because the defendant was a non-resident the case could have been brought in any county in the state of New Mexico").

{27} Because Dairyland is a nonresident, Plaintiff could bring suit against the insurer in any county, and Plaintiff was free to choose Santa Fe County. Because venue was proper as to Dairyland, venue was proper as to Defendant Lovato as well. This result might not comport with the intent of the legislature in drafting the venue statute. Subsection F is designed to protect foreign corporations from being subject to suit anywhere in the state by limiting the options available to plaintiffs. *See Cooper*, 2000-NMCA-100, ¶ 28, 129 N.M. 710, 13 P.3d 68 (discussing the legislative policy embodied in the statute). Under our decision today, that protection is not available to insurers organized under the laws of states other than New Mexico, making those companies amenable to suit statewide. We think the Su-

preme Court's holding in *Sunwest Bank*, however, compels such a result.

CONCLUSION

{28} A plaintiff can base the decision as to venue on the residency of any proper party to the action. In this case, Dairyland, a nonresident, is subject to suit in any county of the state under the clear language of Section 38–3–1(F). Therefore, venue for this cause of action was proper in Santa Fe County, and we affirm the decision of the district court denying Defendants' motion to dismiss for improper venue.

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

WE CONCUR: MICHAEL D. BUSTAMANTE, Judge, and IRA ROBINSON, Judge.

2002-NMSC-004

41 P.3d 333

Frank TRUJILLO and Lorraine Trujillo, Plaintiffs–Appellees and Cross–Appellants,

v.

NORTHERN RIO ARRIBA ELECTRIC COOPERATIVE, INC., Defendant–Appellant and Cross–Appellee.

No. 26,542.

Supreme Court of New Mexico.

Dec. 6, 2001.

Rehearing Denied Feb. 21, 2002.

Herrera, Long and Pound, P.A., Judith C. Herrera, Mark E. Komer, Santa Fe, NM, for Appellant.

Linda G. Hemphill, Annie–Laurie Coogan, Santa Fe, NM, for Appellees.

OPINION

FRANCHINI, Justice.

{1} Northern Rio Arriba Electric Cooperative, Inc. (NORA) appeals from a jury verdict granting damages to Frank and Lorraine Trujillo. Frank Trujillo had pursued a discrimination claim against NORA under the New Mexico Human Rights Act, NMSA 1978, §§ 28–1–1 to –15 (1969, as amended through 1993, prior to 1995, 2000, & 2001 amendments), alleging that NORA discriminated against him because of a medical condition when they fired him. *See* NMSA 1978, § 28–1–7(A) (1987, prior to 1995 & 2001 amendments). Plaintiffs subsequently filed a complaint in the district court for a trial de novo under NMSA 1978, § 28–1–13(A) (1987), and alleged additional claims, including Mrs. Trujillo's claim for loss of consortium. After a five-day trial, the jury returned a verdict favorable to Mr. and Mrs. Trujillo on all claims, finding that the firing of Mr. Trujillo violated the Human Rights Act and public policy, breached an implied contract of employment, intentionally inflicted severe emotional distress on Mr. Trujillo, and caused a loss of consortium for his wife. The trial court subsequently awarded attorney's fees and costs to the Trujillo attorneys. NORA filed an appeal directly to this Court under Section 28–1–13(C) of the Human Rights Act, arguing that the trial court erred in submitting the Trujillos' claims to the jury. Plaintiffs filed a cross-appeal seeking an increase in the amount of attorney's fees and various costs. We reverse the judgment in favor of Plaintiffs, thereby rendering the cross-appeal moot.

I. FACTUAL AND PROCEDURAL BACKGROUND

{2} NORA is a cooperative nonprofit corporation with approximately fifteen employees. In 1995, Mr. Trujillo was employed by NORA in the billing department as a computer operator and billing clerk and had been with the cooperative for thirteen years. In the fall of 1994, after the cooperative had been cautioned by the certified public accounting firm that performed its annual audit about various irregularities, NORA began an internal audit to identify where the record-keeping and collection problems were occurring. On February 8, 1995, the three employees in the billing department, including Mr. Trujillo, attended a seminar designed to address billing errors and revenue losses that had been identified by the audit. At the seminar, which was intended to last several days, the employees were asked to report any billing problems they might know about that had not yet been uncovered by the audit. The following morning, Mr. Trujillo felt fatigued and told his co-workers that he had been dizzy and disoriented while driving to work. He left work early and did not come in the following day, which was Friday, but rather went to see a doctor. The following Monday, when Mr. Trujillo told the general manager of the symptoms he was experiencing, NORA placed him on sick leave to recuperate.

{3} Relying on the symptoms Mr. Trujillo reported to her, the doctor's working hypothesis was that they might represent a "transient ischemic attack like syndrome." Concerned that the episode might be a precursor to a stroke,[1] she referred Mr. Trujillo to several specialists for diagnostic testing. Mr. Trujillo underwent a cerebrovascular evaluation on February 24, 1995, with "unremarkable" results. The results of a treadmill test and an EKG fell within normal limits. On March 3, 1995, he had both an EEG and MRI of the brain; those tests did not reveal any problems.

{4} Based on these test results, Mr. Trujillo was cleared by his doctor to return to work on a part-time basis on March 7, 1995. Upon receiving the work release, NORA's general manager tried to contact the doctor by telephone and also sent a letter by facsimile asking for more information about the part-time work restriction. He received no response from the doctor. When Mr. Trujillo returned to work on March 13, 1995, he had been on sick leave for approximately a month. Upon return, he met with the general manager to discuss further concerns about Mr. Trujillo's job performance and additional problems with his work that had been discovered during his absence. The additional problems included delays in billing and inaccurate records which had resulted in lost and delayed revenues of thousands of dollars. With regard to the work release, the general manager stated that he was hesitant about having Mr. Trujillo work part-time hours and that he wanted him working full time. Following their discussion, the general manager placed Mr. Trujillo on administrative leave with pay.

{5} The following week, NORA sent Mr. Trujillo a letter advising him that his employment with NORA would be terminated as of March 20, 1995. The letter also described NORA's loss of confidence in Mr. Trujillo based on the shortcomings in his job performance. Under NORA's appeal process, Mr. Trujillo requested the Board of Directors to reinstate him. After his appeal was denied, he filed a claim under the Human Rights Act and then pursued a trial in District Court from which this appeal ensues.

II. DISCUSSION

{6} NORA argues on appeal that it was error for the trial court to have submitted to the jury the claims related to the Human Rights Act, discharge due to medical condition and failure to accommodate. NORA also contends that it was error to submit the additional claims of retaliatory discharge, breach of implied contract, intentional infliction of emotional distress, loss of consortium, and punitive damages. In the proceedings below, NORA had filed a motion for summary judgment and motions for directed verdict at the close of the Trujillos' case and before submission to the jury in which they argued that the evidence presented was legally insufficient to sustain the Trujillo's claims. Over NORA's objection, the trial court instructed the jury on all claims.

{7} We treat NORA's argument as challenging the sufficiency of the evidence upon which the jury based its verdict. *See Gonzales v. N.M. Dep't of Health*, 2000–NMSC–029, ¶ 18, 129 N.M. 586, 11 P.3d 550. If the verdict below is supported by substantial evidence, which we have defined as "such relevant evidence that a reasonable mind would find adequate to support a conclusion," we will affirm the result. *See Landavazo v. Sanchez*, 111 N.M. 137, 138, 802 P.2d 1283, 1284 (1990). In assessing whether the evidence is sufficient as a matter of law to justify the jury's verdict, we review all evidence in the light most favorable to the verdict and resolve all conflicts in the light most favorable to the prevailing party. *Smith v. FDC Corp.*, 109 N.M. 514, 519, 787 P.2d 433, 438 (1990).

A. Claims under the Human Rights Act.

{8} Mr. Trujillo claimed that NORA discriminated against him in violation of the

1. "A transient ischemic attack (TIA) always has a sudden onset and is an acute neurologic deficit usually reaching its maximum intensity in a few minutes and disappearing completely within 24 hours. By definition, a TIA cannot last longer than a 24–hour interval. Recognition is crucial since the transient ischemic attack may serve as a warning that a stroke is imminent." 3B *Attorneys' Textbook of Medicine* 89A.40, at 24 (Roscoe N. Gray et al. eds., 3d ed.1996).

Human Rights Act when it fired him because of a medical condition. Under the Human Rights Act, an employer is prohibited from discharging "any person otherwise qualified because of ... medical condition." Section 28–1–7(A). In interpreting our state Human Rights Act, we have previously indicated that it is appropriate to rely upon federal adjudication for guidance in analyzing a claim under the Act, with the following reservation:

> Our reliance on the methodology developed in the federal courts, however, should not be interpreted as an indication that we have adopted federal law as our own. Our analysis of this claim is based on New Mexico statute and our interpretation of our legislature's intent, and, by this opinion, we are not binding New Mexico law to interpretations made by the federal courts of the federal statute.

Smith, 109 N.M. at 517, 787 P.2d at 436; *see Kitchell v. Pub. Serv. Co.,* 1998–NMSC–051, ¶¶ 5–8, 126 N.M. 525, 972 P.2d 344 (relying on federal authority to aid in the interpretation of the phrase "otherwise qualified" in relation to a claim of discrimination based on medical condition). For this claim, the closest federal counterpart would be the Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (1994) (ADA), a federal statute prohibiting discrimination against persons with a disability. The Tenth Circuit has stated that in order to maintain a disability discrimination claim under the ADA, a plaintiff must demonstrate "(1) that he [or she] is a disabled person within the meaning of the ADA; (2) that he [or she] is qualified ...; and (3) that the employer terminated him [or her] because of the disability." *White v. York Int'l Corp.,* 45 F.3d 357, 360–61 (10th Cir.1995). *See generally* 42 U.S.C. § 12112(a). Although the New Mexico statute uses the terms "medical condition" or "handicap" rather than the ADA term "disability," we believe in the context of this case that the terms can be viewed as interchangeable.

1. Medical Condition.

{9} NORA argues that Mr. Trujillo did not present sufficient evidence of a medical condition to support a claim under the terms of the Human Rights Act. The applicable regulations of the New Mexico Human Rights Division define a medical condition as "any medical condition as defined by an appropriate medical authority through documentation, or by direct witness of a clearly visible disablement." Rules & Regulations, N.M. Dep't of Labor, Human Rights Division, I(A)(26) (Nov. 11, 1988) (superceded 1998).

{10} NORA's objections to the jury verdict are twofold. First, they argue that the symptoms reported by Mr. Trujillo in February and March were insufficient to establish that he had a medical condition. Second, they contend that the medical evidence presented by the psychiatrist and neurologist was improperly admitted at trial because it was not relevant to the time period in question. We agree with both.

{11} At trial Mr. Trujillo testified about feeling ill on the morning after the billing department seminar on February 9 and described feeling exhausted, dizzy, and disoriented as well as experiencing some numbness in his arm. His original doctor did not testify, but her treatment notes were admitted into evidence over objection as unauthenticated. We agree with NORA that the medical records should not have been admitted. *See* Rule 11–803(F) NMRA 2001 (providing an exception to the hearsay rule for documents prepared and kept in the course of regularly conducted business activity "as shown by the testimony of the custodian or other qualified witness"). Additional medical evidence was presented through the psychiatrist who first saw Mr. Trujillo in October 1995 and who also relied upon the medical records of the doctor who had treated him. The psychiatrist testified that because the earlier diagnostic tests had ruled out a physical cause for Mr. Trujillo's problems, she concluded that Mr. Trujillo must have had a psychiatric illness. Although she considered Mr. Trujillo medically healthy when she saw him in October, he was depressed about losing his job, and she thus recommended an antidepressant and medication for anxiety. Based on what Mr. Trujillo had reported to her, she concluded Mr. Trujillo's illness on February 9 might have been an acute anxiety attack. The remaining medical evidence was introduced through the deposition of the neurologist who had per-

formed the EEG and MRI on Mr. Trujillo. His medical conclusions were also based on the medical records of the psychiatrist who had testified and a neuropsychologist who examined Mr. Trujillo in May 1995.

{12} Our review leads us to conclude that, even when viewing the evidence in a light most favorable to upholding the verdict, Mr. Trujillo failed to present sufficient evidence to show that he suffered from a medical condition at the time NORA discharged him. Although he testified to the symptoms he experienced during February and March, the nature of his condition was never identified or diagnosed at the time. Further Mr. Trujillo's problems existed for a short period; by March 13 he had been cleared to return to work by his doctor. In a letter dated March 31, 1995, this doctor stated that although her initial diagnosis of his illness was a transient ischemic attack-like syndrome, the diagnostic testing revealed that Mr. Trujillo had not suffered a stroke and was, in fact, at low risk of stroke. She also stated that he was "very capable of returning to full-time employment." Mr. Trujillo did not claim at trial to have suffered a relapse of these symptoms. Being ill is not synonymous with having a medical condition. We do not believe that the Legislature intended that the phrase "medical condition" in Section 28-1-7(A) include temporary illnesses with minimal residual effects. We hold that a jury could not have properly determined that Mr. Trujillo suffered from a medical condition under the Human Rights Act at the time he was fired by NORA and therefore the question of a violation of the Human Rights Act should not have been submitted to the jury.

{13} Consistent with our interpretation of Section 28-1-7(A), several courts have held that a temporary injury with minimal residual effects cannot be the basis for a sustainable claim under the ADA. *See, e.g., Hilburn v. Murata Elecs. North Am. Inc.*, 181 F.3d 1220, 1229 (11th Cir.1999) (holding that a thirty-eight day absence from work after a heart attack did not support claim that plaintiff was substantially limited in ability to work); *Sanders v. Arneson Prods., Inc.*, 91 F.3d 1351, 1354 (9th Cir.1996) (holding that temporary psychological impairment with no residual effects was not of sufficient duration to be a disability under the ADA); *Rakestraw v. Carpenter Co.*, 898 F.Supp. 386, 390 (N.D.Miss.1995) (determining that a back injury of limited duration which was later remedied was not sufficient to constitute a disability); *Blanton v. Winston Printing Co.*, 868 F.Supp. 804, 807-08 (M.D.N.C.1994) (holding that a temporary knee injury with minimal residual effects cannot provide a basis for an ADA claim).

{14} We also determine that it was error for the trial court to have admitted the psychiatrist's testimony regarding Mr. Trujillo's medical status at the time of treatment as opposed to the time of the adverse employment claim. The fact that Mr. Trujillo was eventually diagnosed as depressed in September 1995 is irrelevant to this case. The employment action affecting Mr. Trujillo occurred in March 1995, and we evaluate his medical claim based on how the alleged condition manifested itself at that time. *See Cameron v. Navistar Int'l Transp. Corp.*, 39 F.Supp.2d 1040, 1046 (N.D.Ill.1998) (concluding that medical records that pertain to plaintiff's condition after the employment decision did "not shed light on [plaintiff's] condition at the relevant time"); *cf. Browning v. Liberty Mut. Ins. Co.*, 178 F.3d 1043, 1047 (8th Cir.1999) (stating that the determination of whether employee is a "qualified individual" under the ADA must be based on his or her capabilities "as of the time of the employment decision"). The psychiatrist did properly testify regarding her opinion of Mr. Trujillo's symptoms on February 9; this testimony was relevant to the issue of whether Mr. Trujillo suffered from a medical condition. Again, however, even viewing this testimony in a light most favorable to Mr. Trujillo, this testimony established nothing more than a temporary illness rather than a medical condition protected by the Human Rights Act.

2. Failure to Accommodate.

{15} NORA also challenges the sufficiency of the evidence for the claim of failure to accommodate. Under the Human Rights Act, it is an unlawful discriminatory practice for an employer "to refuse or fail to accom-

modate to an individual's physical or mental handicap or medical condition, unless such accommodation is unreasonable or an undue hardship." Section 28–1–7(J). It appears that the accommodation claim was based on Mr. Trujillo's doctor having issued a certificate to return to work for "half time for one month."

{16} NORA argues that the certificate was inadequate to put it on notice that Mr. Trujillo was requesting an accommodation under the Human Rights Act. Mr. Trujillo responds that NORA should have known about his medical condition and thus regarded the medical release for half-time work as a request for accommodation. Mr. Trujillo accuses NORA of acting in bad faith for refusing to engage in an interactive process to determine whether the alleged condition could be reasonably accommodated. Mr. Trujillo relies upon *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1172 n. 10 (10th Cir. 1999), for this proposition. However, we do not read *Midland* to support such a claim, and we are unpersuaded by this argument. We note the Court in that opinion made the following observation:

> In general, the interactive process must ordinarily begin with the employee providing notice to the employer of the employee's disability and any resulting limitations, and expressing a desire for reassignment if no reasonable accommodation is possible in the employee's existing job.

Midland at 1171–72 (footnote omitted). In so concluding, the Court relied upon *Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130, 1134 (7th Cir.1996), which stated that "[a]n employee has the initial duty to inform the employer of a disability before ADA liability may be triggered for failure to provide accommodations." *Midland*, 180 F.3d at 1171 n. 9. Although the certificate did ask for a reduction in Mr. Trujillo's hours, it did not offer a diagnosis of his illness and how it limited his ability to work, or suggest any accommodation that his illness might require. Under the facts of this case, the terse language of the return to work certificate was insufficient to put NORA on notice that Mr. Trujillo was requesting an accommodation for a medical condition under the Human Rights Act. We agree with the Fifth Circuit that an employer cannot be held to have imputed knowledge of an illness in the following circumstance:

> Where the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, the initial burden rests primarily upon the employee, or his health-care provider, to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations.

Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 165 (5th Cir.1996). Moreover, the failure to accommodate claim must fail because, as discussed above, Mr. Trujillo failed to demonstrate that he had a medical condition which is a necessary predicate for an accommodation request.

3. Discharge Because of Medical Condition.

{17} Even if we were to conclude that Mr. Trujillo had a medical condition on the day of his discharge, his claim under the Human Rights Act could not succeed because no evidence was presented at trial that NORA discriminated against him because of his health. The fact that NORA was aware of Mr. Trujillo's health problems is not sufficient to show that they regarded him as having a medical condition or that he was fired for that reason. *See Webb v. Mercy Hosp.*, 102 F.3d 958, 960 (8th Cir.1996) ("An employer's knowledge that an employee exhibits symptoms which may be associated with an impairment does not necessarily show that the employer regarded the employee as disabled.").

{18} The Human Rights Act states that it is unlawful for an employer to discriminate "because of" a medical condition. "[A]n employer cannot fire an employee 'because of' a disability unless it knows of the disability. If it does not know of the disability, the employer is firing the employee 'because of' some other reason." *Hedberg v. Ind. Bell Tel. Co.*, 47 F.3d 928, 932 (7th Cir.1995) (quoting 42 U.S.C. § 12112). No evidence was introduced at trial that Mr. Trujillo's

health was a factor in the decision to fire him. Mr. Trujillo did not testify that he thought he had been fired for health reasons. The letter placing him on administrative leave and the termination letter discussed a number of reasons NORA was dissatisfied with Mr. Trujillo's job performance; the shortcomings described by NORA predate his illness. There is no evidence that NORA regarded Mr. Trujillo as suffering from a medical condition. Neither at trial nor on appeal has Mr. Trujillo pointed to any evidence that NORA's decision to terminate him was based on anything but concerns about his work performance.

{19} Mr. Trujillo contends that because NORA failed to take the necessary actions to find out about his medical condition that they should be charged with that knowledge. Under the facts of this case, this contention is without merit because it would require this Court to impute knowledge to NORA at a time when even Mr. Trujillo's doctors had not diagnosed his illness. Instead, the diagnostic testing had apparently eased the initial concerns of the treating doctor to the extent that she had cleared Mr. Trujillo to return to work. As the Court stated in *Miller v. National Casualty Co.*, 61 F.3d 627, 630 (8th Cir.1995), an employer is "not obligated to divine the presence of a disability from [the employee's] extended absence from work and the company's knowledge that she [or he] was in some sort of stressful . . . situation." Similarly, we do not think that knowledge of a medical condition may be imputed to an employer under the Human Rights Act.

B. Retaliatory Discharge.

{20} Our holding on the claims under the Human Rights Act disposes of Mr. Trujillo's claim for retaliatory discharge. Because Mr. Trujillo's discharge did not violate the Human Rights Act, the claim of wrongful discharge in violation of public policy must fail. *See Gandy v. Wal-Mart Stores, Inc.*, 117 N.M. 441, 444–45, 872 P.2d 859, 862–63 (1994) (holding that an unlawful discharge under the Human Rights Act may provide the public policy basis for a claim of retaliatory discharge); *see also Sanders*, 91 F.3d at 1354 (applying the rationale that there can be "no public policy claim against employers who have not violated the law").

C. Breach of Implied Contract.

{21} Mr. Trujillo successfully claimed below that he was terminated in violation of an implied contract with NORA. In making this argument, he relied upon an employee policy manual and NORA's dealings with other employees in disciplinary matters. He contended that the evaluation and discipline provisions described in the policy manual created an implied contract and that NORA was therefore contractually bound to follow the described procedures in terminating him. On appeal, NORA argues that the provisions in the policy manual relied on by Mr. Trujillo neither created a discharge procedure nor overcame the presumption of at-will employment.

{22} Employment without a definite term is presumed to be at will. *Garrity v. Overland Sheepskin Co.*, 1996–NMSC–032, ¶ 10, 121 N.M. 710, 917 P.2d 1382; *Hartbarger v. Frank Paxton Co.*, 115 N.M. 665, 672, 857 P.2d 776, 783 (1993). In an at-will employment relationship, both the employer and the employee have the right to terminate the employment relationship at any time and for any reason. *See Melnick v. State Farm Mut. Auto. Ins. Co.*, 106 N.M. 726, 730, 749 P.2d 1105, 1109 (1988). Our courts have recognized two exceptions to the at-will employment rule: (1) "wrongful termination under facts disclosing unlawful retaliatory discharge" or (2) "where the facts disclose the existence of an implied employment contract provision that limits the employer's authority to discharge." *Lopez v. Kline*, 1998–NMCA–016, ¶ 11, 124 N.M. 539, 953 P.2d 304. The parties may modify the at-will presumption by a contractual agreement regarding termination. *Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 426–27, 773 P.2d 1231, 1233–34 (1989); *Kestenbaum v. Pennzoil Co.*, 108 N.M. 20, 24–26, 766 P.2d 280, 284–86 (1988). A representation in an employee handbook or personnel policies may contractually modify the at-will presumption. *Hartbarger*, 115 N.M. at 669, 857 P.2d at 780; *Newberry*, 108 N.M. at 426–27, 773 P.2d at 1233–34. To

create contractual rights, however, the terms of the representation must be sufficiently explicit to create a reasonable expectation of an implied contract. *Garrity,* 1996–NMSC–032, ¶ 12, 121 N.M. 710, 917 P.2d 1382.

{23} Mr. Trujillo relied on three provisions of the manual: two dealt with evaluation procedures and the third with discipline. After a review of these provisions, we conclude that they are insufficient to create an implied contract between NORA and Mr. Trujillo. *See Sanchez v. New Mexican,* 106 N.M. 76, 79, 738 P.2d 1321, 1324 (1987). The two sections dealing with performance evaluations detail when and how reviews are to be conducted. Mr. Trujillo's argument appears to be that these provisions link performance evaluation with termination. Because he was discharged without being afforded an evaluation, he argues that NORA breached an implied contract. But the difficulty we find with this argument is there is no language in the provisions requiring NORA to evaluate an employee as a prerequisite to termination.[2] Moreover, the section on discipline, contrary to the argument of Mr. Trujillo, states clearly that "The General Manager reserves the right to impose disciplinary sanctions, including discharge from employment ... for work performance that the General Manager deems unacceptable." This section further provides that determination of which disciplinary sanction to impose is left to the general manager's discretion. The manual unambiguously stated that NORA did not have to follow a progressive disciplinary practice before discharging an employee because the disciplinary sanctions "may or may not be progressive in terms of one sanction preceding or following another." Given this express language, the "written personnel policy cannot be said to have created any reasonable expectation of an implied contract." *Garrity,* 1996–NMSC–032, ¶ 12, 121 N.M. 710, 917 P.2d 1382.

{24} We are also not persuaded by Mr. Trujillo's argument that an implied contract was created by NORA's conduct in dealing with other employees. *See* UJI 13–2303 NMRA 2001 ("In determining whether there was an implied agreement, you may consider all the surrounding circumstances, including ... how other employees in the same or similar circumstances were customarily dealt with by [employer]...."). Mr. Trujillo testified that he knew of other employees who had made mistakes and had been given warnings before termination. However, the manual states that, in matters of discipline, "[e]ach case is considered individually." From the testimony at trial, it appears that a case-by-case approach was used in making decisions about discipline and that other employees who were reprimanded or demoted were not in the "same or similar circumstances" as Mr. Trujillo.

D. Intentional Infliction of Emotional Distress.

{25} NORA also challenges Trujillo's claim of intentional infliction of emotional distress. In addressing this tort, our courts have adopted the approach used in the Restatement (Second) of Torts § 46 (1965). *See generally Padwa v. Hadley,* 1999–NMCA–067, ¶ 10, 127 N.M. 416, 981 P.2d 1234. The following elements must be proven to establish a claim of intentional infliction of emotional distress: "(1) the conduct in question was extreme and outrageous; (2) the conduct of the defendant was intentional or in reckless disregard of the plaintiff; (3) the plaintiff's mental distress was extreme and severe; and (4) there is a causal connection between the defendant's conduct and the claimant's mental distress." *Hakkila v. Hakkila,* 112 N.M. 172, 182, 812 P.2d 1320, 1330 (Ct.App.1991) (Opinion of Donnelly, J.). The Restatement describes extreme and outrageous conduct as that which is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Restatement (Second) of Torts § 46 cmt. d; *see also Stieber v. Journal Publ'g Co.,* 120 N.M. 270, 274, 901 P.2d 201, 205 (Ct.App. 1995); UJI 13–1628 NMRA 2001 ("Extreme

2. Even if this had been the case, it is unclear how Mr. Trujillo could have had a reasonable expectation of an implied contract when the evaluation procedures had not been followed for two years.

and outrageous conduct is that which goes beyond bounds of common decency and is atrocious and intolerable to the ordinary person.").

{26} As a threshold matter, the trial court should determine as a matter of law whether the conduct at issue "reasonably may be regarded as so extreme and outrageous that it will permit recovery under the tort of intentional infliction of emotional distress." *Padwa*, 1999-NMCA-067, ¶ 9, 127 N.M. 416, 981 P.2d 1234. "When reasonable persons may differ on that question, it is for the jury to decide, subject to the oversight of the court." *Id.* (relying upon Restatement (Second) of Torts § 46 cmt. h). In a motion for directed verdict, NORA argued that there had been no evidence that they had acted recklessly or outrageously when they fired Trujillo.

{27} In *Stock v. Grantham*, 1998-NMCA-081, ¶ 35, 125 N.M. 564, 964 P.2d 125, the Court of Appeals "recognize[d] that only in extreme circumstances can the act of firing an employee support a claim of intentional infliction of emotional distress." We agree. Being fired is a common occurrence that rarely rises to the level of being "beyond all possible bounds of decency" and "utterly intolerable in a civilized community." Our review of the record persuades us that the facts of this case do not satisfy any of the elements of the tort; the failure of any one of the elements will defeat the claim. Mr. Trujillo has not pointed to evidence of specific instances in which NORA's conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency. NORA's conduct in this case was to fire an employee whose performance they no longer considered satisfactory. When Mr. Trujillo received the termination letter from NORA, he had been cleared by his doctor to return to work on a part-time basis because medical testing had revealed no physical problems. We conclude that NORA's actions were not extreme and outrageous and thus did not satisfy the threshold requirement for intentional infliction of emotional distress.

{28} The claim must also fail because there was insufficient evidence to support the view that the emotional distress experienced by Mr. Trujillo was severe. *See Hakkila*, 112 N.M. at 182, 812 P.2d at 1330 (Opinion of Donnelly, J.); *U.S.A. Oil, Inc. v. Smith*, 415 So.2d 1098, 1101 (Ala.Civ.App. 1982) ("[I]n order to prevent the tort of outrage from becoming a panacea for all of life's ills, recovery must be limited to distress that is severe."). "To recover emotional distress damages, those damages must be 'severe.' " *Jaynes v. Strong-Thorne Mortuary, Inc.*, 1998-NMSC-004, ¶ 20, 124 N.M. 613, 954 P.2d 45 (quoting *Flores v. Baca*, 117 N.M. 306, 313, 871 P.2d 962, 969 (1994)). Severe emotional distress means that " 'a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances.' " *Id.* (quoting *Folz v. State*, 110 N.M. 457, 469, 797 P.2d 246, 254 (1990)). In other words, the distress must be "so severe that no reasonable [person] could be expected to endure it." Restatement (Second) of Torts § 46 cmt. j. Mr. Trujillo testified that his initial reaction was to feel offended by being called "Sir" in the termination letter and that he resented being fired after giving NORA so many years. He also testified that he felt "lousy" and depressed and that Prozac was prescribed for him. His wife described him as being depressed and sleeping long hours and as having erratic eating habits during the period after he was fired. Without minimizing Mr. Trujillo's distress, we conclude that this evidence was legally insufficient under New Mexico law. "The law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it." *Phifer v. Herbert*, 115 N.M. 135, 139-40, 848 P.2d 5, 9-10 (Ct.App.1993) (quoting Restatement (Second) of Torts § 46 cmt. j), *overruled on other grounds by Spectron Dev. Lab. v. Am. Hollow Boring Co.*, 1997-NMCA-025, ¶¶ 31-32, 123 N.M. 170, 936 P.2d 852.

E. Loss of Consortium.

{29} Our holding on Mr. Trujillo's claim of wrongful termination also reverses the loss of consortium claim by Mrs. Trujillo which was premised on her husband's termination. *See Archer v. Roadrunner Trucking, Inc.*, 1997-NMSC-003, ¶ 11, 122 N.M. 703,

930 P.2d 1155 ("Loss-of-consortium damages are contingent upon the injured person's entitlement to general damages.").

F. Damages.

{30} We offer the following to explain why in this case it was necessary to discuss both retaliatory discharge and breach of implied contract. This Court held in *Silva v. Albuquerque Assembly & Distribution Freeport Warehouse Corp.*, 106 N.M. 19, 21, 738 P.2d 513, 515 (1987) and reaffirmed in *Gandy*, 117 N.M. at 444–45, 872 P.2d at 862–63, that a plaintiff may not recover twice for the same harm; that is, compensatory damages may not be awarded in an employment case on both a claim of breach of an employment contract and a claim of the tort of retaliatory discharge. As we concluded in *Silva*, trial courts should instruct the jury that "they could find either a breach of contract or retaliatory discharge, but not both." *Silva*, 106 N.M. at 21, 738 P.2d at 515. This distinction was not made in instructions given in this case. On the special verdict form, the jury was permitted improperly to find for Mr. Trujillo on both the claims of retaliatory discharge and breach of an implied contract. The jury was also not instructed that the Human Rights Act does not permit the award of punitive damages. *See Gandy*, 117 N.M. at 443, 872 P.2d at 861 ("Punitive damages are sometimes recoverable in tort actions but are not recoverable under the Human Rights Act.") (relying upon *Behrmann v. Phototron Corp.*, 110 N.M. 323, 328, 795 P.2d 1015, 1020 (1990)).

III. CONCLUSION

{31} We reverse the claim under the Human Rights Act for discharge because of a medical condition as well as the claims for retaliatory discharge, breach of implied contract, intentional infliction of emotional distress, and loss of consortium. The award of compensatory and punitive damages and the order on attorney's fees, costs, and prejudgment interest are also reversed. We note that the award of attorney's fees and costs was inconsistent with our holding in *Gonzales*, 2000–NMSC–029, ¶¶ 35–36, 129 N.M. 586, 11 P.3d 550, that a complainant could receive attorney's fees only for claims under the Human Rights Act. *See also Gandy*, 117 N.M. at 443, 872 P.2d 859 at 861 ("[A]ttorney's fees are recoverable under the [Human Rights] Act, but generally are not recoverable in a tort action.") (citations omitted); *cf. Gaglidari v. Denny's Rests, Inc.*, 117 Wash.2d 426, 815 P.2d 1362, 1375 (1991) (en banc) ("Segregation is required where attorney fees are authorized for only some of the claims.").

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

WE CONCUR: PATRICIO M. SERNA, Chief Justice, JOSEPH F. BACA, Justice, PAMELA B. MINZNER, Justice, and PETRA JIMENEZ MAES, Justice.

[redacted]

2002-NMCA-021

41 P.3d 347

Wilbert LARGO, Plaintiff–Appellant,

v.

The ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Delaware corporation, and J.P. Bigley, Defendants–Appellees.

No. 21,927.

Court of Appeals of New Mexico.

Dec. 10, 2001.

Scott E. Borg, Rosenfelt, Barlow & Borg, P.A., Albuquerque, NM, Robert A. Schuetze, Cortez Macaulay Bernhardt & Schuetze LLC, Denver, CO, for Appellant.

Tim L. Fields, Earl E. Debrine, Jr., Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, NM, for Appellees.

OPINION

FRY, Judge.

{1} This case concerns a fatal collision between a train and a pickup truck driven by Hudson Benally at a railroad crossing near Coolidge, New Mexico. Benally was killed, and his passenger, Plaintiff Wilbert Largo, was injured. Virginia Tom, Benally's personal representative, and Largo filed suit against the Atchison, Topeka and Santa Fe Railway Company (Railroad) and the engineer, alleging negligence. Tom and Defendants have settled, and Largo remains as Plaintiff.

{2} At issue in this interlocutory appeal is the trial court's order granting Defendants summary judgment on Plaintiff's claims that warnings at the crossing were inadequate and that excessive speed of the train contributed to the accident. The court held that Plaintiff's state law negligence claims were preempted by the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20101 (1994).[1] We affirm in part and reverse in part. We hold that Plaintiff's excessive speed claim is preempted by federal law, but Plaintiff's claim that warnings were inadequate is not preempted. We reject Defendants' alternative argument, not ruled on below, that the Railroad had no duty to maintain adequate warnings.

BACKGROUND

{3} On December 23, 1994, at approximately 6:30 p.m., Benally and Largo were returning from a shopping trip. They were driving north on County Road 27, a gravel road in McKinley County, in a pickup truck Benally had borrowed from his brother. There is some evidence that Benally had not driven on the road before that evening. Conditions were dark, clear, and dry.

{4} As Benally approached the crossing, a westbound train was also approaching the crossing at approximately 70 miles per hour, which is below the legal limit set by federal law. J.P. Bigley, the engineer, said that as he approached the crossing he sounded the horn in the normal pattern. The conductor, Lesley Sharp, in the train with Bigley, said they saw the vehicle approaching the crossing and the engineer was blowing the horn. Sharp said, "It looked like the car was slowing and possibly going to stop, and just before we got to the crossing, the car took a surge and just jumped out in front of the train." The evidence suggested that the Benally vehicle was struck at the near rail, just as it proceeded into the train's path.

DISCUSSION

{5} Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Rule 1–056(C) NMRA 2001; *Self v. United Parcel Serv., Inc.*, 1998–NMSC–046, ¶ 6, 126 N.M. 396, 970

1. The FRSA was previously codified at 45 U.S.C. § 421–447 (1988). *See Stone v. CSX Transp., Inc.*, 37 F.Supp.2d 789, 793 n. 1 (S.D.W.Va. 1999).

P.2d 582. Whether Defendants were entitled to judgment as a matter of law based on federal preemption is a legal question we review de novo. *Self*, 1998–NMSC–046, ¶ 6, 126 N.M. 396, 970 P.2d 582,.

{6} The doctrine of preemption is based on the Supremacy Clause of Article VI of the United States Constitution. *Id.* ¶ 7. The purpose of the preemption doctrine is to allow Congress to promulgate a uniform federal policy without states frustrating it through either legislation or judicial interpretation. *Id.* Federal regulations may preempt common law as well as statutory duties. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993). However, there is "a strong presumption against preemption." *Montoya v. Mentor Corp.*, 1996–NMCA–067, ¶ 7, 122 N.M. 2, 919 P.2d 410. Additionally, "[t]here is ... a reluctance to preempt state laws relating to health and safety matters because those matters have been the exclusive concern of the states." *Id.*

{7} The relevant statute is the FRSA, which directs the Secretary of Transportation to "maintain a coordinated effort to develop and carry out solutions to the railroad grade crossing problem." 49 U.S.C. § 20134(a). The FRSA also contains a preemption provision stating that "[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106.

{8} The party seeking to establish preemption must establish that federal regulations cover "the same subject matter as [state] negligence law pertaining to the maintenance of, and the operation of trains at, grade crossings." *Easterwood*, 507 U.S. at 664, 113 S.Ct. 1732; *see also Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 352, 120 S.Ct. 1467, 146 L.Ed.2d 374 (2000). It is not sufficient that the federal regulations " 'touch upon' or 'relate to' that subject matter." *Shanklin*, 529 U.S. at 352 (quoting *Easterwood*, 507 U.S. at 664, 113 S.Ct. 1732). Federal regulations "cover" the same subject matter "only if the federal regulations substantially subsume the subject matter of the relevant state law." *Easterwood*, 507 U.S. at 664, 113 S.Ct. 1732; *Shanklin*, 529 U.S. at 352, 120 S.Ct. 1467.

I. Inadequate Warning

{9} Defendants argue that federal law preempts Plaintiff's claim that the warning devices at the crossing were inadequate. In *Shanklin*, the Supreme Court held that the FRSA "pre-empts state tort claims concerning a railroad's failure to maintain adequate warning devices at crossings where federal funds have participated in the installation of the devices." 529 U.S. at 351, 120 S.Ct. 1467. Because Federal Highway Administration (FHWA) regulations " 'establish requirements as to the installation of particular warning devices,' " when these regulations are applicable, " 'state tort law is preempted.' " *Shanklin*, 529 U.S. at 352, 120 S.Ct. 1467 (quoting *Easterwood*, 507 U.S. at 670, 113 S.Ct. 1732). However, *Easterwood* and *Shanklin*, when read together, make it clear that federal law preempts state law only when federal funds are actually spent on warning devices. In *Easterwood*, the Court held that FHWA regulations did not preempt state tort law because the warning devices contemplated by the crossing project were never actually installed, and therefore, there was no evidence "that federal funds participate[d] in the installation of the [warning] devices" at the crossing—a prerequisite to preemption. *Easterwood*, 507 U.S. at 671–72, 113 S.Ct. 1732 (citation and internal quotation marks omitted). By contrast, but in a holding consistent with *Easterwood*, the Court in *Shanklin* held that preemption applied because federal funds paid for the warning devices installed as part of the crossing improvement project. *Shanklin*, 529 U.S. at 354, 120 S.Ct. 1467. Under both *Easterwood* and *Shanklin*, "the determinative question in a particular case is ... whether federal funds have participated in the installation of warning devices." *Armijo v. Atchison, Topeka & Santa Fe Ry. Co.*, 19 F.3d 547, 550 (10th Cir.1994).

{10} In the case at bar, the record does not establish that any federal money was spent installing warning devices at the crossing. In 1978, a federal program provided $2,056 to widen and install sixteen track feet

of timber planking at the crossing. However, the record indicates that no warnings were placed at the crossing as the result of the federal program. The minimal level of federal involvement at this crossing does not cover or substantially subsume "the same subject matter as [state] negligence law pertaining to the maintenance of, and the operations of trains at, grade crossings." *Easterwood*, 507 U.S. at 664, 113 S.Ct. 1732; *see also, Shanklin*, 529 U.S. at 352, 120 S.Ct. 1467.

{11} Defendants argue that under *Shanklin*, 529 U.S. at 354, 120 S.Ct. 1467, a state tort action is pre-empted when federal funds participate at any level in the crossing improvement project. They contend that this is so because as a prerequisite to undertaking the improvement project the FHWA necessarily must have determined that the warnings were adequate. We disagree. The *Shanklin* Court made it clear that FHWA's determination of, or its failure to determine, the adequacy of warning devices is irrelevant to the preemption inquiry. *Id.* at 357–58, 120 S.Ct. 1467. Instead, the relevant consideration is whether FHWA's regulations "establish a federal standard for the adequacy of those devices that displaces state tort law addressing the same subject." *Id.* at 357, 120 S.Ct. 1467.

{12} We hold that because federal funds were not actually used to install warning devices at the crossing, preemption does not bar Plaintiff's state law claim that warnings were inadequate. We reverse summary judgment for Defendants on this claim and remand it for trial.

II. The Railroad's Duty to Ensure Safe Crossings

{13} As an alternative to their preemption argument, Defendants contend that they have no duty to install and maintain adequate warning devices at railroad crossings because state statutes give the state highway department and applicable local governmental entities the exclusive authority to place warning devices. *See* NMSA 1978, §§ 66–7–102, –103, –108, –109, and –342 (1978). Plaintiff counters that the district court did not rule on this issue and therefore we should not consider it. It is true that the district court did not rule on this issue; however, Defendants raised it below and we therefore consider it as a possible ground for affirmance. *See State v. Torres*, 1999–NMSC–010, ¶ 22, 127 N.M. 20, 976 P.2d 20 (holding that the trial court will be affirmed if right for any reason, unless it would be unfair to the other party).

{14} The interpretation of statutes is a question of law, *Bajart v. Univ. of N.M.*, 1999–NMCA–064, ¶ 7, 127 N.M. 311, 980 P.2d 94, and our goal in interpreting statutes is to determine legislative intent. *State v. Shop Rite Foods, Inc.*, 74 N.M. 55, 57, 390 P.2d 437, 438 (1964). Defendants' argument relies on Section 66–7–108, which states:

> A. No person shall place, maintain or display upon or in view of any highway any unauthorized sign, signal, marking or device which purports to be or is an imitation of or resembles an official traffic-control device or railroad sign or signal, or which attempts to direct the movements of traffic, or which hides from view or interferes with the effectiveness of any official traffic-control device or any railroad sign or signal, and no person shall place or maintain nor shall any public authority permit upon any highway any traffic sign or signal bearing thereon any commercial advertising.

We do not agree with Defendants that Section 66–7–108 prohibits the Railroad from insuring that there are adequate warnings at railroad crossings, or that the legislature intended to absolve railroads of all responsibility for warnings at railroad crossings. Instead, this statute has the obvious purpose of prohibiting false or unofficial traffic signs. While this and other statutes cited by Defendants may place primary responsibility with governmental entities, they do not prohibit railroads from addressing dangerous crossings.

{15} In addition, railroads have a common-law duty to provide and adequately maintain warnings at railroad crossings. "While final authority for the installation of particular safety devices at grade crossings has long rested with state and local governments, this

allocation of authority apparently does not relieve the railroads of their duty to take all reasonable precautions to maintain grade crossing safety. . . ." *Easterwood*, 507 U.S. at 665 n. 5, 113 S.Ct. 1732 (citation omitted). Had the legislature intended to abrogate the railroad's common law duty to provide safe crossings, we would expect to see the legislature's intent clearly expressed. *See Gallegos v. Lyng*, 891 F.2d 788, 798 (10th Cir.1989) (instructing that implied repeals of common law are disfavored and should be found only where such a statutory purpose is evident). The statutes relied on by Defendants simply do not demonstrate that the legislature intended to absolve railroads of their common law duty to provide adequate warnings at crossings. *Cf. Alcorn v. Union Pac. R.R. Co.*, 50 S.W.3d 226, 236 (Mo.2001) (en banc) (rejecting railroad's argument that it had no duty to ensure adequate warning devices because state agency had the responsibility to do so); *but see Duncan v. Union Pac. R.R. Co.*, 842 P.2d 832, 833 (Ut.1992) (finding that railroad had no duty to ensure adequate warnings at crossings or to notify state authorities of the need to upgrade warnings).

{16} Finally, in addition to the statutory and common law support for our holding, public policy considerations convince us that railroads have a duty to provide adequate warnings at dangerous crossings. *See Pollock v. State Highway & Transp. Dep't*, 1999–NMCA–083, ¶ 10, 127 N.M. 521, 984 P.2d 768 (construing a statute so as to impose a duty on the Highway Department because "public policy supports accountability and review of the Department through imposition of a duty"). Railroad employees are in the best position to evaluate difficulties at crossings and to identify crossings that have presented problems because they use the crossings every day. *See Easterwood*, 507 U.S. at 668, 113 S.Ct. 1732 (recognizing that railroads are "the entities arguably most familiar with crossing conditions"). Railroads also have superior knowledge about accidents at particular crossings, because they must deal with insurance claims and lawsuits arising out of those accidents. Public policy and common sense dictate that when railroads become aware of particular hazards and dangerous conditions, they should at a minimum be required to notify the appropriate governmental authorities that improvements are necessary. *See Easterwood*, 507 U.S. at 665 n. 5, 113 S.Ct. 1732 (noting that under Georgia law, even though the final authority for the installation of particular safety devices at a crossing rests with state and local governments, the railroads are not relieved of their duty to take "all reasonable precautions to maintain grade crossing safety, including, for example, identifying and bringing to the attention of the relevant authorities dangers posed by particular crossings." (citation omitted)). We reject Defendants' argument that railroads have no duty whatsoever to do anything about hazardous crossings.

III. Excessive Speed

{17} The district court granted summary judgment against Plaintiff on his excessive speed claim, ruling that it was preempted by federal law. We agree. Excessive speed claims are preempted because federal speed limits cover "the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings." *Easterwood*, 507 U.S. at 675, 113 S.Ct. 1732.

{18} Under federal law, the crossing in this case has a maximum speed of 110 miles per hour for passenger trains and 80 miles per hour for freight trains. The timetable set by the Railroad allowed passenger trains to travel at 90 miles per hour, and freight trains at 70 miles per hour. However, the Railroad had the discretion to restrict speed for certain sections of track or crossings by issuing a "slow order," an order requiring a slower speed. Plaintiff argues that the characterization of the crossing in question compelled the Railroad to issue a slow order because the crossing constituted an "essentially local safety hazard" or a "specific, individual hazard."

A. Essentially Local Safety Hazard

{19} Plaintiff argues that this case falls within the savings clause of 49 U.S.C. § 20106:

> A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation or order—(1) is necessary to eliminate or reduce an essentially local safety hazard; (2) is not incompatible with a law, regulation, or order of the United States Government; and (3) does not unreasonably burden interstate commerce.

Thus, Plaintiff claims state negligence law would require Defendant Railroad to set a slower speed for this section of track because the crossing constituted a "an essentially local safety hazard." *Id.*

{20} Plaintiff introduced evidence in support of his argument. The crossing in this case is less than a mile north of Interstate 40. The approach from the south involves a curve, an acute angle, and a hump profile at the crossing itself, all of which make it more difficult for a driver to see a train approaching from the east. Because of the acute angle of the approach, a driver might not see an approaching westbound train while looking straight ahead through his windshield, but would only see it by looking through a rear window. There had been three prior train-vehicle collisions similar to this one at the crossing, in which vehicles heading north were struck by westbound trains. At the time of the accident, there were no warning lights or gates at the crossing. The crossing was marked only with crossbuck signs-reflective black-and-white signs indicating an "X" and stating, "RAILROAD CROSSING." There was also a small yellow reflective warning sign 100 feet south of the crossing. There were two train-vehicle collisions at the crossing, including this one, in a nine-month period, out of less than twenty-five per year in all of New Mexico. The McKinley County sheriff's office responded to citizens' concerns about the dangerousness of the crossing and noted that, because of the angle of approach, drivers would not see a train until they were 0.1 mile from the crossing. Most or all of the other highly traveled McKinley County road crossings had mechanical warning devices. Several years after this accident, gates and flashing lights were installed.

{21} Despite Plaintiff's comprehensive argument regarding the danger of this railroad crossing, the law does not support a waiver of the federal speed preemption for three reasons. First, Section 20106 requires Plaintiff to establish all three elements of the savings clause, including the third element requiring that the state law in question "does not unreasonably burden interstate commerce." 49 U.S.C. § 20106(3). Plaintiff does not direct our attention to any evidence regarding this element.

{22} Second, the *Easterwood* Court rejected this argument, stating that "the [federally established] speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation." *Easterwood*, 507 U.S. at 674, 113 S.Ct. 1732. Moreover, "the Secretary's regulations focus on providing appropriate warnings given variations in train speed." *Id.* Thus, the regulatory scheme as a whole addresses state concerns about crossing safety in a variety of ways, which together "substantially subsume the subject matter of the relevant state law." *Id.* at 664, 113 S.Ct. 1732.

{23} Third, the Federal Railroad Administration of the Department of Transportation (FRA) has made it clear that there are sound reasons for federal preemption:

> FRA's current regulations governing train speed do not afford any adjustment of train speeds in urban settings or at grade crossings. This omission is intentional. FRA believes that locally established speed limits may result in hundreds of individual speed restrictions along a train's route, increasing safety hazards and causing train delays. The safest train maintains a steady speed. Every time a train must slow down and then speed up, safety hazards, such as buff and draft forces, are introduced. These kinds of forces can enhance the chance of derailment with its attendant risk of injury to employees, the traveling public, and surrounding communities.

63 Fed.Reg. No. 119, 33993, 33999 (June 22, 1998). It is apparent that, at least with respect to train speed, Congress intended to promulgate a uniform federal scheme that cannot be frustrated by the various states.

It is this intent that requires adherence to preemption doctrine. *See Self,* 1998–NMSC–046, ¶ 7, 126 N.M. 396, 970 P.2d 582.

{24} We recognize that since *Easterwood,* courts have achieved divergent results when they consider the question of what constitutes an "essentially local safety hazard." Some courts have construed the phrase narrowly, declining to apply it to crossings that have problems like the ones presented by the crossing in this case. *See, e.g., O'Bannon v. Union Pac. R.R. Co.,* 960 F.Supp. 1411, 1421 (W.D.Mo.1997) (determining that the absence of active warning devices, steep grade and angle of crossing, and the proximity of the crossing to a highway did not constitute a local safety hazard); *Gunn v. Atchison, Topeka & Santa Fe Ry. Co.,* 13 S.W.3d 52, 55 (Tex.App.1999) (holding that an angle of crossing requiring a driver to look backward rather than merely to the right did not constitute a local hazard). These cases rely on the rationale that increasing train speed restrictions along a train's route undermines a uniform policy, imposes delays, and increases the chances of a derailment.

{25} Other courts have found an "essentially local safety hazard" based on the peculiarities of a crossing. *See In re Speed Limit for Union Pac. R.R. Through City of Shakopee,* 610 N.W.2d 677, 684 (Minn.Ct.App.2000); *Stone v. CSX Transp., Inc.,* 37 F.Supp.2d 789, 794–97 (S.D.W.Va.1999); *Mo. Pac. R.R. Co. v. Lemon,* 861 S.W.2d 501, 509–10 (Tex. App.1993). These cases are distinguishable from the case at bar.

{26} In *City of Shakopee,* the city imposed a ten-mile-per-hour limit on trains using a one-mile section of track through the city's central business district. The track ran right down the middle of the street, and had vehicular traffic on both sides. Two to four thousand vehicles a day used the roadway. There were ten crossings in the one-mile section, and none had gates; all were marked with signs. Pedestrians used the area as well. The court held that the ten-mile-per-hour limit was allowable because the section constituted an essentially local safety hazard. The facts in *City of Shakopee* are unique, and the result there is understandable. We do not agree that the facts in this case approach those in *City of Shakopee.*

{27} *Stone* is also distinguishable. It involved a signal that falsely activated so often that everyone ignored it. The court stated that taking into account "terrain, the sight lines, and the limited access into consideration, and assuming that there were repeated malfunctions of the signal apparatus at that crossing, the Court would likely conclude that the Ventroux Hollow grade crossing was a local hazard." *Stone,* 37 F.Supp.2d at 796. However, the court relied heavily on the fact that federal regulations required the railroad to issue a slow order when it was aware of problems with a signal falsely activating. Consequently, the court held that Plaintiff's claim was not preempted because its holding would not result in state law displacing federal law, and would not allow the local hazard exception to swallow the general rule. *Id.*

{28} *Lemon* held that a crossing that was obstructed because the railroad had illegally parked train cars so as to obstruct the engineer's vision, combined with the fact that the crossing was unlit, unmarked by active warning devices, and that the road curved approaching the tracks, was a specific, individual hazard. *Lemon,* 861 S.W.2d at 509–10. *Lemon* is distinguishable because it involves affirmative, illegal conduct that made the crossing more dangerous.

{29} This case does not present the unique circumstances of the cases that found "an essentially local safety hazard." Although the evidence here suggested that there were physical characteristics of the crossing making it difficult for drivers to see a westbound train, there are signs marking the railroad crossing and there is countervailing evidence that drivers could see a train when they were 0.1 mile from the crossing.

{30} Given the clear direction of Congress and the FRA, it is apparent that Plaintiff bears a heavy burden in seeking to establish an essentially local safety hazard. This ensures that the policies advanced by preemption remain in force. Otherwise, the exception will swallow the rule. Railroads will be forced to cobble together a patchwork of train speeds, reacting to every crossing that involves some peculiarity or has some acci-

dent history. *See Easterwood*, 507 U.S. at 675, 113 S.Ct. 1732 (emphasizing the need for uniformity and for the Secretary to be able to set speed limits without having to make countless adjustments for local conditions). Our holding advances the goal of uniformity expressed in *Easterwood*.

B. Specific, Individual Hazard

{31} Plaintiff argues for the first time in a pleading entitled "Appellant's Submission of Additional Legal Authority," filed after his reply brief, that his excessive speed claim is not preempted because the approach of the Benally vehicle constituted a "specific, individual hazard." It is inappropriate to raise a new argument in this fashion. *Cf. Villanueva v. Sunday Sch. Bd.*, 121 N.M. 98, 105, 908 P.2d 791, 798 (Ct.App.1995) ("[R]aising new issues in the reply brief, when it is too late for an appellee to respond to them, is insufficient to obtain a review of those issues.").

{32} Even if we were to consider Plaintiff's new theory, not advanced in his brief in chief or reply brief, we would reject it. Although *Easterwood* states that "the duty to slow or stop a train to avoid a specific, individual hazard" would not be preempted, 507 U.S. at 675–76 n. 15, 113 S.Ct. 1732, there is no evidence of such a hazard in the present case. A "specific, individual hazard" applies to a situation where a person or car is already on the tracks and the engineer must slacken speed and try to stop. *See O'Bannon*, 960 F.Supp. at 1420–21 (discussing cases finding a "specific, individual hazard" where, for example, a train failed to reduce speed to avoid striking a child on the railway). There is no evidence in this case that the Benally vehicle was already on the tracks. Rather, the evidence establishes that the truck was moving toward the tracks and the engineer did not know whether it would stop. An engineer does not have to slacken speed or throw the train into emergency stop every time he wonders whether an approaching vehicle will stop. *Price v. Nat'l R.R. Passenger Corp.*, 14 P.3d 702, 708 (Utah Ct.App.2000), (holding that an engineer has the right to assume that the driver of an approaching automobile will give the train the right of way, and is not required to bring his train to a standstill simply because the automobile is approaching the track, unless it becomes evident the automobile is proceeding onto the tracks).

IV. Motion to Strike

{33} Defendants attached two exhibits to their answer brief. Plaintiff moved to strike these exhibits arguing that they reflect matters not of record. We agree. Neither exhibit was before the trial court until after the motion for summary judgment was granted and the case was accepted by this Court as an interlocutory appeal. Matters not of record are not considered on appeal. *Gallegos v. City of Albuquerque*, 115 N.M. 461, 466, 853 P.2d 163, 168 (Ct.App.1993) (holding that appellate review of order appealed from cannot be based on evidence that had not been presented to the judge at the time the order was entered). Defendants have offered no compelling reason why we should depart from our longstanding rule that matters not of record are not considered on appeal, and we grant the motion to strike the exhibits attached to Defendants' brief.

{34} Plaintiff also moved to strike Defendants' argument that they had no duty to ensure that warnings at the crossing were adequate. We deny this part of the motion. Defendants are correct that their argument would provide an alternative basis for affirmance. *Torres*, 1999–NMSC–010, ¶ 22, 127 N.M. 20, 976 P.2d 20 (holding that the trial court will be affirmed if right for any reason). However, we have addressed Defendants' duty argument and rejected it.

CONCLUSION

{35} We reverse the grant of summary judgment on the inadequate warning claim and remand that claim for trial. We affirm the district court's grant of summary judgment on the excessive speed claim.

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

WE CONCUR: A. JOSEPH ALARID, and JAMES J. WECHSLER, Judges.

2002-NMCA-028

41 P.3d 356

Brent R. O'NEEL, Plaintiff–Appellee,

v.

USAA INSURANCE COMPANY, Defendant–Appellant.

No. 21,611.

Court of Appeals of New Mexico.

Jan. 16, 2002.

Certiorari Denied, No. 27,334, Feb. 21, 2002.

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OPINION

CASTILLO, Judge.

{1} Defendant (USAA) appeals the judgment entered in favor of Plaintiff (O'Neel) awarding damages and attorney fees for bad faith failure to pay a first party claim, breach of an insurance contract, and unfair insurance practices. USAA raises five issues on appeal. One issue challenges the jury's verdict as inconsistent. One issue questions the validity of the district court's award of attorney fees. Two issues object to the form of the special verdict and related jury instructions, and one issue seeks to assert a comparative fault defense to O'Neel's bad faith claim. For the reasons that follow, we affirm.

FACTUAL BACKGROUND

{2} Following the burglary of a house he was building near Tome, New Mexico,

O'Neel submitted a claim under his USAA renter's insurance policy. Under the terms of the policy, O'Neel was entitled to the replacement cost for personal property stolen in the burglary. Consequently, O'Neel submitted a claim to USAA requesting reimbursement in the amount $7052. USAA began an extensive investigation into O'Neel's claim, which included two lengthy examinations of O'Neel under oath by USAA's attorney. Based on its investigation and evaluation of O'Neel's claim, USAA concluded that O'Neel overvalued the amount of his claim. Because of these ostensible overvaluations, USAA accused O'Neel of breaching the insurance contract by misrepresenting and concealing material facts and by failing to cooperate with the investigation. As a result, USAA denied O'Neel's claim in its entirety.

{3} Upon receiving notice that USAA denied his claim, O'Neel instituted this action to recover damages for bad faith breach of an insurance contract and unfair insurance claims practices. The district court referred the action to court-annexed arbitration, and the arbitrator's award in favor of USAA was ultimately appealed de novo to district court. A jury trial was held at which both sides presented evidence concerning the extent to which Plaintiff did or did not overvalue his claim and cooperate with USAA's investigation. Both sides also presented evidence from experts in the field of insurance claims practices to give their opinions on the reasonableness of USAA's claims handling practices. Although O'Neel valued his claim at over $7000, the jury awarded O'Neel only $2500 in compensatory damages. However, the jury also found that USAA breached the insurance contract in bad faith and engaged in unfair insurance practices. The jury, therefore, awarded O'Neel an additional $20,000 in punitive damages. In addition, the district court subsequently awarded O'Neel over $64,000 in attorney fees. USAA now appeals.

DISCUSSION

{4} As indicated above, USAA raises five issues on appeal, which challenge the consistency of the jury's verdict, the propriety of the court's attorney fees award, and the extent to which the district court's jury instructions and special verdict form inadequately dealt with USAA's defenses. We address each of USAA's arguments in turn.

I. Inconsistent Verdict

{5} USAA argues that the district court erred by refusing to rectify what USAA perceives as an inconsistent jury verdict. O'Neel contends that USAA waived review of this issue on appeal because it failed to alert the district court to the alleged inconsistency before the jury was discharged. *See G & G Serv., Inc. v. Agora Syndicate, Inc.*, 2000–NMCA–003, ¶¶ 41–42, 128 N.M. 434, 993 P.2d 751. In response, USAA maintains that it did not waive review of this issue because it did not have a fair opportunity to object before the jury was discharged. *See* Rule 12–216(A) NMRA 2001 (excusing absence of objection if party has no opportunity to object). In support of its position, USAA emphasizes that only three minutes elapsed from the time that the jury returned to the courtroom with its verdict until proceedings were concluded. However, during that time, the court read the special verdict in its entirety in a way that USAA should have realized the alleged inconsistency. The judge then polled the jurors and told them that their service was concluded, but asked them to wait in the jury room until he could talk to them. The court then instructed counsel on the preparation of the judgment and asked counsel if there was anything else, to which counsel for USAA answered in the negative. At this point, the jury was still available and USAA could have raised its issue and sought a cure for the inconsistency. Under the authority of *G & G Services, Inc.*, USAA waived this issue. Even if we were to assume that USAA did raise a proper objection, for the reasons that follow we find no reversible error.

{6} USAA argues that it was inconsistent for the jury to find that USAA breached the insurance contract in bad faith and engaged in unfair claims practices while at the same time awarding O'Neel less in compensatory damages than he originally claimed. USAA notes that even though O'Neel submitted a theft claim to USAA for

over $7000, the jury awarded O'Neel only $2500 in compensatory damages. USAA contends that the jury's compensatory damages award implicitly acknowledged that O'Neel overvalued his claim. Thus, USAA reasons that it was inconsistent for the jury to find that USAA acted in bad faith in denying O'Neel's claim. USAA, therefore, believes that the jury's award of $20,000 in punitive damages to O'Neel must be vacated to cure the purported inconsistency in the jury's verdict. *See McLelland v. United Wis. Life Ins. Co.*, 1999-NMCA-055, ¶ 31, 127 N.M. 303, 980 P.2d 86; *see also Paiz v. State Farm Fire & Cas. Co.*, 118 N.M. 203, 210-11, 880 P.2d 300, 307-08 (1994).

{7} In support of its argument, USAA cites to a number of out-of-state cases for the proposition that a claim of bad faith must fail as a matter of law when the insured engages in material misrepresentations during the claims process. However, USAA's reliance on those cases is misplaced. Unlike the cases cited by USAA, there is a view of the evidence presented in this case from which the jury could reasonably and properly conclude that O'Neel did not engage in intentional misrepresentations but was entitled to less than the full amount of the claim he submitted to USAA and that USAA nevertheless acted in bad faith during its handling of O'Neel's claim for reasons other than its refusal to pay O'Neel's claim in full. *See Norwest Bank N.M. v. Chrysler Corp.*, 1999-NMCA-070, ¶ 22, 127 N.M. 397, 981 P.2d 1215 (recognizing that appellate standard of review requires appellate court to view evidence in light most favorable to support jury verdict rather than speculate on a theory of the evidence under which the jury may have been confused and reached its conclusions for the wrong reason).

{8} Although the jury awarded O'Neel less than what he originally claimed from USAA, the record reveals that the jury could have concluded that O'Neel's overvaluation of the claim was the product of mistake and inadvertence, not intentional misrepresentations. *See Eldin v. Farmers Alliance Mut. Ins. Co.*, 119 N.M. 370, 374, 890 P.2d 823, 827 (Ct.App. 1994) (recognizing that whether insured's misstatements to insurer were product of fraud, or mistake and confusion, is question of fact for jury to resolve). For example, USAA places great weight on the fact that O'Neel claimed $1500 to replace a stolen stove that originally cost $185. However, O'Neel's testimony suggested that he may have been confused about the meaning of his replacement cost policy. O'Neel testified that he purchased a $1500 stove to replace his stolen stove, but also admitted that he originally paid $185 for the stolen stove. O'Neel explained that he had made a mistake in his sworn statement concerning the cost of the stolen stove, and he acknowledged that it was misleading but did not mean for it to come across that way. In light of this testimony, the jury could reasonably determine that O'Neel did not engage in intentional misrepresentations but was simply confused or mistaken with regard to what he was allowed to claim from USAA. *Id.* (determining whether insured was engaged in fraud or was simply mistaken or confused is dependent on jury's determination of credibility of witnesses).

{9} We recognize that USAA maintains that O'Neel's claim for bad faith should fail as a matter of law even if O'Neel's overvaluation of his claim was done in complete good faith because an innocent overvaluation would justify USAA's refusal to pay O'Neel's claim. *See United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480, 486, 709 P.2d 649, 655 (1985). However, the record contains evidence to support a finding of bad faith against USAA based on conduct separate from USAA's refusal to pay O'Neel the full amount of the claim originally submitted to USAA. For example, there was evidence that USAA initially imposed duties on O'Neel based on an insurance policy that was not the policy that O'Neel had purchased. In addition, there was evidence from which the jury could find that USAA's investigation was excessive and unnecessarily invasive. In particular, USAA subjected O'Neel to two lengthy examinations during the claims review process and required O'Neel to produce substantial documentation about his personal financial condition and history, which the jury could have concluded was not specifically required under the terms of O'Neel's policy. USAA also questioned O'Neel about his

personal relationship with the woman he referred to as his life partner, and repeatedly asked O'Neel to have the woman give a sworn statement even though she was not a named insured and USAA had already told O'Neel that her property was not covered under the policy. Despite USAA's extensive investigation into O'Neel's claim, O'Neel did not learn until the time of trial that USAA was not raising any issue with regard to the burglary. Moreover, there was testimony suggesting that O'Neel may have removed certain items of property from his claim because USAA told him they were not covered even though they may have been covered under the terms of the policy. Finally, contrary to the facts in *United Nuclear Corp.*, 103 N.M. at 486, 709 P.2d at 655, it does not appear that USAA simply wanted to contest the amount of damages claimed in a court of law; instead, the jury could have found that USAA set up O'Neel in anticipation of a claim of fraud which it would then use, and did use, to attempt to totally void any obligation under the policy.

{10} O'Neel also presented the report of an expert witness on the subject of insurance claims handling practices who reviewed documentation generated during the claims review process and pre-trial litigation of this case. The expert opined that USAA accused O'Neel of intentional concealment and misrepresentations without any credible evidence to support its accusations; that USAA intentionally and maliciously misinterpreted the policy, coverages, and duties of the insured; that the scope of USAA's examination process ignored the terms of the policy; that USAA engaged in an inquisition-style examination and documentation process without justification or support; and that USAA's claim that O'Neel failed to cooperate was inconsistent with the record.

{11} The jury was instructed that to establish a claim for bad faith failure to pay a first party claim, O'Neel had to prove that USAA failed to deal fairly with O'Neel by proving either that USAA's reasons for refusing to pay were frivolous or unfounded, that USAA did not act reasonably under the circumstances to conduct a fair investigation of O'Neel's claim, or that USAA did not act reasonably under the circumstances to conduct a fair evaluation of O'Neel's claim. To establish a claim for an unfair claims handling practices, O'Neel had to prove that USAA failed to adopt and implement reasonable standards for the prompt investigation and processing of insureds' claims arising under insurance policies. Based on the evidence outlined above, we believe there was substantial evidence to support the jury's finding of bad faith and unfair claims practices. The fact that the jury also valued O'Neel's theft claim at roughly one-third of the amount originally submitted by O'Neel does not render the jury's finding of bad faith irrational or inconsistent because USAA's bad faith could have been premised on conduct other than its refusal to pay O'Neel the full amount that he originally claimed.

II. Attorney Fees Award

{12} USAA also argues that the district court erred in awarding O'Neel his attorney fees. The district court awarded attorney fees based on NMSA 1978, § 59A–16–30(B) (1990), and NMSA 1978, § 39–2–1 (1977). Under Section 59A–16–30(B) the district court has the discretion to award attorney fees against the party who has engaged in an unfair claims practices if that party has willfully engaged in such a violation. Under Section 39–2–1, the insured is entitled to an award of attorney fees if he prevails in any type of first party coverage action against the insurer and the insurer acted unreasonably in failing to pay the claim. USAA raises a number of attacks on the award of attorney fees under either section.

{13} To the extent that attorney fees were awarded for a willful unfair claims practices under Section 59A–16–30(B), USAA argues that Plaintiff failed to present any evidence in support of its only asserted basis for an alleged violation of the Act, namely, that USAA failed to adopt or implement reasonable standards for claims handling. Although USAA acknowledges that O'Neel introduced the report of his bad faith expert, John Kezer, in support of his claim under the Act, USAA contends that Kezer's report fails

to address the reasonableness of USAA's claims handling practices. We disagree.

{14} As indicated above, the report specifically states that USAA engaged in an inquisition-style examination and documentation process without justification or support; that USAA accused O'Neel of intentional concealment and misrepresentations without any credible evidence to support its accusations; that USAA intentionally and maliciously misinterpreted the policy, coverages and duties of the insured; and that the scope of USAA's examination process ignored the terms of the policy. Moreover, based on the evidence discussed above concerning the manner in which O'Neel was treated by USAA during the claim evaluation and investigation process, there was substantial evidence from which the fact finder could reasonably conclude that USAA failed to implement reasonable standards for the handling of O'Neel's claim. Finally, by awarding O'Neel punitive damages, the jury necessarily found that USAA's actions were malicious, reckless, or wanton. In light of the foregoing, we find no abuse of discretion in the district court's decision to award attorney fees under Section 59A–16–30(B).

{15} We recognize that USAA presented its own expert witness who was of the opinion that USAA's claims handling practices were reasonable and consistent with industry standards. However, the fact finder was free to reject that expert testimony, and we will not reweigh the evidence on appeal. *See Sanchez v. Molycorp, Inc.*, 103 N.M. 148, 153, 703 P.2d 925, 930 (Ct.App. 1985).

{16} Although we believe the district court's award of attorney fees could be upheld solely under Section 59A–16–30(B), we also believe it was appropriate for the district court to award attorney fees based on Section 39–2–1. USAA appears to argue that the district court's reliance on Section 39–2–1 to award attorney fees was inappropriate because O'Neel never relied on that statute as a basis for recovering attorney fees. However, the record reveals that O'Neel did request an alternative award of attorney fees under Section 39–2–1 orally and in writing before the court made its final ruling on attorney fees. And given that the jury found that USAA acted in bad faith in the handling of O'Neel's insurance claim and awarded O'Neel punitive damages based on USAA's conduct, the district court was justified in basing its award of fees alternatively on Section 39–2–1. *See Jessen v. Nat'l Excess Ins. Co.*, 108 N.M. 625, 630, 776 P.2d 1244, 1249 (1989) (awarding of punitive damages by district court under Section 39–2–1 is an implicit finding of unreasonableness that supports award of attorney fees when jury awards punitive damages for failure to pay first party claim), *modified on other grounds by Paiz*, 118 N.M. at 211, 880 P.2d at 308.

{17} USAA relies on *Mitchell–Carr v. McLendon*, 1999–NMSC–025, ¶ 29, 127 N.M. 282, 980 P.2d 65, and *Jacob v. Spurlin*, 1999–NMCA–049, ¶ 27, 127 N.M. 127, 978 P.2d 334, to suggest that, even if O'Neel raised Section 39–2–1 as a basis for an award of attorney fees in its reply to USAA's objection to an award of fees, it was unfair for the district court to rely on that ground because USAA did not have a chance to respond to the applicability of Section 39–2–1. We question USAA's reliance on these cases because they concern only proper appellate procedure and implicate only the unfairness that may result from considering an argument that has been raised for the first time in a reply brief on appeal. In any event, the record shows that USAA did have a chance to respond to the propriety of awarding attorney fees under Section 39–2–1 during the post-trial hearing on April 27, 2000, to address various outstanding motions, and USAA did not object to the award of fees under Section 39–2–1 at that time.

{18} USAA also challenges the manner in which the district court awarded attorney fees because the court did not issue written findings and conclusions to support the award of the fees despite USAA's request to do so. USAA cites *Woodson v. Phillips Petroleum Co.*, 102 N.M. 333, 695 P.2d 483 (1985), in support of its claim that the court was required to enter findings and conclusions on the matter of attorney fees. *Woodson* recognizes that findings and conclusions are often needed to provide the appellate court with an adequate basis for review-

ing whether the attorney fees awarded in workers' compensation cases are reasonable in amount. *Id.* at 339, 695 P.2d at 489. To the extent that *Woodson* has been applied in a context outside of workers' compensation law, findings and conclusions have been required to substantiate the amount of fees awarded. *See Lenz v. Chalamidas,* 109 N.M. 113, 118–19, 782 P.2d 85, 90–91 (1989).

{19} USAA does not attack the award of attorney fees as unreasonable in amount, and we see no basis in the record for questioning the amount awarded. USAA's objection to the absence of findings and conclusions focuses on whether it was appropriate to award any attorney fees to O'Neel. As discussed above, O'Neel's entitlement to attorney fees was established by the factual determinations implicit in the jury's award of punitive damages. As such, we see no basis for concluding that the district court should have issued findings and conclusions with regard to a matter that was already decided by the jury. *See Jessen,* 108 N.M. at 631, 776 P.2d at 1250 (acknowledging that district court does not abuse discretion in awarding attorney fees based on jury's implicit finding of unreasonableness).

{20} USAA relies on *City of Farmington v. L.R. Foy Constr. Co,* 112 N.M. 404, 409–10, 816 P.2d 473, 478–79 (1991), to suggest that the district court needed to make a separate inquiry to determine whether USAA's conduct rose to a level of willfulness that would support an award of attorney fees. USAA's reliance, is misplaced because in *City of Farmington* the district court awarded attorney fees against the City for pursuing a groundless action without determining whether the City knew that the suit was groundless, which was a predicate to awarding attorney fees. In contrast, because the jury awarded punitive damages in this case, the district court could rely on the jury's explicit determination that USAA's conduct was malicious, reckless, or wanton and its own view that the same facts support the predicate of willfulness necessary to award attorney fees to O'Neel. And because USAA does not question the actual amount that was awarded, we see no need to reverse for findings and conclusions to justify the amount awarded by the district court. *See In re Termination of Parental Rights of Doe,* 98 N.M. 540, 541, 650 P.2d 824, 825 (1982) (explaining that an appellate court will not address issues the parties do not argue on appeal).

{21} USAA's final challenge to the award of attorney fees concerns the district court's decision to include O'Neel's pre-arbitration attorney fees as part of the amount awarded. Because USAA failed to object below to the award of pre-arbitration attorney fees, USAA urges this Court to consider its arguments in this regard as an issue of general public interest. *See* Rule 12–216(B)(1). While USAA's arguments against awarding pre-arbitration attorney fees may raise novel issues, we are unpersuaded by USAA's attempts to couch its arguments as matters of general public interest because the award of pre-arbitration fees is not the type of decision that affects the interests of the State at large or affects the law that will be applied to a large number of cases in the near future. *See Pineda v. Grande Drilling Corp.,* 111 N.M. 536, 540, 807 P.2d 234, 238 (Ct.App.1991) (invoking general public interest exception to preservation requirement alerted Workers' Compensation Division that soon-to-be promulgated administrative regulations would not apply to any case filed before the regulations are filed with State Records Center); *State v. Doe,* 90 N.M. 572, 574, 566 P.2d 121, 123 (Ct.App.1977) (invoking general public interest exception to address several cases raising questions concerning the children's court's authority to commit mentally ill children to the boys' school, authority to order psychiatric treatment for the children, and authority to maintain control over the release of the children once they were committed to the Department of Corrections boys' school).

{22} In short, the district court's decision to award pre-arbitration attorney fees in this case in which fees were awarded on a basis other than the local rule involving court-annexed arbitration, LR 2–603(VI)(D) NMRA 2001, does not have the far-reaching impact necessary to invoke the general public interest exception to our general preservation requirements. Accordingly, in the ab-

sence of a timely objection below, we will not review the district court's decision to grant pre-arbitration attorney fees in this case.

III. Special Verdict Form

{23} USAA objects to the special verdict form submitted to the jury because it did not explicitly require the jury to consider USAA's affirmative defenses. O'Neel contends that USAA failed to properly preserve this issue because it never argued to the district court that the special verdict form was defective if it did not include USAA's affirmative defenses. We disagree.

{24} The record indicates that just before the district court called the jury in for the reading of jury instructions, USAA specifically objected to the lack of any questions in the special verdict form asking the jury to decide whether O'Neel had breached the insurance contract or breached his duty of good faith under the contract. Although USAA did not specifically say that the special verdict form should include questions about its affirmative defenses, USAA did ask for questions that would in effect ask the jury to specifically accept or reject the affirmative defenses. Moreover, USAA specifically referenced its requested special verdict forms in its argument to the court which included questions about its affirmative defenses. In short, we believe USAA adequately preserved this issue. *See 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."). We therefore proceed to consider the merits of USAA's argument.

{25} USAA argues that the special verdict form was unfair and one-sided because it encouraged the jury to consider O'Neel's claims in isolation without considering USAA's affirmative defenses. USAA maintains that once a district court elects to use special interrogatories all material issues must be included in the special verdict form. However, USAA's argument minimizes the fact that the jury was instructed on USAA's affirmative defenses. In particular, Instructions 10, 11, and 22 specifically informed the jury of USAA's affirmative defenses.

{26} When considering whether the jury was properly instructed, we must consider the instructions as a whole to determine whether all issues of fact and law were fairly and accurately presented to the jury. *See Kestenbaum v. Pennzoil Co.*, 108 N.M. 20, 26, 766 P.2d 280, 286 (1988). Because the jury was specifically directed that it should find in USAA's favor if it found that O'Neel breached the insurance contract by engaging in material misrepresentations or otherwise prejudiced USAA's ability to evaluate the claim by failing to cooperate in USAA's investigation, we find no reversible error based on the lack of specific questions concerning USAA's affirmative defenses within the special verdict form itself. *See Hourigan v. Cassidy*, 2001–NMCA–085, ¶¶ 26–27, 131 N.M. 141, 33 P.3d 891 (finding no reversible error in special verdict form that fails to include question about causation where issue of causation was covered by other jury instructions); *see also Concise Oil & Gas P'ship v. La. Intrastate Gas Corp.*, 986 F.2d 1463, 1474 (5th Cir.1993) (concluding that separate interrogatories for each affirmative defense are not necessary where instructions and interrogatories together adequately present issues to jury); *Perzinski v. Chevron Chem. Co.*, 503 F.2d 654, 659–60 (7th Cir. 1974) (failing to include question regarding whether plaintiff was contributorily negligent was not reversible error where other instructions adequately covered issue of contributory negligence); *Johnson v. First Nat'l Bank of Shreveport*, 792 So.2d 33, 54 (La.Ct.App. 2001) (holding that covering affirmative defenses in general instructions instead of special interrogatories is not abuse of discretion by district court).

IV. Bad Faith Jury Instructions

{27} USAA also objects to the manner in which the district court instructed the jury on O'Neel's bad faith claim. In particular, USAA argues that the district court committed reversible error by modifying UJI 13–1702 NMRA 2001. O'Neel asserts that USAA failed to preserve this issue below. In a motion to supplement the record, USAA's

attorneys sought to include affidavits in the record below to establish that USAA had objected to the form of the instructions during an off-the-record conference. The district court denied the motion to supplement the record, and O'Neel suggests that this establishes USAA in fact failed to raise a timely objection to the instruction that it now seeks to challenge on appeal. Since the district court denied USAA's motion to supplement the record with affidavits summarizing USAA's objections to the jury instructions, there is no objection to the instructions on the record. *See State v. Reynolds,* 111 N.M. 263, 267, 804 P.2d 1082, 1086 (1990) ("Matters outside the record present no issue for review."). As such, this issue does not appear properly preserved in the record of this appeal. *See* Rule 12–216(A) (failing to timely object precludes review of issue on appeal). Even if we were to assume that USAA did raise a timely objection, for the reasons that follow we find no reversible error.

{28} USAA challenges Instruction 8 as an improper modification of UJI 13–1702. *See* Rule 1–051(D) NMRA 2001 (allowing for deviation from uniform jury instruction if, under the circumstances of the case, the UJI is erroneous or otherwise improper and the court so finds and states its reasons on the record); *see also Brooks v. K–Mart Corp.,* 1998–NMSC–028, ¶ 7, 125 N.M. 537, 964 P.2d 98. We disagree with USAA's characterization of the record. UJI 13–1702 was actually given in its entirety as Instruction 18. To the extent that portions of UJI 13–1702 also were included as part of Instruction 8, we believe that the court acted properly by including the elements of O'Neel's bad faith claim within the form required by UJI 13–302B NMRA 2001.

{29} USAA maintains that by including the elements of Plaintiff's bad faith claim in two separate jury instructions, the district court unfairly emphasized Plaintiff's claims to the jury. However, USAA ignores that its own affirmative defenses also were submitted in two separate instructions, one patterned after UJI 13–1710 NMRA 2001 and one patterned after UJI 13–302D NMRA 2001. Accordingly, we find no merit to USAA's claim that the district court's instructions unfairly emphasized O'Neel's theory of the case.

{30} Although USAA also objects to the structure of Instruction 8 because it allowed the jury to find bad faith if it found that USAA failed to conduct a fair investigation *or* fair evaluation of the claim, we find no requirement in UJI 13–1702 that an insured must prove both an unfair investigation *and* unfair evaluation to establish a claim of bad faith. To the extent that USAA also objects to the fact the Instruction 8 was actually entitled "Plaintiff's Instruction 8" because it gave O'Neel an unfair advantage, we agree with O'Neel that attributing the instruction to Plaintiff rather than the court was as likely to prejudice O'Neel because the jury was to consider only the court's instructions as the applicable law. In short, considering the instructions as a whole, we find no error. *See Kestenbaum,* 108 N.M. at 26, 766 P.2d at 286.

V. Comparative Fault Defense

{31} USAA asks this Court to recognize a defense of comparative fault to an insurance bad faith claim. However, acknowledging that it failed to raise this as a defense below, USAA asks us to consider this issue as a matter of general public interest.

{32} For an issue to be considered on appeal there must have been a timely objection below. *See* Rule 12–216(A); *Woolwine,* 106 N.M. at 496, 745 P.2d at 721. As discussed above with regard to USAA's unpreserved challenge to the award of pre-arbitration attorney fees, on rare occasions this Court will suspend the general preservation requirement when the issue raised on appeal concerns a matter of general public interest. *See Pineda,* 111 N.M. at 540, 807 P.2d at 238; *Doe,* 90 N.M. at 574, 566 P.2d at 123. We find no basis for applying the general public interest exception in this case. We recognize that adoption of a comparative fault defense could apply to a large number of cases in the future. However, in contrast to cases like *Pineda* and *Doe,* there is no indication that the district courts will fail to rule correctly

when a claim to such a defense is raised and fully developed below. To allow an appellant to raise an unpreserved issue on appeal simply because it is novel and has the potential for applying to similar cases in the future would essentially allow the general public interest exception to swallow the general rule of preservation. We therefore decline to address USAA's arguments for recognizing such a defense because its arguments are raised for the first time on appeal.

CONCLUSION

{33} Based on the foregoing, we affirm the district court's judgment.

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

WE CONCUR: LYNN PICKARD, Judge, and CYNTHIA A. FRY, Judge.

2002-NMCA-012
41 P.3d 908

STATE of New Mexico,
Plaintiff–Appellee,

v.

Michael ERVIN, Defendant–Appellant.

No. 21,415.

Court of Appeals of New Mexico.

Dec. 1, 2001.

Certiorari Denied, No. 27,282,
Jan. 28, 2002.

Patricia A. Madrid, Attorney General, William McEuen, Ass't Attorney General, Santa Fe, NM, for Appellee.

M. David Chacon, II, Albuquerque, NM, for Appellant.

OPINION

PICKARD, Judge.

{1} Defendant appeals his convictions for criminal sexual penetration of a child under thirteen, kidnapping, false imprisonment, and bribery of a witness. On appeal, Defendant argues that the trial court erred in denying Defendant's motion for a statement of facts and in limiting the scope of defense counsel's cross-examination of the victim. Defendant also claims his counsel were ineffective. We affirm the convictions.

FACTS AND PROCEEDINGS

{2} In November 1996, the child (Victim), then eleven years old, told his legal guardian (Guardian) that Defendant had sexually molested him, and Guardian reported the abuse to the Bernalillo County Sheriff's Department. The initial indictment, filed on November 20, 1997, alleged that the acts had occurred between May 1, 1992, and August 30, 1993, a sixteen-month time frame. Defendant filed a motion for a statement of facts, asking the trial court for an order requiring the State to narrow the charging time frame in the indictment so that Defendant could raise an alibi defense. After a hearing, the trial court held the motion in abeyance to see if additional discovery would narrow the time frame. Three weeks before trial, after additional discovery efforts, including an interview with Victim, Defendant renewed his motion, indicating that those efforts had not helped to narrow the time frame of the charges. The trial court held a hearing on the renewed motion on the first day of the trial, April 5, 1999, after the two sides had already taken Victim's videotaped testimony. The State asserted that it could not get more specific dates from its witnesses. The trial court denied Defendant's motion.

{3} In his videotaped testimony, Victim testified that the abuse occurred while both he and Defendant were living at Guardian's house. He could not remember what year the abuse occurred or how old he was at the time. During the trial, both Guardian and Victim's biological mother (Mother) testified that Defendant lived in the house sometime during the summer of 1993.

DISCUSSION

Due Process

{4} Defendant's central argument is that the sixteen-month charging period in his indictment was so overly broad as to deprive him of his due process right to reasonable notice of the charges against him. *See* U.S. Const. amend. XIV, § 1; N.M. Const., art. II, § 14. Defendant relies on *State v. Baldonado,* in which we held that lengthy charging periods must be carefully scrutinized to ensure that a defendant's due process rights are protected. *See State v. Baldonado,* 1998–NMCA–040, ¶ 21, 124 N.M. 745, 955 P.2d 214. Defendant asserts that if the State had narrowed the charging time frame, he could have raised an alibi defense for some of the charges against him.

{5} In *Baldonado,* the defendant was charged with criminal sexual contact of a minor under thirteen. *Id.* ¶ 3. The indictment alleged that the crimes could have occurred anytime within a two-year period. *Id.* ¶ 4. The defendant sought an order requiring the State to narrow the time frame so he could assert an alibi defense. *Id.* The State argued that it was not required to provide more specific information as to the time frame. *Id.* ¶ 9. The trial court denied the defendant's motion, and the defendant was eventually convicted of the charges. The defendant appealed, arguing that the two-year charging period violated his due process rights.

{6} While we agreed that the trial court had failed to give sufficient consideration to the defendant's due process rights, we declined to hold that the two-year time frame was unconstitutional as a matter of law. *Id.* ¶ 23. Instead, we set out a two-part test to analyze the constitutionality of lengthy charging periods: (1) whether the State could reasonably have provided greater specificity of the times of the alleged offenses and (2) if so, whether the State's failure to do so prejudiced the defendant. *See id.* ¶ 29. We provided a list of nine nonexclusive factors to be used in applying this test:

1. The age and intelligence of the victim and other witnesses, and their ability to particularize the date and time of the alleged offense;
2. The surrounding circumstances; including whether a continuing course of conduct is alleged, as opposed to a relatively few, discrete or isolated events;
3. The extent to which defendant had frequent, unsupervised access to the victim;
4. The nature of the offense, including whether it is likely to occur at a specific time or is likely to have been discovered immediately;
5. The length of the alleged period of time in relation to the number of individual criminal acts alleged;
6. The length of time asserted in the indictment;
7. The passage of time between the period alleged for the crime and the time the abuse was asserted and/or the time defendant was arrested and/or indicted;
8. The extent and thoroughness of the State's efforts to narrow the time frame; and
9. Whether the defendant can assert a plausible alibi defense.

Id. ¶ 27.

{7} As we stated in *Baldonado,* there is no set length of time that will automatically necessitate a due process review. *See id.* ¶¶ 23, 26. Nonetheless, we stressed that trial courts must be diligent in protecting the due process rights of defendants in cases where the indictment is not specific as to the dates of the charged crimes. *Id.* ¶¶ 21, 28. In this case, the sixteen-month charging period was long enough to alert the trial court to the need to conduct a thorough analysis in order to ensure that Defendant had sufficient notice of the charges against him. The trial court, however, did not engage in a thorough analysis of Defendant's constitutional claims.

{8} First, the trial court did not examine the "extent and thoroughness of the State's efforts," as is required under *Baldonado. Id.* ¶ 27. During the first hearing on the matter, the trial court postponed making a ruling while the parties continued discovery. When discovery was completed, defense counsel informed the trial court that discovery had not served to narrow the charging time frame. The trial court did not hold another hearing on the issue until the first day of trial, after the victim's testimony was already complete, when it was realistically too late to require the State to conduct further investigation without a significant interruption in the proceedings. During that hearing, the trial court accepted the State's assertion without any inquiry into what efforts the State had made up to that point.

{9} Perhaps more importantly, the trial court did not evaluate the potential prejudice to Defendant. As we explained in *Baldonado,* if the State's failure to narrow the time frame prejudiced Defendant, then the charges must be dismissed, unless the State can respond with a statement of facts that provides Defendant with proper notice of the charges against him. *Id.* ¶ 34. The trial court should have more thoroughly evaluated the impact on Defendant's due process rights before allowing the State to move forward with a sixteen-month charging period.

{10} When we derived this two-part test in *Baldonado,* we did not apply it to that particular case, instead remanding to the trial court to more fully develop the factual record in order to analyze the factors we identified. Here, we believe that the record is sufficiently developed that we can apply the test to determine whether the charges in this case must be dismissed. Before we do so, however, we will address Defendant's suggestion that we reject *Baldonado*'s multi-factor approach in favor of a presumption that extended charging periods violate due process.

{11} *Baldonado,* the defense argues, relaxed the State's burden of proof in child sexual abuse cases. We disagree. As we observed in *Baldonado,* time is not an element of most offenses, and thus the State usually need not prove the date on which a crime occurred beyond a reasonable doubt. *Id.* ¶ 29. By adopting a case-by-case approach, we sought to provide safeguards for the due process rights of defendants without allowing the "predictable limitations of young witnesses . . . to prevent prosecution of their abusers." *Id.* ¶ 20. We rejected the even more restrictive approach of several jurisdictions that have refused to hold that extended charging periods raise due process concerns. *See, e.g., Dilbeck v. State,* 594 So.2d 168, 174 (Ala.Crim.App.1991); *State v. Martinez,* 250 Neb. 597, 550 N.W.2d 655, 657 (1996). We see no reason to abandon the careful balancing required by the *Baldonado* case at this time.

{12} Defendant also reads *Baldonado* as mandating an express analysis of all of the nine factors listed above. In fact, the case set out a two-part test to determine whether a charging period is overly broad. *Id.* ¶¶ 2, 29. The nine factors enumerated in the case "relate to both whether the indictment is reasonably particular and whether the defendant suffered prejudice." *Id.* ¶ 29. We expressly recognized that " 'the weight to be accorded the factors will vary according to the circumstances of the case.' " *Id.* ¶ 28 (quoting *In re K.A.W.,* 104 N.J. 112, 515 A.2d 1217, 1222 (1986)). We now apply that two-part test to the case at hand.

Reasonable Particularity

{13} Under *Baldonado,* the State is obligated to make reasonable efforts to narrow the charging time frame. *Id.* ¶ 25. *Cf. State v. Ware,* 118 N.M. 319, 323, 881 P.2d 679, 683 (1994) ("[T]he State generally has no duty to collect particular evidence."). The State argues that it could not have narrowed the charging time frame further because Victim was unable to pinpoint the dates on which the abuse occurred. The State also relies on expert testimony indicating that most children have difficulty sequencing events in time, and that children who experience trauma have even greater difficulty. The State, however, has not met its burden to establish that it could not have provided greater specificity of the times of the alleged offenses. To the contrary, the record shows that the State could have substantially narrowed the time frame before trial with relatively little effort.

{14} The difficulty in pinpointing a more precise time frame in this case arose because Victim not only had trouble remembering when the events in question occurred, but at times gave conflicting information about the relevant time frame. The State based the sixteen-month charging period of May 1992 to August 1993 on statements Victim made during an initial interview at a "safehouse," a site where trained counselors conduct interviews of youth who claim to be victims of sexual abuse. In that interview, Victim stated that he was less than six years old when the abuse occurred. In his pretrial interview with defense counsel, Victim said he was three or four at the time, which would have put the dates of the abuse well before the charging period. Victim testified at trial that the abuse occurred while Defendant was living at Guardian's house, and that it occurred when he was approximately eight years old.

{15} Testimony at trial revealed that Defendant lived at Guardian's house during the summer of 1993. Guardian testified that Defendant had stayed overnight occasionally before the summer of 1993, that he lived there sometime during that summer, and that he never returned after September 1993. Mother, who was also living in the house at that time, also estimated that Defendant was living there "from May through August or September of '93." Guardian also testified that Defendant reported allegations of neglect to the Bernalillo County Sheriff's Department and the Division of Family Services just a few weeks after leaving the house. Investigator Lucinda Ward testified that she visited Guardian's house on September 17, 1993, in response to those allegations. Ms. Ward also testified that Guardian told her that Defendant lived at the house for approximately two weeks during that summer.

{16} Each of these witnesses was called to testify by the State, not Defendant, and the State had access to these witnesses throughout the pretrial period. In short, the State

was either already aware of, or could have easily become apprised of, facts that would reduce the time frame from sixteen months to four. It is not clear why the State insisted on maintaining the sixteen-month time frame in the indictment, and later in the jury instructions, when it had such information available. Indeed, in its opening statements, the prosecutor emphasized several of the facts that showed Defendant was living at Guardian's house during the summer of 1993. These statements were made just shortly after the hearing on Defendant's renewed motion for a statement of facts, when the State continued to maintain that it could not obtain more specific information from its witnesses. Whatever the State's motion for maintaining the sixteen-month charging period, the State did not fulfill its duty to provide adequate specification of the times of the alleged offenses.

Prejudice to Defendant

{17} Having held that the indictment was not stated with reasonable particularity, we must now determine whether the State's failure caused prejudice to Defendant. If Defendant will be prejudiced by the indictment's broad time frame, the charges must be dismissed, even when the State has done all it could to narrow the time frame. *Baldonado,* 1998–NMCA–040, ¶¶ 32, 34, 124 N.M. 745, 955 P.2d 214. On the other hand, without prejudice, there is no reversible error. *Id.* ¶ 29. Prejudice must be both actual, not based on pure conjecture, and substantial in its impact on the defense. *State v. Padilla,* 1998–NMCA–088, ¶ 14, 125 N.M. 665, 964 P.2d 829. Prejudice is shown when the defense loses its only means of proving its case. *See State v. Riggs,* 114 N.M. 358, 361, 838 P.2d 975, 978 (1992). "Denial of a likely defense cannot be anything other than prejudicial." *March v. State,* 105 N.M. 453, 456, 734 P.2d 231, 234 (1987).

{18} Defendant claims he was prejudiced because he was unable to raise an alibi defense without more specific information as to when the charged incidents occurred. During trial, defense counsel indicated that he could make an offer of proof of testimony from the records custodian from the Veteran's Administration Hospital, where Defendant underwent treatment for alcohol dependence. Defense counsel never actually made the offer of proof, and thus the dates of Defendant's hospitalization are not part of the record before us. After reviewing the record, we are not persuaded that Defendant could have raised a viable alibi defense if the charging time frame had been narrowed to four months.

{19} Alibi evidence would have only been helpful to Defendant if it contradicted the State's evidence that Defendant was living at Guardian's house during the summer of 1993. Defendant, however, does not claim that he was not living at Guardian's house during that time. In fact, Defendant now argues that the State should have used this evidence to narrow the time frame of the charges. In addition, although the State should have clarified the time frame prior to trial, Defendant had sufficient opportunity at trial to present a viable alibi defense. Guardian's and Mother's testimony regarding the relevant time frame was presented in the State's case-in-chief. Defendant had gathered the V.A. records prior to trial and could have introduced that evidence if it served to rebut their testimony. Had the V.A. records established that Defendant was never at Guardian's house during that summer, we have no doubt that Defendant would have introduced that evidence at trial. In fact, Defendant's notice of alibi claimed that he was at the V.A. Hospital only until May of 1993 and that he lived with his sister from May to July 1993. He admitted in closing argument that he was "up there [at Guardian's house] for a four-to-six week period of time."

{20} The V.A. records might have been helpful to the defense if the State had been able to narrow the time frame even further or to provide specific dates on which the assaults occurred. The State, however, was not required to do so because it could not do so. Although we again stress that there is no set amount of time frame that as a matter of law is reasonable, we think that a four-month charging time frame would have provided Defendant with sufficient notice of the charges against him to meet due process requirements. In *Baldonado,* we sought to balance the due process rights of defendants against the reality that " '[y]oung children

cannot be held to an adult's ability to comprehend and recall dates and other specifics.' " *Baldonado,* 1998–NMCA–040, ¶ 20, 124 N.M. 745, 955 P.2d 214 (quoting *State v. Fawcett,* 145 Wis.2d 244, 426 N.W.2d 91, 94 (App.1988)). In his testimony, Victim described three separate incidents of abuse. He testified that some time lapsed between each separate incident. He did not report the abuse for approximately three years, and his testimony at trial came approximately three years after that. Given that Victim alleged a continuing course of abuse throughout the time Defendant lived in the house with the family, a four-month time frame was narrow enough to provide Defendant with notice as to when the events in question occurred.

{21} Because Defendant was not prejudiced by the State's failure to narrow the charging time frame from sixteen months to four, and because a four-month charging time frame would have met the requirements of due process, we find no reason to remand this case for further proceedings on this issue.

Ineffective Assistance of Counsel

{22} Defendant argues that his trial counsel were ineffective for two reasons. First, Defendant argues that his counsel should have been more diligent in pursuing the *Baldonado* issue. He asserts that counsel should have more strongly urged the trial court to analyze each of the nine factors listed in *Baldonado.* He also argues that his counsel should have objected to the sentencing requirement that Defendant register as a sex offender. He argues that, because his offenses were committed in 1993, prior to the legislature's enactment of the state's sex offender registry laws, the requirement that he register as a sex offender amounts to ex post facto punishment. Neither of Defendant's contentions have merit.

{23} To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate (1) that his counsel did not exercise the skill of a reasonably competent attorney and (2) that the incompetent representation prejudiced the defendant's case. *State v. Baca,* 1997–NMSC–045, ¶ 20, 124 N.M. 55, 946 P.2d 1066. The main question is whether the allegedly incompetent representation prejudiced the case such that but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different. *Id.*

{24} We have already said that Defendant was not prejudiced by the sixteen-month charging period. Thus, Defendant was not prejudiced by defense counsel's inability to convince the trial court to engage in a more exacting analysis under *Baldonado.* In addition, we note that failure to obtain a favorable ruling does not make counsel ineffective, particularly when, as here, counsel made reasonable efforts to bring an issue to the trial court's attention. *See State v. Martinez,* 1996–NMCA–109, ¶ 27, 122 N.M. 476, 927 P.2d 31 ("Failure to renew at trial a motion . . . [that] has been denied in limine does not constitute ineffective assistance of counsel."). Counsel for Defendant filed two separate motions asking the trial court to apply *Baldonado,* and requested hearings on each motion. They indicated that they could make an offer of proof regarding Defendant's alibi evidence. But the proof obviously did not extend to the entire four-month period. Their efforts should not be deemed deficient simply because the trial court was not persuaded or because the four-month period was not sufficiently narrow to mount an alibi defense.

{25} We similarly reject Defendant's argument that defense counsel were ineffective because they failed to object when the trial court ordered Defendant to register as a sex offender in accordance with NMSA 1978, § 29–11A–4 (2000). According to Defendant, defense counsel should have argued that the registration requirement violated the prohibition on ex post facto punishment. *See* U.S. Const., art. I, § 10; N.M. Const., art. II, § 19. Defendant also invites this Court to go beyond his ineffective assistance of counsel claim and analyze the constitutionality of the registration requirement, even though the issue was not raised below and neither party has fully briefed the issue. We express no opinion as to the merits of this argument at this time, because Defendant can still raise this issue before the trial court under Rule 5–801(B) NMRA 2001, which allows a defendant to file for a sentence reduction within

ninety days after the trial court receives a mandate from an appellate court. As a result, Defendant's ineffective assistance of counsel claim fails, because Defendant was not prejudiced by counsel's failure to raise the issue when the sentence was first imposed. In addition, there is no need for us to invoke any exceptions to the preservation requirement, *see* Rule 12–216(B) NMRA 2001, when the issue can still be raised below.

Restriction on the Cross Examination of the Victim

{26} As a final matter, Defendant asserts that the trial court erred in limiting Defendant's ability to attack Victim's credibility during cross-examination. Specifically, defense counsel wanted to ask Victim about the fact that he was banned from a Wal–Mart for shoplifting and that he lied about his grades during an interview regarding the sexual abuse. The trial judge excluded this particular evidence, indicating a lack of a factual basis regarding the Wal–Mart incident and characterizing the grades as exaggeration. Defendant concedes that the trial court, under Rule 11–608(B) NMRA 2001, has discretion to determine whether the probative value of evidence regarding a witness's prior instances of misconduct is outweighed by its prejudicial impact and that the trial court's ruling is reviewed for abuse of discretion only. *See State v. Apodaca,* 118 N.M. 762, 773, 887 P.2d 756, 765 (1994). Nonetheless, he argues that the trial court abused its discretion because the ruling deprived him of his ability to test the credibility of the witness. We disagree.

{27} Defense counsel was able to cross-examine Victim at length about other allegations he made against Defendant that Victim later admitted were false. In addition, despite the trial court's ruling, Guardian testified that Victim had stolen items from her, from her friends, and from stores. With this evidence before the jury, the probative value of Victim's lies about his grades would have been minimal, and certainly outweighed by the potential prejudice. The trial court did not abuse its discretion in limiting Defendant's cross-examination.

CONCLUSION

{28} We hold that Defendant suffered no prejudice as a result of the State's failure to narrow the charging time frame from sixteen months to four, and Defendant's due process rights were not violated. In addition, we hold that defense counsel were effective, and the trial court was within its discretion in prohibiting cross-examination regarding the victim's prior acts of lying and stealing. Therefore, we affirm Defendant's convictions.

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

WE CONCUR: CYNTHIA A. FRY, Judge, and IRA ROBINSON, Judge.

2002-NMCA-023

41 P.3d 914

Kelly RUPP, Plaintiff–Appellant,

v.

Lloyd HURLEY, M.D., Sidney Schultz, M.D., Defendants–Appellees.

No. 21,147.

Court of Appeals of New Mexico.

Dec. 10, 2001.

Certiorari Denied, No. 27,338, Feb. 26, 2002.

Stevan J. Schoen, Stevan J. Schoen, P.A., Albuquerque, NM, for Appellant.

Michael S. Jahner, Butkus & Jahner, P.C., Michael J. Dekleva, Madison, Harbour, Mroz & Brennan, P.A., Albuquerque, NM, for Appellees.

OPINION

FRY, Judge.

{1} In this case, consistent with New Mexico Supreme Court precedent, we hold that under NMSA 1978, § 41–5–15 (1977) of the Medical Malpractice Act (MMA), a decision by the Medical Review Commission (MRC) is not a jurisdictional prerequisite to the filing of a complaint in court against a qualified health care provider for medical malpractice. Consequently, the initial complaint in this case was not a nullity even though it was filed early. We therefore reverse summary judgment in favor of Defendants and remand for reinstatement of Plaintiff's claims.

BACKGROUND

{2} On June 18, 1991, Drs. Lloyd Hurley and Sidney Schultz (Defendants), performed hip replacement surgery on 28–year–old Kelly Rupp (Plaintiff). During the surgery, Plaintiff's femur was fractured. Defendants repaired the fracture with a blade plate which was later alleged to be approved only for veterinary, rather than human, use. About a month after the surgery, the blade plate broke and caused Plaintiff's femur to refracture. Defendants performed surgery to remove the plate and reduce the fracture. Plaintiff filed a medical malpractice action which is before us now on her appeal from an order dismissing her claims with prejudice on statute of limitations grounds.

{3} The procedural history of this case is long and complex. In the following summary, we include the specific dates of various events because the dates are critical to an understanding of the parties' claims.

{4} Plaintiff filed her original complaint on June 16, 1994, two days before the expiration of the MMA's statute of limitations. *See* NMSA 1978, § 41–5–13 (1976) (providing three years from date of alleged malpractice within which to bring a claim). The complaint asserted multiple causes of action against Defendants, who are "qualified health care providers" under the MMA, *see* NMSA 1978, § 41–5–5(A) (1992), against certain non-qualified health care providers, and against the alleged manufacturers of the blade plate. In addition to her claims against Defendants for medical negligence, Plaintiff's complaint included claims against Defendants that fell outside the purview of the MMA, such as claims for breach of contract and fiduciary duty and for negligent infliction of emotional distress.

{5} On the same day Plaintiff filed her original complaint, she filed an application with the MRC pursuant to NMSA 1978, § 41–5–15 (1976). During the time Plaintiff's

application was pending with the MRC, Plaintiff did not serve Defendants and there was no activity in her case in district court. The MRC met on November 3, 1994, and issued a decision in favor of Defendants on November 4, 1994.

{6} After the MRC issued its decision, Plaintiff filed an amended complaint on January 6, 1995, substituting the correct manufacturer and adding minor details to her allegations against the manufacturer and Defendants. The first amended complaint also added causes of action against Defendants for fraudulent concealment and lack of informed consent. Plaintiff served Defendants with the first amended complaint on May 15, 1995, nearly a year after the date she filed her original complaint. Plaintiff never served Defendants with the original complaint.

{7} The parties engaged in several years of litigation during which Defendants sought dismissal on numerous grounds. However, it was not until four years after being served that Defendants argued that the statute of limitations barred Plaintiff's claims. In support of their motion for summary judgment, Defendants made a two-part argument. First, Defendants argued that filing an application with the MRC is a jurisdictional prerequisite that must be observed *before* filing a malpractice action against any qualified health care provider in any court in this state. Therefore, they argued, because Plaintiff filed her MRC application and her complaint at the same time, her original complaint was void. Second, Defendants argued that, even if the first amended complaint would have been valid because it was filed after the MRC issued its decision, it was filed after the statute of limitations expired. Therefore, they contended that, pursuant to Rule 1-015 NMRA 2001, the first amended complaint was valid only if it related back to the filing of the original complaint. They argued that the amended complaint could not relate back because the original complaint was void.

{8} The district court granted Defendants' motion for summary judgment without entering any findings of fact or conclusions of law. Plaintiff now appeals.

DISCUSSION

Standard of Review

{9} We review a grant of summary judgment de novo. *Hasse Contracting Co. v. KBK Fin., Inc.*, 1999-NMSC-023, ¶ 9, 127 N.M. 316, 980 P.2d 641 (1999). We view the record in the light most favorable to the party opposing summary judgment. *Blackwood & Nichols Co. v. N.M. Taxation & Revenue Dep't.*, 1998-NMCA-113, ¶ 5, 125 N.M. 576, 964 P.2d 137. Because the parties do not dispute the facts, we determine whether the district court properly decided the legal effect of those facts. *Bd. of Comm'rs of Rio Arriba County v. Greacen*, 2000-NMSC-016, ¶ 3, 129 N.M. 177, 3 P.3d 672.

Compliance With Section 41-5-15 of the Medical Malpractice Act is Not Jurisdictional

{10} Section 41-5-15 of the MMA states that "[n]o malpractice action may be filed in any court against a qualifying health care provider before application is made to the medical review commission and its decision is rendered." Defendants interpret this statute to mean that receiving a decision from the MRC is a jurisdictional prerequisite to filing a medical malpractice complaint in district court. As authority for their position, Defendants rely primarily on the following language from *Perez v. Brubaker*, 99 N.M. 529, 531, 660 P.2d 619, 621 (Ct.App. 1983):

> The language of the statute is clear. The jurisdictional prerequisite is that there must be application made to the medical review commission and its decision on the application before the action can be filed in the trial court.... Any rulings regarding the merits are a nullity absent this jurisdictional prerequisite.

Although this language appears to support Defendants' position, other opinions from the New Mexico Supreme Court clarify that Section 41-5-15 is a procedural precondition rather than a jurisdictional prerequisite.

{11} Before considering these other opinions, it is helpful to understand the relationship between the MMA's requirement for a preliminary application to the MRC and its

statute of limitations, because it is this relationship that gave rise to this appeal. The MMA allows a claimant three years from the date of the act of malpractice within which to bring a claim. Section 41–5–13. The limitation period may be tolled pursuant to NMSA 1978, Section 41–5–22 (1976) which provides 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] panel and shall not commence to run again until thirty days after the panel's final decision is entered in the permanent files of the commission and a copy is served upon the claimant and his attorney by certified mail." Section 41–5–22.

{12} In the present case, the limitations period would have expired on June 18, 1994, three years from the date of Defendants' alleged malpractice. Plaintiff filed both her district court complaint and her MRC application on June 16, 1994. Had she submitted only her MRC application on that date as required by Section 41–5–15, the submission would have tolled the limitations period on her malpractice claims, and she would have had thirty days from service of the MRC's November 4 decision, plus three days for mailing,[1] or until December 7, 1994, by which to file her malpractice claims in court. She would have had an additional two days for filing due to the two days remaining in the limitations period when she filed her MRC application, or until December 9, 1994. However, because Plaintiff filed her complaint before the MRC rendered its decision, if that fact somehow rendered her complaint void, then the critical date for limitations purposes is the date she filed her first amended complaint, which was January 6, 1995.

{13} We now turn to the Supreme Court opinions establishing that Section 41–5–15 is not jurisdictional and, therefore, that Plaintiff's original complaint is not void. The Court filed *Jiron v. Mahlab,* 99 N.M. 425, 659 P.2d 311 (1983), a week before *Perez.* While *Jiron* did not directly address the question, its holding suggests that an MRC decision is *not* a jurisdictional prerequisite to the filing of an action in district court. *Jiron* held that enforcement of the literal requirements of Section 41–5–15 under the particular circumstances of the case "unconstitutionally deprive[d] [plaintiffs] of their due process right of access to the courts without delay." *Id.* at 428, 659 P.2d at 314. In that case, the plaintiffs filed their complaint in district court and served the defendant physician before they filed their application with the MRC because the defendant was leaving the country indefinitely, and the plaintiffs feared they would not be able to serve him if they waited for the MRC decision. *Id.* at 426, 659 P.2d at 312. Because strict compliance with Section 41–5–15 would cause undue delay that could result in loss of their claim against the defendant, the Court reversed the district court's dismissal for lack of subject matter jurisdiction. *Id.* at 427–28, 659 P.2d at 313–14.

{14} Two years after *Perez* and *Jiron,* the Supreme Court clarified that an early filing of a medical malpractice action, though improper, would not be a nullity. *Otero v. Zouhar,* 102 N.M. 482, 486, 697 P.2d 482, 486 (1985). In that case, four days before the limitations period would have expired, the plaintiff sued a qualified health care provider physician and two defendants he believed to be non-qualified health care providers "in order to observe the joinder requirement [of Rule 1–019 NMRA 2001] and to preserve his cause of action against the non-qualified parties before the statute ran." *Id.* at 484, 697 P.2d at 484. He mailed his application to the MRC three days later, and the district court granted his motion to stay the proceedings until the MRC acted. *Id.* The defendant physician argued that an MRC application was a jurisdictional prerequisite to the plaintiff filing his complaint in district court, but the district court disagreed and denied the defendant's motion to dismiss. *Id.*

{15} On the defendant's appeal, the Supreme Court noted that the district court's stay was technically erroneous because a strict reading of Section 41–5–15 would have required the district court to dismiss the plaintiff's complaint without prejudice to allow the MRC to consider the plaintiff's appli-

1. In accordance with *Saiz v. Barham,* 100 N.M. 596, 599–600, 673 P.2d 1329, 1332–33 (Ct.App. 1983), if an MRC decision is served by mail, as it was here, an additional three days for mailing is added to the tolling period.

cation. The tolling provisions of the MMA's statute of limitations would have then permitted the plaintiff to refile his complaint after the MRC rendered its decision. *Id.* However, the Supreme Court decided it would be unjust for it to strictly apply Section 41–5–15 by ordering the district court to dismiss the complaint on remand because the thirty-day tolling period had long since passed, and "[s]uch 'Catch–22's' are procedural anomalies that do not deserve perpetuation." *Otero* at 485, 697 P.2d at 485.

{16} As a separate ground for its decision in *Otero,* the Supreme Court made clear that the MMA did not and could not control or affect the subject matter jurisdiction of the district courts and did not impinge on procedure in the courts. The court stated:

> Additionally, we once again affirm our exclusive constitutional power under N.M. Const. art. III, § 1 and art. VI, § 3 to regulate all pleading, practice and procedure affecting the judicial branch of government. State v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975). Clearly, the district courts have jurisdiction to hear tort actions and to grant relief. N.M. Const. art. VI, § 13; NMSA 1978, § 37–1–7. The statutory provision that claimants against health care providers first submit their claims to the commission before filing suit is a purely procedural requirement and cannot, therefore, be deemed binding.

Otero, 102 N.M. at 486, 697 P.2d at 486. This language teaches us that submitting an application to the MRC is not a jurisdictional prerequisite to filing a medical malpractice complaint in district court. If the requirement were jurisdictional, then none of the circumstances present in *Jiron* and *Otero* could have served to confer jurisdiction. Jurisdiction either exists or it does not. *Govich v. N. Am. Sys., Inc.,* 112 N.M. 226, 230, 814 P.2d 94, 98 (1991) (noting that courts "strictly adhere to jurisdictional subject matter limits"). If there is not a subject matter jurisdiction defect in filing a medical malpractice complaint against a qualified health care provider early, the complaint is not a nullity, and it is not void.

{17} In light of this New Mexico precedent, we reject Defendants' argument analogizing claims under the MMA to federal law requiring exhaustion of administrative remedies as a jurisdictional prerequisite to filing suit in court. Our Supreme Court has established that the early filing of a medical malpractice complaint has no impact on the district courts' subject matter jurisdiction.

{18} Defendants conceded at oral argument that, if the original complaint is not void, and if the requirements of Rule 1–015(C) NMRA 2001 are met, the first amended complaint would relate back to the date Plaintiff filed her original complaint. Rule 1–015(C) provides that "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Defendants argue that relation back could not occur because they had no notice of the original complaint. We disagree. Rule 1–015(C) requires notice only when the amendment seeks to change the party being sued. Rule 1–015(C) ("An amendment changing the party against whom a claim is asserted relates back if . . . within the period provided by law for commencing the action against him, the party to be brought in by amendment: (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense. . . .") Here, Plaintiff's original complaint and her first amended complaint both asserted claims against Defendants, and therefore, the notice requirement did not apply. Because we hold that the premature filing of Plaintiff's original complaint was not a jurisdictional defect, we necessarily reject Defendants' argument that the complaint was a nullity. Consequently, the first amended complaint related back to the date the original complaint was filed, and Plaintiff's claims were filed before the statute of limitations expired.

{19} We also find compelling the absence of prejudice to Defendants. Plaintiff did not serve Defendants—and Defendants did not have to respond to Plaintiff's claims—until after the MRC rendered its decision. For the first four years of active litigation, Defendants did nothing to put forth their theory that the initial complaint was void, and they

actually admitted in their answer to the first amended complaint that Plaintiff had complied with the MMA. Defendants are in no worse position now than they would have been if Plaintiff had delayed filing until after the MRC had acted.

{20} Permitting Plaintiff's lawsuit to proceed is not inconsistent with the purposes of the MMA and the MRC screening process. The stated purpose of the Medical MMA is to "promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico." NMSA 1978, § 41–5–2 (1976). The two original purposes of the MRC screening process were:

> On the one hand, to prevent where possible the filing in Court of actions against physicians and their employees for professional malpractice in situations where the facts do not permit at least a reasonable inference thereof; and, on the other hand, to make possible the fair and equitable disposition of such claims against physicians as are, or reasonably may be, well founded [by providing an expert witness].

Ruth L. Kovnat, Medical Malpractice Legislation in New Mexico, 7 N.M.L.R. 5, 35 (1976–77) (Appendix I—Joint Medical–Legal Plan for Screening Medical Negligence Cases). Permitting Plaintiff's lawsuit does not violate either purpose. It is unlikely that waiting for the MRC decision would have deterred Plaintiff from filing her complaint. It is equally obvious that the district court's eventual strict enforcement of Section 41–5–15 did not in any way streamline the disposition of Plaintiff's claims, largely because Defendants did not press the issue until after four long years of zealous litigation.

{21} We emphasize that the necessity for an MRC determination prior to the filing of a medical malpractice claim remains a mandatory procedural threshold that must be crossed in the ordinary case. However, failure to comply with this requirement should not result in evisceration of the plaintiff's cause of action; other less drastic remedies are available. For example, if an early complaint is brought to the attention of the district court prior to the MRC decision, the district court should normally dismiss the complaint without prejudice. In addition, if the plaintiff cannot demonstrate a good faith basis for filing the complaint early, it would be appropriate for the district court to consider Rule 11 sanctions against the plaintiff.

CONCLUSION

{22} We reverse summary judgment in favor of Defendants and remand for reinstatement of Plaintiff's claims.

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

WE CONCUR: RICHARD C. BOSSON, Chief Judge, and MICHAEL D. BUSTAMANTE, Judge.

2002-NMCA-031

41 P.3d 919

STATE of New Mexico, Plaintiff–Appellee,

v.

Ginnie CONTRERAS, Defendant–Appellant.

No. 21,473.

Court of Appeals of New Mexico.

Jan. 3, 2002.

Certiorari Denied, No. 27,319, Feb. 28, 2002.

Patricia A. Madrid, Attorney General, Ann M. Harvey, Assistant Attorney General, Santa Fe, NM, for Appellee.

Phyllis H. Subin, Chief Public Defender, Nancy M. Hewitt, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

CASTILLO, Judge.

{1} Defendant Ginnie Contreras appeals her conviction of harboring a felon contrary to NMSA 1978, § 30–22–4 (1963), arguing that her conviction cannot stand because she harbored a juvenile and juveniles can never be considered felons. This case presents us with a question of first impression: does harboring a juvenile offender, who is not subject to conviction as a felon but whose conduct is classifiable as a felony under the laws of the State of New Mexico, fall within the scope of Section 30–22–4. We hold that an offender who commits acts constituting "a felony" can be considered a felon for purposes of Section 30–22–4 notwithstanding the fact that the offender is a juvenile who cannot be considered a felon under the Delinquency Act of the Children's Code. We affirm.

BACKGROUND

{2} In late August 1999, while answering a call, police officers went to the home of Lilian Salazar. Upon entering, they found five people including Defendant and a juvenile whom Defendant identified as Manual Sosa. Subsequent investigation revealed the following: the juvenile was not Manuel Sosa, but Angelo Sedillo; there was a bench warrant for the arrest of Sedillo for failing to appear at trial on burglary charges; Defendant knew about the burglary; Defendant, Sedillo, and others had lived at the Salazar residence for some time; police officers had gone to the Salazar house looking for Sedillo on several occasions between May and August 1999, and Defendant stated that she did not know Sedillo's whereabouts. The investigation also revealed that Sedillo's mother reported him as a runaway and that Defendant is not related to Sedillo.

{3} Ultimately, the State charged Defendant with contributing to the delinquency of a minor contrary to NMSA 1978, § 30–6–3 (1990), and harboring or aiding a felon contrary to Section 30–22–4. The district court denied Defendant's motion to dismiss the crime of harboring a felon. Defendant then pled to the two counts but reserved her right to appeal the district court's denial of her

motion in accordance with *State v. Hodge,* 118 N.M. 410, 414–15, 882 P.2d 1, 5–6 (1994).

DISCUSSION

{4} Defendant argues that under the Children's Code, Sedillo could not be adjudicated a "felon" as a result of his alleged participation in a burglary; at most, he could only be adjudicated a "delinquent offender." *See* NMSA 1978, § 32A–2–3(A), (K) (1996). Defendant therefore contends that she could not have committed the statutory offense of "harboring or aiding a felon" because Sedillo is not a "felon."

{5} Because Defendant's argument presents questions of statutory interpretation, we review the district court's ruling de novo. *See State v. Lopez,* 2000–NMCA–001, ¶ 3, 128 N.M. 450, 993 P.2d 767 (citing *State v. Rowell,* 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995)). The question of whether an adult may be charged with the offense of harboring or aiding a felon when the person harbored or aided is a juvenile has not been previously considered in this state. Section 30–22–4 provides:

> Harboring or aiding a felon consists of any person, ... who knowingly conceals any offender or gives such offender any other aid, knowing that he has committed a felony, with the intent that he escape or avoid arrest, trial, conviction or punishment.
>
> In a prosecution under this section it shall not be necessary to aver, nor on the trial to prove, that the principal felon has been either arrested, prosecuted or tried.
>
> Whoever commits harboring or aiding a felon is guilty of a fourth degree felony.

{6} The legislature's function is to determine prohibited actions and to define crimes through statutes. *State v. Elmquist,* 114 N.M. 551, 552, 844 P.2d 131, 132 (Ct.App. 1992). The judiciary's function is to construe statutes for their meaning. *State v. Attaway,* 117 N.M. 141, 145, 870 P.2d 103, 107 (1994) (stating that the primary function of an appellate court is as an expositor of law); *Elmquist,* 114 N.M. at 552, 844 P.2d at 132.

{7} Defendant first urges a plain meaning to the words "felon" and "felony," arguing that Section 30–22–4 requires the person harbored to be a "felon" and to have committed a "felony." Defendant concludes that juveniles can never be considered felons because their offenses are considered "delinquent acts" regardless of whether they are misdemeanors, felonies, or other types of criminal acts. Defendant contends that the language of the statute is truly clear and unambiguous; therefore, the courts must give effect to the language as written and not resort to statutory construction. *State ex rel. Helman v. Gallegos,* 117 N.M. 346, 351, 871 P.2d 1352, 1357 (1994). The State responds that the legislature's intent trumps a plain meaning interpretation and in no case may a plain meaning interpretation provide an absurd result. The State points out that a plain meaning interpretation would lead to an absurd result because it would allow an actor who harbors a juvenile to be shielded from a felony simply by relying on the age of the offender being harbored.

{8} In response to the State's argument, Defendant contends that the intention of the legislature is to be ascertained from the language of the statute itself relying on *State v. Shop Rite Foods, Inc.,* 74 N.M. 55, 57, 390 P.2d 437, 439 (1964) (defining crimes and providing that the penalty is a legislative function). Defendant further argues that had the legislature intended the harboring a felon statute to apply to those who aid juveniles in avoiding arrest or trial, it could have drafted the statute to state so explicitly as did the Washington legislature. Wash. Rev. Code Ann. § 9A.76.050 (2001). Defendant argues that if the court determines that her action is within the scope of Section 30–22–4, the rule of lenity should apply because the statute is ambiguous.

{9} Other jurisdictions have considered this question. Kansas has a similar statute which criminalizes "harboring, concealing or aiding any person who has committed a felony." Kan. Stat. Ann. § 21–3812(a) (2000). In *State v. Busse,* 252 Kan. 695, 847 P.2d 1304, 1306 (1993), the Kansas Supreme Court held that the state properly charged an adult with aiding a felon based on the act of a juvenile because the determining factor is the conduct of the one aided, not the status of the one aided. The Kansas court recognized that even though the definition of felony did not encompass juvenile offenses, the

juvenile's conduct in that case was classifiable as a Class C felony; therefore, the state properly looked to the felonious conduct of the one aided not to his status as a juvenile. *Id.* at 1307. The Kansas court further stated that the purpose of the juvenile code is to shield juveniles from the adult consequences of their actions, not to shield adults from the consequences of their actions when they aid juveniles. The Kansas court recognized that because its ruling implicated a wholly distinct question of charging an adult with the offense of aiding a felon, the purpose of the juvenile code continued to be observed. *Id.* at 1306.

{10} Oklahoma and Mississippi have adopted the same approach for harboring and accessory statutes. *See Shockley v. State,* 724 P.2d 256, 258 (Okla.Crim.App. 1986) (stating that an adult charged with harboring a fugitive from justice cannot avoid the illegal consequences of his own actions when he harbors a minor); *State v. Truesdell,* 620 P.2d 427, 428–29 (Okla.Crim.App. 1980) (convicting mother of accessory to the crime of shooting with intent to kill was a separate crime from child's action of shooting a person; therefore, the child's status as a minor was immaterial to her actions); *cf. Dobbs v. State,* 726 So.2d 1267, 1275 (Miss.Ct. App.1998) (focusing on adult's action of assisting in disposal of weapon used by a juvenile in a burglary resulted in adult being convicted as an accessory after the fact to burglary regardless of the status of the one who committed the crime of burglary).

{11} Defendant cites to *Frost v. State,* 527 N.E.2d 228 (Ind.App.1988) (Miller, J. specially concurring) in support of her position. In that case, Indiana's harboring statute required the person aided to have "committed a crime." Ind.Code Ann. § 35–44–3–2 (2001). Indiana law did not allow a child to be charged with or convicted of a crime unless the child had "been waived to a court having criminal jurisdiction." Ind.Code Ann. § 31–6–3–5 (1996), *repealed by* P.L. 1–1997 § 157. Based on these two statutes, the Indiana Court of Appeals reversed the defendant's conviction for harboring because the prosecution failed to establish the juvenile had committed a criminal offense. This case, however, is distinguishable. As Judge Miller points out in his concurring opinion, several years before the defendant was charged, the Indiana legislature repealed the statute that had criminalized the harboring of juveniles thereby providing evidence that the legislature intended to decriminalize the harboring of juveniles. *Frost,* 527 N.E.2d at 231. New Mexico has no such legislative history.

{12} In interpreting a statute, we look to the legislature's intent and give it effect without an absurd result. *Rowell,* 121 N.M. at 114, 908 P.2d at 1382 (stating that the primary purpose of statutory construction "is to give effect to the intent of the legislature" while not rendering an absurd, unreasonable, or unjust application of the statute); *State v. Mobbley,* 98 N.M. 557, 558, 650 P.2d 841, 842 (Ct.App.1982). The legislature prohibited the action of concealing a person who has committed a felony by enacting Section 30–22–4. The purpose of Section 30–22–4 is to protect society from the danger an actor creates in harboring a felon. *See State v. Smith,* 102 N.M. 512, 514, 697 P.2d 512, 514 (Ct.App.1985).

{13} We decline to use the plain meaning doctrine to narrowly construe the words "felon" and "felony" to exclude juveniles because this construction would allow adults to commit an action the legislature prohibits and defines as a crime. *See Busse,* 847 P.2d at 1306 (harboring a person who has committed a felony is a separate crime from the crime of the person being concealed). This result is absurd and is not what the legislature intended. *See Rowell,* 121 N.M. at 114, 908 P.2d at 1382. We construe "any offender" to include a juvenile offender and "felony" to mean a crime defined in law as a felony because this is a reasonable interpretation of the statutes. Defendant concealed a juvenile, whose action of committing burglary makes him an offender. Defendant knew the juvenile committed burglary, a crime defined as a felony. *See* NMSA 1978, § 30–16–3 (1971). We construe the statute's language to effect the legislature's intent of protecting society. We believe that in enacting Section 30–22–4, the legislature intended to prohibit persons from harboring any offender, including juveniles. *See Busse,* 847 P.2d at 1306 ("The felonious conduct of the one aided, not the status of the one aided,

triggers the applicability of [the aiding of a felon statute].").

{14} Lastly, we reject Defendant's argument urging us to apply the rule of lenity. The rule of lenity applies "when insurmountable ambiguity persists" about the statute's scope after statutory interpretation or when we are unable to discern legislative intent. *State v. Ogden*, 118 N.M. 234, 242, 880 P.2d 845, 853 (1994); *State v. Anaya*, 1997–NMSC–010, ¶ 32, 123 N.M. 14, 933 P.2d 223. Because neither is present in this case, we need not resort to the rule of lenity.

CONCLUSION

{15} We interpret Section 30–22–4 to include principals who are juvenile offenders who have committed an offense punishable as a felony notwithstanding the fact that such offense is referred to as a delinquent act under the Children's Code. We affirm.

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

WE CONCUR: A. JOSEPH ALARID, Judge, and CYNTHIA A. FRY, Judge.

2002-NMCA-025

41 P.3d 923

Mack HENINGTON, Worker–Appellee,

v.

TECHNICAL–VOCATIONAL INSTITUTE and New Mexico Public School Insurance Authority, Employer/Insurer–Appellants.

No. 21,758.

Court of Appeals of New Mexico.

Jan. 10, 2002.

Certiorari Denied, No. 27,336, Feb. 26, 2002.

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Gerald A. Hanrahan, Albuquerque, NM, for Appellee.

Phyllis S. Lynn, Yenson, Lynn, Allen & Wosick, P.C., Albuquerque, NM, for Appellants.

OPINION

WECHSLER, Judge.

{1} This case requires us to address the application of the statute of limitations in the context of a worker's claim for increased scheduled injury benefits based on the increased loss of use of his left knee. We hold that agreements to pay medical and compensation benefits are "compensation order[s]" within the meaning of NMSA 1978, § 52–1–56 (1989), even if they have not been reduced to writing and approved by the workers' compensation judge (WCJ). We further hold that the statute of limitations of NMSA 1978, § 52–1–31(A) (1987) applies to initial claims for benefits, not to later claims for increased benefits based on a change in a worker's physical condition. We further agree with the WCJ that NMSA 1978, § 52–1–43(B) (1989) does not limit the amount of time in which a worker may file a claim for increased benefits under Section 52–1–56. Thus, we affirm the order awarding Worker additional benefits.

Arguments on Appeal

{2} Respondents, Technical–Vocational Institute (T–VI) and the New Mexico Public School Insurance Authority, appeal from the decision of the WCJ awarding Mack Henington (Worker) increased benefits based on the increased partial loss of use of his left knee. On appeal, Respondents argue (1) that Worker's claim for increased benefits cannot be brought under Section 52–1–56 because there is no compensation order in this case; (2) that Worker's claim is barred by Section 52–1–31(A) because Worker knew or should have known of the increased impairment rating or loss of use of the knee more than two years and thirty-one days before the claim for increased benefits was filed; and (3) even if the claim is not barred by Section 52–1–31(A), it is barred because it was not filed during the time that Worker was receiving benefits under Section 52–1–43. Respondents also make arguments based on NMSA 1978, § 52–5–9 (1989), which they did not raise below and, therefore, we do not consider on appeal. *See Gracia v. Bittner*, 120 N.M. 191, 196–97, 900 P.2d 351, 356–57 (Ct. App.1995) (explaining that to preserve an issue about the application of a particular statute to a particular situation, appellant must have raised the issue in the trial court and invoked a ruling on the issue); *Woolwine v. Furr's, Inc.*, 106 N.M. 492, 496–97, 745 P.2d 717, 721–22 (Ct.App.1987) (stating that to preserve an appellate issue, appellant must invoke ruling of trial court "on the same grounds argued in the appellate court").

Facts

{3} The facts in this case are not in dispute. Worker was employed by T–VI as Dean of Student Affairs. On October 22, 1992, he was injured when a drunken driver broadsided the T–VI car Worker was driving on T–VI business. During the collision, Worker's left knee hit the steering column of the T–VI car. He also injured his right knee, although less severely. He returned to work about ten days after the accident.

Worker did not lose any wages while he was off work following the accident because the time was covered by sick leave.

{4} After returning to work, Worker continued to have problems with both knees. On February 12, 1993, Dr. Anthony Pachelli performed bilateral arthroscopic surgery to repair meniscal tears in both knees. Worker again used his vacation and sick leave for the time that he was unable to work and therefore did not lose any wages. Worker reached maximum medical improvement (MMI) from the initial injuries and surgery on June 28, 1993, at which point Dr. Pachelli assessed his impairment rating as 15% to each lower extremity.

{5} Although he had reached MMI in June 1993, Worker's left knee continued to hurt. In August 1993, Worker saw Dr. William Chesnut. Dr. Chesnut told Worker that if his symptoms continued to increase, he would need a total knee replacement (TKR) at some point in the future. Dr. Chesnut indicated that this procedure "should only be considered when [Worker] gets to the point that he is having pain daily that interfers [sic] with his quality of life and begins to have pain at night that awakens him or keeps him awake." Worker asked Dr. Chesnut if this opinion meant his impairment rating should be increased. However, Dr. Chesnut concurred in the 15% impairment rating to the left knee that had been assigned by Dr. Pachelli.

{6} Sometime in late 1993 or early 1994, Worker made a claim for scheduled injury benefits from the date of MMI forward. Ultimately, Respondents agreed to pay Worker scheduled injury benefits based on the 15% impairment rating for each knee for the period from June 28, 1993 through May 31, 1996. We note that the agreement to pay benefits was reached before this Court decided *Lucero v. Smith's Food & Drug Centers, Inc.*, 118 N.M. 35, 37–38, 878 P.2d 353, 355–56 (Ct. App.1994) (holding that a worker need not prove an impairment as defined by statute in order to receive scheduled injury benefits). We further note that both sides have continued to equate the impairment rating to the loss of use. Thus, we refer to the impairment rating and the loss of use interchangeably.

{7} Worker's left knee continued to hurt off and on. Worker's knee locked up on him in January 1995. In May 1996, when he received his last payment of scheduled injury benefits, Worker was having significant pain in his left knee every few weeks.

{8} On July 13, 1998, Dr. Pachelli performed a TKR on Worker's left knee. Once again, Worker used his accumulated sick and annual leave to cover the time that he was off work. Worker reached MMI from this surgery on October 11, 1999. Unfortunately, the TKR did not eliminate the problems with Worker's left knee, which continued to be swollen with fluid and unable to be bent more than 85 degrees, sometimes less. The knee also continued to be painful and give out at times. Worker still could not play tennis, dance, or walk downhill. Even the vibration from a car could aggravate the pain. On October 11, 1999, Dr. Pachelli increased the impairment rating for the left knee from 15% to 50%.

{9} On December 22, 1999, Worker filed a complaint with the Workers' Compensation Administration. After some initial exchange of documents, the claim was reduced to one for increased scheduled injury benefits based on the increased impairment or loss of use of his left knee. Respondents contended that the claim was barred by Section 52–1–31(A). The WCJ determined the claim was not time barred, and Respondents appealed to this Court.

Applicability of Section 52–1–56

{10} Under Section 52–1–56, the WCJ may increase or decrease compensation benefits based upon changes in the worker's disability. Section 52–1–56 provides in pertinent part that "[t]he workers' compensation judge may, upon the application of the employer, worker or other person bound by the compensation order, fix a time and place for hearing."

{11} Respondents contend that Section 52–1–56 requires the existence of a compensation order. Thus, they argue that, because there was no compensation order below, Section 52–1–56 did not apply to Worker's claim for increased benefits. According to Respondents, Section 52–1–56 excludes cases such as

this one, in which an employer pays benefits by agreement without a formal claim being filed. Worker does not disagree with Respondents' argument but contends that the principles of Section 52–1–56 and cases decided under it should apply to his claim. The WCJ essentially held that Section 52–1–56 applies to Worker's claim for increased benefits. We agree.

{12} The meaning of language used in a statute is a question of law that an appellate court reviews de novo. *State v. Rowell,* 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995). In construing a statute, our goal is to give primary effect to the intent of the legislature. *Draper v. Mountain States Mut. Cas. Co.,* 116 N.M. 775, 777, 867 P.2d 1157, 1159 (1994). We ascertain the intent of the legislature primarily from the language used in the statute. *See id.* We give such language its ordinary and plain meaning unless the legislature indicates a different interpretation is necessary. *Id.* However, we also recognize that the "beguiling simplicity [of the plain meaning rule] may mask a host of reasons why a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate (i.e., nonfrivolous) differences of opinion concerning the statute's meaning." *State ex rel. Helman v. Gallegos,* 117 N.M. 346, 353, 871 P.2d 1352, 1359 (1994); *see also Draper,* 116 N.M. at 777, 867 P.2d at 1159 (explaining that the intention of the legislature will prevail over the strict meaning of the literal language).

{13} We believe that this case is the type in which the plain language of the section would frustrate rather than advance the legislature's intent. The purpose of Section 52–1–56, as demonstrated by its language and by our opinions concerning its predecessor statutes, is to give a WCJ the power to increase or decrease awards of compensation upon a proper showing. *See Gallegos v. City of Albuquerque,* 115 N.M. 461, 463, 853 P.2d 163, 165 (Ct.App.1993) (explaining that employer seeking reduction in awarded benefits needs to show a decrease in worker's disability whereas worker seeking increase in benefits has burden to show increase in disability); *St. Clair v. County of Grant,* 110 N.M. 543, 547–48, 797 P.2d 993, 997–98 (Ct.App. 1990) (stating that district court possesses continuing jurisdiction to reopen workers' compensation award under Section 52–1–56); *Glover v. Sherman Power Tongs,* 94 N.M. 587, 589–90, 613 P.2d 729, 731–32 (Ct.App. 1980) (holding that any compensation judgment may be reopened during remainder of statutory period as Workers' Compensation Act (Act) was not written to bind worker to "one-shot" chance to determine disability). This purpose is equally served when the initial benefits have been paid by agreement.

{14} In this case, Respondents agreed from the outset that the accidental injury was sustained in the course and scope of employment, that they had proper notice, and that the disability was causally connected to the accidental injury. Thus, in effect, they agreed they were liable to pay benefits. Respondents later agreed to the payment of benefits of a specific amount, for a specific period of time, based on a specific impairment rating. Respondents fully paid these benefits.

{15} Worker never proceeded to a litigated conclusion of a formal claim for benefits because the matter appeared to have been resolved prior to entry of a compensation order. Indeed, except in circumstances that do not apply here, the Act prohibits a worker from filing a claim for benefits if he or she is receiving the maximum allowable benefits. NMSA 1978, § 52–5–18 (1989). There is no question that the policy of the Act is to encourage employers and insurers to pay claims without requiring a worker to file a claim. *See* NMSA 1978, § 52–1–54(E), (J) (1993) (requiring employers to pay part of worker's attorney fees if worker is forced to file a claim in order to obtain compensation); *Wilson v. Richardson Ford Sales, Inc.,* 97 N.M. 226, 228, 638 P.2d 1071, 1073 (1981) (citing the policy as support for holding that the voluntary payment of benefits by an employer does not constitute an admission of liability, although it is a factor to be considered in determining whether employer has admitted liability for benefits); *Gallegos,* 115 N.M. at 463–64, 853 P.2d at 165–66 (citing the policy in holding that worker has the burden of proving entitlement to benefits even when employer files a petition to decrease benefits based on an alleged decrease in disability). This policy of judicial economy

would be significantly undercut if we were to hold that benefits paid by agreement cannot be increased or decreased as appropriate when the disability changes, merely because there is no formal order awarding compensation.

{16} Our interpretation of Section 52–1–56 is supported by our interpretation of similar language used in Section 52–5–9(B), the statute discussing grounds for modifications of compensation orders. Section 52–5–9, like Section 52–1–56, refers specifically to modification of a "compensation order." Regardless, we have interpreted the term "compensation order" to apply to the initial award of benefits even though the award was not, in the strict sense of the term, a compensation order. *See Fasso v. Sierra Healthcare Ctr.*, 119 N.M. 132, 134, 888 P.2d 1014, 1016 (Ct. App.1994) (finding that recommended resolution following settlement conference became binding compensation order because neither party objected); *Curliss v. B & C Auto Parts*, 116 N.M. 668, 670, 866 P.2d 396, 398 (Ct.App.1993) (treating lump sum settlement agreement as "compensation order" for purposes of modification and review under Section 52–5–9).

{17} *Brooks v. Hobbs Municipal Schools*, 101 N.M. 707, 709–10, 688 P.2d 25, 27–28 (Ct.App.1984), does not hold differently. In that case, the employer began paying benefits when the worker was injured. Later, the employer wanted to terminate benefits because the worker had refused surgery and other treatment that was recommended by her physicians. *Id.* This Court held that the provision of the Act authorizing the reduction of benefits in such a situation implicitly gave the district court jurisdiction to determine the employer's claim. *Id.* In dictum, we stated that Section 52–1–56 did not apply because there was no judgment. *Brooks*, 101 N.M. at 709–10, 688 P.2d at 27–28. However, in *Brooks*, the absence of a judgment was not a technicality. Although there had been a stipulation, the parties had yet to agree that the employer was liable to pay disability benefits based on a particular disability caused by the accidental injury. *Id.* at 709, 688 P.2d at 27. By contrast, in this case, employer agreed that it was liable to pay scheduled injury benefits, for a specific period of time, based on a specific percentage impairment or loss of use. The question is whether this agreement is subject to modification based on a change in Worker's physical condition. When the parties have agreed to the payment of benefits at a specific amount, for a specific time, based on a specific disability and a specific percentage loss of use or impairment rating, that agreement satisfies the requirement of a compensation order for the purposes of Section 52–1–56 such that it can be modified based on a change in the worker's physical condition.

Inapplicability of Section 52–1–31(A)

{18} Respondents argue that Worker's claim is barred by the limitation period of Section 52–1–31(A). They note that because the injury and disability occurred before the 1993 amendments to the Act were effective, the relevant limitations period for this case is two years and thirty-one days. *See* NMSA 1978, §§ 52–1–30, 52–1–31 (1987). We assume without deciding that they are correct. The claim for increased benefits was filed on December 22, 1999. Thus, Respondents contend that the claim is barred if Worker knew or should have known that he had a compensable injury at any time before October 23, 1997. Respondents further claim that Worker in fact knew or should have known that he was entitled to increased benefits as early as August 1993, when his doctor advised him that he would ultimately need a TKR. Respondents point out that Worker continued to have pain in his left knee even after the first surgery, that this pain increased over time, and that Worker's knee locked up in January 1995. Respondents argue that the WCJ's findings on this issue are not supported by substantial evidence when viewed in the light of the record as a whole. Additionally, Respondents argue this issue as a matter of law.

{19} We ultimately rule that Section 52–1–31 does not apply. However, even if it did apply, Respondents' argument is without merit. The WCJ found as fact that from June 28, 1993, to July 29, 1998, Worker had received all the benefits to which he was entitled and that Worker did not suffer an increased disability to his left knee until October 11, 1999. On appeal, we review the

whole record to determine whether there is substantial evidence to support the WCJ's findings. *Chavarria v. Basin Moving & Storage,* 1999–NMCA–032, ¶ 11, 127 N.M. 67, 976 P.2d 1019. In making this determination, we view the evidence in the light most favorable to the finding below. *Herman v. Miners' Hosp.,* 111 N.M. 550, 552, 807 P.2d 734, 736 (1991). The question is whether, viewed in the light of the whole record, the finding is reasonable. *Id.* The fact that the evidence might have supported different findings does not require us to reverse. *Id.*

{20} Respondents point to the following evidence that, they contend, shows that the WCJ's finding was not reasonable. Worker was told in 1993 that he would eventually need a total knee replacement. Worker's left knee was more painful than his right knee, although he had been given the same impairment rating for each knee. The pain in his left knee sometimes limited Worker's ability to ride a bicycle, play tennis, and jog. In January 1995, Worker's left knee locked up on him while he was riding a bicycle. By May 1996, Worker was having significant pain in his knee every few weeks. Based on this evidence, Respondents contend that Worker knew or should have known as early as July 1994 or January 1995 that he had a claim for increased benefits. They rely on *ABF Freight System v. Montano,* 99 N.M. 259, 260, 657 P.2d 115, 116 (1982), and *Noland v. Young Drilling Co.,* 79 N.M. 444, 447, 444 P.2d 771, 774 (Ct.App.1968).

{21} We are not persuaded by the argument. *ABF Freight System* and *Noland* were both decided at the time that disability was defined as an inability to perform work. *See Torres v. Plastech Corp.,* 1997–NMSC–053, ¶ 21, 124 N.M. 197, 947 P.2d 154. However, since 1991, determinations of disability have been based on the worker's impairment, as defined by the current edition of the American Medical Association Guide to the Evaluation of Permanent Impairment. NMSA 1978, § 52–1–24(A), 52–1–26(B) (1990).

{22} Through the testimony of his treating physician, Worker established his initial impairment rating of 15% in 1993 and his impairment rating of 50% in October 1999. Respondents claim that Worker's impairment rating increased some time before the October 1999 impairment rating of 50%, but have not pointed to expert medical testimony that would establish that Worker's impairment rating was more than 15% at any time between 1993 and 1999, much less that Worker should have known of the increase in impairment rating.

{23} We recognize that, as a factual matter, a worker may know that he has an injury for which he is entitled to compensation without knowing the impairment rating. *See Montoya v. Kirk–Mayer, Inc.,* 120 N.M. 550, 551–55, 903 P.2d 861, 862–66 (Ct.App. 1995). However, in this case, the increase in impairment rating is the critical fact. Respondents are contending that Worker's impairment rating increased to more than 15% at some point before October 1999. In the absence of evidence showing that Worker was experiencing symptoms that would result in an impairment rating of more than 15% at some point prior to October 1999 and that Worker should have known that his symptoms resulted in an increased impairment rating, the WCJ reasonably determined that Worker's impairment rating did not increase until October 1999, when his treating physician determined that Worker had a 50% impairment to his left knee. *See Smith v. Dowell Corp.,* 102 N.M. 102, 104, 692 P.2d 27, 29 (1984) (stating that it would be "patently unfair to expect the common laborer to have greater knowledge than the medical expert").

{24} Although we reject Respondents' substantial evidence argument, we note that it is premised on Respondents' contention that Section 52–1–31(A) applies to Worker's claim for increased benefits. However, it is well settled that Section 52–1–31(A) applies only to initial claims for compensation, not to applications for modification of benefits under Section 52–1–56. *Norvell v. Barnsdall Oil Co.,* 41 N.M. 421, 423, 70 P.2d 150, 152 (1937) (stating that application for increase or decrease may be presented at any time within the period for which compensation is allowable); *Martinez v. Earth Res. Co.,* 90 N.M. 590, 592, 566 P.2d 838, 840 (Ct.App.1977) (relying on *Norvell*), *overruled on other grounds by Garza v. W.A. Jourdan, Inc.,* 91 N.M. 268, 270, 572 P.2d 1276, 1278 (Ct.App. 1977). Therefore, technically, we need not

have addressed Respondents' arguments concerning when the limitations period provided by Section 52–1–31(A) began to run on the claim for increased benefits.

Lack of Preservation as to Section 52–5–9

{25} Respondents also argue that Worker's claim for increased scheduled injury benefits is not timely under Section 52–5–9 because it was made more than two years after the last payment to Worker. On the other hand, Worker contends his claim is timely under the other provision of Section 52–5–9, making a claim timely if made within two years after denial of benefits. However, Respondents did not argue to the WCJ that Section 52–5–9 applied to this case. Accordingly, Respondents cannot raise the issue for the first time on appeal.

Inapplicability of Section 52–1–43

{26} Respondents argue that if Section 52–1–56 applies to this case, Worker is still not entitled to an increase in payments. In support of this contention, Respondents point to earlier cases involving this section, which, they contend, have held that Section 52–1–56 only allows a claimant to seek an increase in benefits until the maximum statutory period for receiving benefits has expired. Worker's injury to his left knee is a scheduled injury for which he is entitled to 150 weeks of benefits. Section 52–1–43(A)(30). It is undisputed that the 150 weeks ended on May 31, 1996. Thus, Respondents contend, Worker cannot now seek increased benefits under Section 52–1–56 based on the increased impairment or loss of use after the conclusion of the benefit period.

{27} We do not agree that prior case law supports Respondents' position. Respondents rely initially on *Churchill v. City of Albuquerque*, 66 N.M. 325, 327, 347 P.2d 752, 753 (1959), and *Segura v. Jack Adams General Contractor*, 64 N.M. 413, 416, 329 P.2d 432, 433–34 (1958). The issue in those cases was whether a modification of the original judgment was prohibited by the doctrine of res judicata. In *Churchill*, our Supreme Court held that the original judgment was not final in the res judicata sense. *Churchill*, 66 N.M. at 327, 347 P.2d at 753. The judgment in *Churchill* was for a limited period of time. Nevertheless, the Court held that the judgment could be modified at any time until the 550 weeks during which worker could have received benefits had run. *Id.* In so holding, the Court quoted with approval from its previous opinion in *Segura*, 64 N.M. at 416, 329 P.2d at 433–34, as follows:

> In view of provisions of the applicable statute [the predecessor to Section 52–1–56] the ordinary rules of res judicata cannot apply to a judgment rendered on the merits after trial. In fact, in such a case *except for loss of a specific member of the body* there is no final judgment as it is generally understood short of 550 weeks when either party may come into court and have a hearing on a decrease or increase of disability and have a new judgment rendered in accordance with new findings. (Emphasis added.)

Like *Churchill*, *Segura* involved a judgment for a limited period of time that was less than the full period for which the worker could have received benefits.

{28} Respondents contend that the underlined language from *Segura* amounts to a holding that Section 52–1–56 does not apply to scheduled injuries as a matter of law. However, we believe that this interpretation does not consider the specific reference to "loss" of a body member. At the time *Segura* was written, the "loss" of a scheduled member meant its amputation or suffering an injury that rendered the scheduled member useless. *Gonzales v. Pecos Valley Packing Co.*, 48 N.M. 185, 189, 146 P.2d 1017, 1019 (1944). We believe that the Supreme Court's language in *Churchill* is simply a recognition that, as a practical matter, the loss of a limb was not a condition that would change over time.

{29} Each party argues that *Glover*, 94 N.M. at 589, 613 P.2d at 731, supports its position. Worker has the better of the argument. In *Glover*, the original judgment awarded the worker benefits based on a 25% disability to his dextrous hand. The award was paid in full even before the judgment was entered. *Id.* at 588, 613 P.2d at 730. A year later, the worker applied for an increase in benefits, arguing that he had become totally disabled. *Id.* The trial court determined that the worker was totally and permanently

disabled as that phrase was defined by the statute in effect at the time and ordered that the defendants pay total disability benefits. *Id.* at 589, 613 P.2d at 731. On appeal, this Court held that the worker could file a claim for increased benefits under Section 52–1–56 even though the scheduled injury award had been fully paid before the first judgment was entered. *Id.* In so holding, this Court overruled its prior opinion in *Sena v. Gardner Bridge Co.*, 93 N.M. 358, 600 P.2d 304 (Ct. App.1979), and adopted the views expressed in the dissent filed in that case. *Glover*, 94 N.M. at 589, 613 P.2d at 731. In addition, this Court specifically rejected the argument that the result should be different because the initial award was for scheduled injury benefits. *Id.* at 590, 613 P.2d at 732. This Court stated:

> The Workman's Compensation Act was not written with the intent that it be so penuriously interpreted that a workman be bound by a "one-shot" chance at showing his ability or inability to perform the tasks of his usual occupation or other work he is fitted by past history to do.... Section 52–1–56(A) was unquestionably intended to meet the effect of changes which could occur in a workman's physical condition, as related to a compensable injury (whether the change be for better or worse), *during the period for which compensation could be paid.*

Id. Other decisions of this Court decided under prior versions of the Act have also allowed petitions for modification to be filed at any time during the maximum period for which benefits could have been paid. *See, e.g., DiMatteo v. County of Doña Ana*, 109 N.M. 374, 377, 785 P.2d 285, 288 (Ct.App. 1989) (arguably dicta); *Rumpf v. Rainbo Baking Co.*, 96 N.M. 1, 3–4, 626 P.2d 1303, 1305–06 (Ct.App.1981) (reversing dismissal of claim with prejudice because worker was entitled to file a claim under Section 52–1–56 (prior version) if his condition deteriorated in the future); *Burton v. Jennings Bros.*, 88 N.M. 95, 97, 537 P.2d 703, 705 (Ct.App.1975) (holding that the fact that the judgment previously entered had been fully paid out did not foreclose worker from filing a petition for modification based on Section 52–1–56 (prior version)).

{30} Respondents contend that because Worker's application for increased benefits related to the same scheduled injury for which he originally received benefits, it is not timely because it was not filed within the 150 weeks during which Worker initially received compensation for his scheduled injury. However, we agree with the WCJ that the time period for benefits in Section 52–1–43(A) serves as a calculator of the total benefits to be paid and provides for an accelerated payout schedule. We do not agree that the time for which compensation is allowable is the amount of time specified for the payment of benefits for a particular injury in Section 52–1–43(A). On the contrary, Section 52–1–43(C) gives the WCJ discretion to enlarge or even double the time period of Section 52–1–43(A) if the Worker's disability results from actual amputation of an arm or leg. Similarly, Section 52–1–43(D) provides that Worker shall receive benefits as provided in Section 52–1–43(A) from the date of disability to the date he is "released from regular treatment by his primary treating health care provider" if he is totally disabled during that time. This compensation is in addition to the compensation provided for in Section 52–1–43(A). Section 52–1–43(D) further provides that "in no event shall any worker be entitled to compensation for a period in excess of seven hundred weeks." In short, the time for which compensation is allowable is set by statute at 700 weeks. The 150 weeks of benefits available under Section 52–1–43(A) is the minimum amount of time that a worker may receive benefits under this section.

{31} We believe that this interpretation of the statute is the one adopted by this Court in *Glover*. In *Glover*, the employer argued that the worker's disability ended when he had received all the payments to which he was entitled for the scheduled injury. This Court held, however, that "any judgment for compensation in a workman's compensation case may be reopened during the remainder of the statutory period after the original judgment, for the purpose of requesting an increase or decrease in compensation benefits." *Glover*, 94 N.M. at 589, 613 P.2d at 731; *see also id.* at 590, 613 P.2d at 732 ("Section 52–1–56(A) was unquestionably intended to meet the effect of changes which

could occur in a workman's physical condition ... *during the period for which compensation could be paid.*"). At the time *Glover* was decided, the maximum period of time that a worker could receive benefits for total disability, partial disability, or a scheduled injury was set by statute as 600 weeks. *See* Laws 1975, ch. 284, §§ 8, 9, 10, 11, 12 (changing the maximum period for which compensation is payable in those and other sections of the Act to 600 weeks); *see also Witcher v. Capitan Drilling Co.*, 84 N.M. 369, 372, 503 P.2d 652, 655 (Ct.App.1972) (stating that sections of the Act relating to scheduled injuries, permanent partial disability, and permanent total disability are to be read together to produce a harmonious whole).

{32} When considering sections of the Workers' Compensation Act, we consider the language of the particular section in the context of the entire Act. *Draper v. Mountain States Mut. Cas. Co.*, 116 N.M. 775, 777, 867 P.2d 1157, 1159 (1994). By enacting Section 52–1–56, the legislature provided that compensation payments would be increased if the disability "has increased without the fault of the worker." Section 52–1–56. Nothing in Section 52–1–56 suggests that it only applies to partial disability payments.

{33} Thus, we agree with the WCJ that the scheduled injury section does not limit the time in which a worker can file a petition to modify benefits under Section 52–1–56. The scheduled injury section, Section 52–1–43, is no more or less than a limitation of the amount and payout of benefits for certain injuries covered by that section. However, as this case illustrates, the extent of disability brought about by a particular injury often changes over a period of years. The legislature designed Section 52–1–56 and its predecessors to provide a way to adjust compensation awards based on changes in a worker's physical condition. *Herrera v. Quality Imports*, 1999–NMCA–140, ¶¶ 7–9, 128 N.M. 300, 992 P.2d 313. The Supreme Court and this Court have held that claims under Section 52–1–56 can be filed at any time during the maximum period that a worker could have received benefits, even if the original judgment awarded benefits for less than that period of time and even if the original judgment had been fully paid some time earlier. When a law has been consistently interpreted in a particular way, we will assume that the use of the same language in a later version of that law indicates that the legislature intended that interpretation to apply to the newer version of the law as well. *Twin Mountain Rock v. Ramirez*, 117 N.M. 367, 370, 871 P.2d 1373, 1376 (Ct.App.1994).

Conclusion

{34} We hold that Worker's claim for increased scheduled injury benefits was cognizable under Section 52–1–56. We also hold that Section 52–1–31(A), which defines the limitations period that applies to original proceedings for benefits, does not apply to claims for increased benefits under Section 52–1–56. We further hold that claims for increased benefits based on a change in the worker's physical condition may be filed at any time during the period in which Worker could have received benefits, even though the benefits actually received were for a lesser period of time because the disability was a scheduled injury and even though those benefits have been fully paid. Therefore, we affirm.

{35} On remand, the WCJ shall determine the amount of attorney fees that should be awarded for the services of Worker's attorney incurred in connection with this appeal.

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

WE CONCUR: A. JOSEPH ALARID, Judge, and LYNN PICKARD, Judge.

2002-NMCA-024
41 P.3d 933

CITY OF ALBUQUERQUE, Acequia Madre De Carnue Community Ditch Association and Board of Trustees of the Canon De Carnue Land Grant, Petitioners–Appellees,

v.

STATE of New Mexico MUNICIPAL BOUNDARY COMMISSION, Respondent–Appellant,

and

West Tijeras Canyon Ltd. Co., Interested Party–Appellant.

No. 22,000.

Court of Appeals of New Mexico.

Jan. 11, 2002.

Certiorari Denied, No. 27,337, Feb. 26, 2002.

Robert M. White, City Attorney, David Suffling, Assistant City Attorney, Albuquerque, NM, for Appellee City of Albuquerque.

Patricia A. Madrid, Attorney General, Alvin R. Garcia, Assistant Attorney General, Santa Fe, NM, for Appellant Municipal Boundary Commission.

Kevin J. McCready, John A. Myers, Myers, Oliver & Price, P.C., Albuquerque, NM, for Appellant West Tijeras Canyon Ltd. Co.

OPINION

PICKARD, Judge.

{1} West Tijeras Canyon Ltd. filed an annexation petition with the Municipal Boundary Commission, seeking to have its property annexed to the City of Albuquerque. The Commission determined that the annexation met the requirements of NMSA 1978, § 3–7–15(A) (1965) and ordered the property annexed to the City. On certiorari review, the district court held, inter alia, that the Commission incorrectly interpreted the statutory requirements when it refused to consider the City's opposition to the annexation in making its decision. We hold that the Commission was required to not only consider, but give substantial deference to, the City's opposition to the annexation petition. We therefore affirm the district court's decision reversing the Commission's order.

FACTS AND PROCEEDINGS

{2} The Municipal Boundary Commission is an independent administrative board vested with the authority to hear petitions for annexation. *See* NMSA 1978, § 3–7–11 (1995). The Commission may hear petitions from either municipalities seeking to annex new territory or from landowners hoping to stretch the boundaries of a municipality to include their property. The Commission's decision-making process is governed by Section 3–7–15(A), which provides that:

> At the public hearing held for the purpose of determining if the territory proposed to be annexed to the municipality shall be annexed to the municipality, the municipal boundary commission shall determine if the territory proposed to be annexed:
>
> (1) is contiguous to the municipality; and
>
> (2) may be provided with municipal services by the municipality to which the territory is proposed to be annexed.

If the Commission finds that the two requirements of Section 3–7–15(A) are met, then under Section 3–7–15(B) it must approve the annexation.

{3} West Tijeras owns a 165 acre parcel of land in Bernalillo County. The property lies south of Interstate 40, sharing its borders with the Four Hills neighborhood in Albuquerque on the west and the Canon de Carnue Land Grant to the east. In 1998, West Tijeras approached the Albuquerque City Council, asking the City to annex the property and change the property's "County A–1" zoning designation to allow for denser development. The Council voted to deny annexation. About six months later, West Tijeras presented a petition to the Commission seek-

ing to have 101 acres of the property annexed into the City. West Tijeras's main purpose in seeking annexation is to gain access to City water and sewer services. If the property remains county land, West Tijeras can only develop using water wells and septic tanks.

{4} At the Commission's hearing on the petition, the City maintained its opposition to the annexation. The Commission examined the two statutory requirements set out in Section 3-7-15(A). The first requirement, contiguity, was not at issue. A difference of opinion arose, however, as to whether the second requirement was met. The Commission Chairman indicated that West Tijeras need only show that the City was capable of providing services to the area, stating that "the criteria is not whether the City will or wants to ... it's whether they can...." The City, however, argued that the second requirement would not be met as long as the City was opposed to providing services to the property. Rejecting this interpretation, the Commission voted unanimously in favor of the annexation.

{5} The City and the Land Grant filed separate petitions seeking review of the Commission's decision, which were consolidated into a single action. The district court, after conducting a full-record review, reversed the Commission's decision. The district court found that the Commission misinterpreted the second statutory requirement by substituting "can" in place of "may." The court also found that "[t]he law pertaining to the Municipal Boundary Commission method of annexation cannot be interpreted to mean that annexation must be granted in favor of single corporate owners of land who wish municipal services for developmental purposes over the objection of the municipality and the people." As a result of these findings, the district court concluded that the Commission's decision was arbitrary and capricious, unreasonable as a matter of law, and unsupported by substantial evidence.

{6} West Tijeras and the Commission jointly filed a petition for certiorari with this Court, presenting two questions for review: (1) whether the district court's decision to reverse the Commission was erroneous because there was sufficient evidence that the two statutory requirements were met and (2) whether the district court erred in considering matters unrelated to the two statutory requirements. In reviewing the petition, we were mindful that Rule 12-505(D)(5) NMRA 2001 limits the grounds on which we may issue a writ of certiorari to review the decision of a district court in an administrative appeal. *See C.F.T. Dev., L.L.C. v. Bd. of County Comm'rs*, 2001-NMCA-069, ¶ 9, 130 N.M. 775, 32 P.3d 784. We granted certiorari because we found that this case raises a question of substantial public interest regarding the ability of the Commission to approve annexation of property to a municipality over the objection of that municipality.

DISCUSSION

{7} Appellants argue that the Commission's initial interpretation of the statute was correct, and therefore the Commission was required to approve the annexation once West Tijeras demonstrated that the City was able to provide services to the area. Appellees, on the other hand, assert that the Commission erred in substituting the word "can" for "may," and argue that the annexation can only be approved with the City's consent. This is a case of first impression. It appears that the Commission has never before been asked to approve the annexation of territory to a municipality over the objection of that municipality. We must now determine the implications of the legislature's use of the word "may" within this statute.

{8} The interpretation of a statute is an issue of law that is subject to de novo review, and "we need not defer to the interpretations given by the Commission or by the district court." *Mutz v. Mun. Boundary Comm'n*, 101 N.M. 694, 697-98, 688 P.2d 12, 15-16 (1984). "When appropriate, we will rely on rules of grammar to aid our construction of the plain language of a statute." *Wilson v. Denver*, 1998-NMSC-016, ¶ 16, 125 N.M. 308, 961 P.2d 153. Appellants cite to numerous dictionaries, including Black's Law Dictionary, to support their argument that the two words are sometimes used interchangeably. On the other hand, NMSA 1978, § 12-2A-4(B) (1997) instructs us that " '[m]ay' confers a power, authority, privilege or right." In contrast, "can" connotes ability. *See, e.g., William Strunk Jr. & E.B.*

White, The Elements of Style 42 (4th ed. 2000) ("*Can.* Means 'am (is, are) able.' Not to be used as a substitute for *may.*"). In the context of the annexation statutes and the statutes relating to municipal planning, the word "may" in Section 3–7–15(A) cannot reasonably be interpreted as "can" in the manner Appellants suggest.

{9} We acknowledge that our Supreme Court indicated in *Mutz* that the statutory test could be satisfied "if the municipality demonstrates the ability to provide services to the territory to be annexed." *Mutz,* 101 N.M. at 701, 688 P.2d at 19. In *Mutz,* however, it was the municipality, not landowners, petitioning for annexation. The municipality's willingness to provide services was not at issue. The *Mutz* Court, in explaining the difference in meaning between "may" and "must," recognized that "may," as used in this particular statute, is permissive. *Id.* We are confident that the legislature intended that the Commission find something more than mere physical ability when the legislature directed the Commission to insure that services "may be provided" rather than "can be provided."

{10} Nonetheless, we do not read the statute as requiring landowners to seek a municipality's consent to annexation when presenting an annexation petition to the Commission. The legislature provided two options for landowners who wish to see their property annexed to a municipality. The most commonly exercised option is the "petition method," which is set out in NMSA 1978, §§ 3–7–17 and 17.1 (1998). Using that method, if landowners holding a majority of the acres in the territory proposed to be annexed are in favor of annexation, they can petition directly to the governing body of the municipality. The municipality may then "express its consent or rejection" by ordinance. *See* §§ 3–7–17(A)(4);–17.1(B)(2). This was the approach first taken by West Tijeras in seeking to have its property annexed. The alternative option is the "boundary commission method," which is governed by NMSA 1978, §§ 3–7–11 through 16 (1965, as amended through 1995). Once again, approval is required from landowners holding a majority of the acres in the territory proposed. Unlike the petition method, however, the statutes governing the boundary commission method provide no mechanism through which a municipality can express its consent.

{11} If the legislature had intended to require municipal consent under the boundary commission method, it would have included a consent provision in the governing statutes, just as it did in the petition method statutes. Moreover, if municipal consent was required under the boundary commission method, then there would be no meaningful difference between the two options available to landowners. If a municipality was withholding its consent to annexation, there would be no reason for landowners to approach the Commission. Since we presume that the legislature does not intend to enact useless statutes, *see Benavidez v. Sierra Blanca Motors,* 122 N.M. 209, 213, 922 P.2d 1205, 1209 (1996), we do not think this is a correct interpretation of Section 3–7–15.

{12} The City argues that the legislature could not have intended to give landowners the power to force a municipality to annex property despite the municipality's objection, or to allow the Commission to override the City's planning decisions. The Commission, however, does have that power. The state legislature has the power to create and to destroy municipal corporations, and to enlarge or diminish their boundaries, with or without consent of either the municipalities or the affected residents. *Leavell v. Town of Texico,* 63 N.M. 233, 235, 316 P.2d 247, 248 (1957). The legislature can delegate its authority to an administrative agency, as long as it sets defined boundaries for administrative decision making in order to avoid a violation of separation of powers. *See AA Oilfield Serv., Inc. v. N.M. State Corp. Comm'n,* 118 N.M. 273, 279, 881 P.2d 18, 24 (1994). The legislature delegated its authority to determine municipal boundaries to the Commission. *See* § 3–7–11(A). When it did so, it provided a defined set of guidelines for the Commission to follow under Section 3–7–15. The Commission, therefore, has the authority to annex property over the objections of the municipality involved.

{13} In sum, we cannot adopt either party's position wholesale. In our opinion, the City could not unilaterally defeat West Tijer-

as's petition by withholding its consent to the annexation, but the Commission could not annex property over the City's objection upon a mere showing that the City is capable of providing services to the area. We are still left, then, with some ambiguity as to the meaning of the statutory language. The ambiguity arises, in part, from the use of passive voice in the statutory language. The statute instructs the Commission to determine "if the territory proposed to be annexed . . . may be provided with municipal services by the municipality to which the territory is proposed to be annexed." *Id.* While may is permissive, it is not clear whose permission is required in this context.

The Commission Should Have Deferred to the City's Opposition to the Annexation

{14} When statutory language is ambiguous, we consider the legislative purpose behind the statute in conjunction with related statutes to resolve its meaning, "always striving to 'select the rationale that most likely accomplishes the legislative purpose.' " *Wilson,* 1998–NMSC–016, ¶ 36, 125 N.M. 308, 961 P.2d 153 (quoting *State v. Anaya,* 1997–NMSC–010, ¶ 29, 123 N.M. 14, 933 P.2d 223). All parts of a statute must be read together to ascertain legislative intent. *Id.* The statutes governing annexation, when read together, demonstrate an overall intent to assure that residents who are annexed into a municipality receive services from that municipality. This concern is seen most fully in the statutes governing the arbitration method of annexation. *See* NMSA 1978, §§ 3–7–5 to 10 (1965, as amended through 1985). When an arbitration board is deciding whether territory should be annexed, the statute requires the board to "determine if the benefits of the government . . . are or can be available within a reasonable time to the territory proposed to be annexed." Section 3–7–10(A). If the board approves the annexation, "[t]he territory so annexed shall be governed as part of the municipality and the governing body of the municipality shall promptly proceed to make the benefits of the government of the municipality available to the territory so annexed." Section 3–7–10(C).

{15} In keeping with the legislature's intent to assure that residents within an annexed territory have access to municipal services,. we think that when the legislature directed the Commission to determine that services "may be provided," it wanted to assure that residents would have the right to demand such services if the territory was annexed. The difference in language between the arbitration method and the boundary commission method reflects the differing role of the municipality in the process. The arbitration method can only be initiated by the municipality, *see* § 3–7–5, so there will be no question that the municipality is willing to annex the territory. The arbitration board, therefore, is asked to determine that it is physically possible for the municipality to provide services, and that those services will be provided to residents within a reasonable time. This inquiry assures that a territory-hungry municipality will not reap the benefits of annexing territory without providing for the needs of its new inhabitants.

{16} When a municipality petitions the Commission, there is again no question that the municipality is willing to annex the territory, so the Commission's task is to insure that the provision of services is physically possible. That was the case in *Mutz,* where the municipality's willingness to provide services was not at issue. *Mutz,* 101 N.M. at 701, 688 P.2d at 19. We do not read the Court's statement in *Mutz* that "the statutory requirement is satisfied if the municipality demonstrates the ability to provide services to the territory to be annexed within a reasonable period of time," *id.,* as limiting the Commission's inquiry when the municipality's willingness to provide services is at issue. When landowners present annexation petitions, the Commission must make further inquiries and consider the municipality's position regarding annexation. As part of that inquiry the Commission should have not only considered the City's opposition to the annexation, but should have given the City's position considerable deference.

{17} The City's objection to the annexation relates directly to the statutory requirement that services "may be provided" to the area proposed to be annexed. Much of the City's time and resources are directed toward planning and growth management efforts. In do-

ing so, City officials have evaluated how best to provide service to existing territory and where it would be best able to expand services to meet anticipated population growth. Appellants' arguments that the City is capable of providing services to the area disregards the City's right to determine where and how those services should be provided. As one example, West Tijeras presented testimony that the City could provide social services to residents if the land is developed. The City, however, is already concerned that it is not providing sufficient services to seniors living in the nearby area. Annexation would also impact the City's provision of police, fire, and emergency services; schools; social services; street maintenance; refuse pickup; and many other services. Annexation of the West Tijeras land would put an additional burden on the City and undermine its efforts to provide an adequate level of services to those areas already within its municipal boundaries.

{18} The City presented evidence that annexation of the West Tijeras property conflicted with a number of its established policies. The annexation conflicts with the Albuquerque Bernalillo County Comprehensive Plan, which designated the land as Rural Area. The Comprehensive Plan states that Rural Areas "shall generally retain their rural character with development consisting primarily of ranches, farms and single-family homes on large lots." Annexation of the West Tijeras property conflicts with the City's infill policy, Resolution 70, which expresses a strong preference that development occur within existing infrastructure so that the City's resources are not directed toward extending its infrastructure to new areas. These policies reflect the City's considered evaluation of how best to provide services to current and future residents. Based on these policies, the City expressed its opinion that it did not want to extend its service area to include the West Tijeras property. The Commission should have deferred to the City's opinion as to the wisdom of extending its services to the area.

{19} Appellants contend the City's planning policies are not relevant to the Commission's inquiry, because the City can control the level of development in the area through its zoning power. Annexation alone, however, will obligate the City to provide some services to the area, including police and fire services. Roads may need to be built to provide access for emergency services. School services may have to be provided if families with children move into the area. In addition, municipal zoning authority is not unlimited, so the City may not be able to accomplish by zoning what it wishes to accomplish.

The Commission's Decisions Must Be Reasonable

{20} Appellants also contend it would be unfair to consider the City's opposition to annexation when the Commission is required to disregard the concerns of residents who oppose annexation. That was true in *Mutz,* where the Commission excluded any consideration of the economic impact on residents when allowing the town of Red River to annex contiguous property, and in *Cox v. Municipal Boundary Commission,* 120 N.M. 703, 905 P.2d 741 (Ct.App.1995), where residents outside Sunland Park unsuccessfully argued that annexation should be defeated because the city's sole motivation was to increase its tax base. In both cases, the Commission's decisions were affirmed on appeal. *See Mutz,* 101 N.M. at 702, 688 P.2d at 20; *Cox,* 120 N.M. at 708, 905 P.2d at 746.

{21} Those cases established two principles. First, the Commission cannot look beyond the two statutory requirements included in Section 3-7-15. *Mutz,* 101 N.M. at 701-02, 688 P.2d at 19-20. Second, the Commission's decision is subject to a standard of reasonableness. *See id.* at 702, 688 P.2d at 20; *Cox,* 120 N.M. at 708, 905 P.2d at 746. Our decision today is consistent with those principles. The Commission's obligation to consider the City's opposition to annexation is part of its review of the statutory requirement that services may be provided to the territory proposed to be annexed. We are not instructing the Commission to look beyond the statutory requirements. Instead, our opinion today confirms that the Commission must apply the reasonableness standard when making its determination that the two requirements are met.

{22} In *Mutz*, our Supreme Court held that the Commission must apply a standard of reasonableness in determining whether or not territory is contiguous. *Id.* at 702, 688 P.2d at 20. Although affirming the Commission's finding of contiguity in that case, the Court recognized that in some situations it might be unreasonable to find that territory is contiguous even when it physically touches the municipality. *See id.* at 698, 688 P.2d at 16. One example is the so-called "shoestring" annexation, where an isolated strip of land is included in an annexation petition solely for the purpose of creating contiguity with more desirable property. *Id.*

{23} Similarly, when the provision of services is at issue, the Commission must apply a reasonableness standard rather than rely solely on a technical determination that it is physically possible to extend municipal services to the proposed area. As one City official explained during the hearing on this annexation, "You can make anything feasible if you spend enough money." Yet the City could reasonably argue that the provision of services would be so expensive or burdensome as to be prohibitive. Thus, even when looking at whether the provision of services is physically possible, the decision must be made within reason. Similarly, when the City argues that annexation would be inconsistent with its planning decisions regarding the provision of services to the area, it is unreasonable for the Commission to find that services may be provided to the area. The Commission should only exercise its authority to annex property over a municipality's objections based on a finding that those objections are unreasonable under the circumstances. Because we think it is clear that the City was raising reasonable concerns based on well-established policies, we hold that it was unreasonable for the Commission to approve the annexation.

{24} We recognize that many residents who have been subject to forced annexation have felt that the statutory scheme unfairly denies them the opportunity to object on reasonable grounds because those grounds fall outside the two statutory requirements. To the extent that the residents' objections relate to the two statutory requirements, the Commission should hear and consider those objections. The statute as written, however, leaves no room for consideration of other matters. For that reason, the district court was incorrect when it held that the Commission was required to make an overall determination that the annexation was reasonable and that the Commission could not order the territory annexed over the objections of "the people." In this case in particular, the residents who spoke in opposition to the annexation lived outside the annexation territory, so their objections were beyond the scope of the Commission's inquiry.

CONCLUSION

{25} The Municipal Boundary Commission has the authority to annex property to a municipality over the objections of that municipality. The Commission should only exercise its authority to annex property over a municipality's objections based on a finding that those objections are unreasonable under the circumstances. When the municipality proves the existence of a well-developed planning policy and shows the proposed annexation to be in conflict with that policy, and objects to the annexation based on that conflict, the Commission should defer to the municipality's objections to annexation and deny the annexation. Because the City of Albuquerque presented uncontroverted evidence that annexation of the West Tijeras property was contrary to its existing policies on annexation and development, the City had a reasonable basis for opposing annexation, and West Tijeras's petition should have been denied.

{26} For the foregoing reasons, we affirm the judgment of the district court.

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

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

2002-NMCA-026

41 P.3d 940

Richard A. LEMIRE, on behalf of himself and all other Chaves County residents similarly situated, Plaintiff–Appellant,

v.

BOARD OF COMMISSIONERS OF the COUNTY OF CHAVES, Defendant–Appellee.

No. 21,991.

Court of Appeals of New Mexico.

Jan. 15, 2002.

Certiorari Denied, No. 27,342, Feb. 26, 2002.

R. Trey Arvizu, III, Roswell, NM, for Appellant.

Steven L. Bell, Atwood, Malone, Turner & Sabin, P.A., Roswell, NM, for Appellee.

James W. Bibb, The Anaya Law Firm, P.A., Santa Fe, NM, for Amicus Curiae.

OPINION

SUTIN, Judge.

{1} We are met with complex gross receipts tax and revenue bond legislation merging in apparent conflict. Plaintiff Richard A. Lemire sued Defendant Board of Commissioners of the County of Chaves on behalf of himself and all other Chaves County, New Mexico, residents similarly situated [1] to invalidate actions of the County in regard to the dedication of gross receipts tax revenues for the purpose of paying revenue bonds issued to finance the rehabilitation of the Chaves County courthouse. The district court determined that the County acted lawfully and entered judgment in favor of the County. Lemire appeals. We affirm.

BACKGROUND

The Legal Authority to Tax and to Issue Bonds

{2} The present New Mexico statutory taxing authority is the County Local Option Gross Receipts Taxes Act (Gross Receipts Act), NMSA 1978, §§ 7–20E–1 to –21 (1993,

1. No order was entered regarding whether the action was to be maintained under Rule 1–023 NMRA 2001 as a class action.

as amended through 2001). The statutory revenue bond authority is found in NMSA 1978, §§ 4–62–1 to –10 (1992, as amended through 2001).

{3} Counties have had the authority since 1986 to enact ordinances imposing a total of three-eighths of one percent gross receipts tax in three one-eighth increments, denominating these as the first one-eighth, second one-eighth, and third one-eighth increments. *See* NMSA 1978, § 7–20–3(A)–(D) (1986); NMSA 1978, § 7–20–8(A) (1990 Repl. Pamp.) (1986 N.M. Laws, ch. 20, § 87); *see also* § 7–20–3(A) (1992 Cum.Supp.) (1991 N.M. Laws, ch. 212, § 16). The first and third increments are at issue in this appeal.

{4} At all points in time material to this case, counties have been required by statute to put one-fourth of the net receipts from the *first* one-eighth increment into the county's reserve fund, with certain exceptions and conditions subsequent including discretion to transfer those funds under specific circumstances to its general fund, its road fund, or both. *See* § 7–20–8(A)–(D) (1990 Repl. Pamp.), *amended by* § 7–20E–11(A)–(D). The remaining three-fourths of the first one-eighth increment is to be placed into the county's general fund, its road fund, or both. *Id.*

{5} Legislative authority with regard to the use of revenue from the *third* one-eighth increment has changed slightly over the years.[2] The controlling law in this case with respect to the third one-eighth increment is the May 1996 amendment to Section 7–20E–9(D) permitting counties with dedicated revenues for indigent patient purposes to dedicate one-half of that revenue for general purposes. At all points in time material to this case, an ordinance imposing the third one-eighth increment could only be effective upon voter approval. *See* § 7–20–5(D) (1990 Repl. Pamp.) (1986 N.M. Laws, ch. 20, § 85), *amended by* § 7–20E–10(C)(1993 N.M. Laws, ch. 354, § 10), *amended by* § 7–20E–10(C)(1994 N.M. Laws, ch. 101, § 7).

{6} Also at all points in time material to this case, counties have had the authority through its governing body to adopt an ordinance authorizing the issuance of gross receipts tax revenue bonds to, among other things, construct and rehabilitate public buildings, and to "pledge irrevocably any or all of the revenue from the first one-eighth ... and the third one-eighth ... increment[s] of the county gross receipts tax ... for payment of" that bond debt. Section 4–62–1(B); *see also* §§ 4–62–1(A), (B)(1), –4(A). However, the pledged revenues[3] from the

2. As early as 1986, counties imposing a third one-eighth increment were required to dedicate fifty percent for support of indigent patients, although funds not required for indigent patient purposes were permitted to be used for "general purposes." *See* § 7–20–3(D)–(E) (1992 Cum. Supp.). Section 7–20–3 was recompiled in 1993 N.M. Laws, ch. 354, § 9, as Section 7–20E–9. Section 7–20E–9(D) and (E) were left substantially the same as Section 7–20–3(D) and (E). Effective May 15, 1996, the Legislature amended Section 7–20E–9(D) to read, in pertinent part, as follows:

> Fifty percent of the revenue produced by the imposition of the third one-eighth increment may be used for general purposes.... Any county that has imposed the second one-eighth increment or the third one-eighth increment, or both, on January 1, 1996 for support of indigent patients in the county or imposes one or both increments after January 1, 1996 shall deposit the revenue from the second one-eighth increment, if enacted and at least one-half of the third one-eighth increment, if enacted in the county indigent hospital claims fund and such revenues shall be expended pursuant to the Indigent Hospital and County Health Care Act.

1996 N.M. Laws, ch. 29, § 1. Effective May 20, 1998, Section 7–20E–9(D) was again amended to read, in pertinent part, as follows:

> The revenue produced by the imposition of the third one-eighth increment may be used for general purposes. Any county that has imposed the second one-eighth increment or the third one-eighth increment, or both, on January 1, 1996 for support of indigent patients in the county or after January 1, 1996 imposes the second one-eighth increment or imposes the third one-eighth increment and dedicates one-half of that increment for county indigent patient purposes shall deposit the revenue dedicated for county indigent purposes in the county indigent hospital claims fund and such revenues shall be expended pursuant to the Indigent Hospital and County Health Care Act.

1998 N.M. Laws, ch. 90, § 8.

3. The Legislature did not indicate in the Gross Receipts Act whether any distinction was meant to exist between "net receipts" from the first one-eighth increment, and "revenue" from the third one-eighth increment. *See* §§ 7–20E–11(A), –9(D). "Pledged revenues" is defined to mean "the revenues, net income or net revenues authorized to be pledged to the payment of particular revenue bonds as specifically provided in

gross receipts tax increments cannot be used "for a purpose that would be inconsistent with the purpose for which that county gross receipts tax revenue was dedicated." Section 4–62–4(D). The inconsistent-use prohibition in Section 4–62–4(D) is at the heart of Plaintiff's case.

The Chaves County Ordinances

{7} The County adopted Ordinance 13 on September 8, 1983, effective January 1, 1984, imposing a one-eighth increment gross receipts tax and dedicating "[a] portion of the revenue collected ... toward a specific purpose or area of county government services ...: operational or capital outlay costs of operations or services provided by the county road department." Chaves County, N.M., Ordinance 13 (Sept. 8, 1983). The tax constituted the County's first one-eighth increment. Ordinance 13 did not dedicate any specific portion of the tax revenue to the County road fund. It did not specifically dedicate any revenue to the County reserve fund.

{8} The County adopted Ordinance 35 on June 25, 1992, effective January 1, 1993, imposing a one-eighth increment tax and dedicating all of its revenue for indigent patients. Chaves County, N.M., Ordinance 35 (June 25, 1992). Ordinance 35 was approved by the voters on August 24, 1992. The tax constituted the County's third one-eighth increment. Ordinance 35 was amended on June 12, 1996, to dedicate one-half of the tax to the County general fund for general purposes, as permitted by newly amended Section 7–20E–9(D) (1996). Chaves County, N.M., Ordinance 35 (June 12, 1996). The County did not submit this amendment to the voters for approval nor was it required by law to do so.

{9} Then came Ordinance 0–067 (Ordinance 67), adopted by the County on August 17, 2000, and adopted again December 13, 2000, authorizing gross receipts tax revenue bonds pursuant to Section 4–62–1(B) for Chaves County courthouse and administrative building construction and rehabilitation projects. Chaves County, N.M., Ordinance 67 (Dec. 13, 2000). Ordinance 67 amended Ordinances 13 and 35, rededicating all future Ordinance 13 revenue and one-half the future Ordinance 35 revenue (the half not dedicated for indigent patient support), totaling three-sixteenths of one percent, "to pay debt service on or to redeem gross receipts tax revenue bonds" issued for the construction and rehabilitation projects. Upon the bonds being retired, the tax revenue would be dedicated to the County general fund "for general purposes."

{10} Lemire's complaint attacked the validity of Ordinance 67. Lemire contended Ordinance 67 was adopted in violation of the inconsistent-use prohibition of Section 4–62–4(D). That is, the gross receipts tax revenues were now going to be used to pay for building construction and rehabilitation instead of the purposes for which those taxes were originally imposed and dedicated, namely, the road fund and care of indigent patients. Lemire also contended Ordinance 67 was invalid because one of its underlying ordinances, Ordinance 35 as amended in 1996, was void because of an Open Meetings Act notice requirement violation and because the ordinance amendment was not put to voter referendum.

{11} The district court determined that the County's 1996 amendment of the Ordinance 35 original dedication, and the Ordinance 67 amendments of the dedications in Ordinances 13 and 35, were lawful. The court also determined Lemire's challenge to the 1996 amendment to Ordinance 35 was barred by the statute of limitations in NMSA 1978, § 37–1–24 (1941) which, the court found, "requires prompt notice in writing of an objection to a public bodies [sic] action." The district court entered judgment in favor of the County.

DISCUSSION

{12} On appeal, Lemire repeats his legal challenges to Ordinance 67 that he first raised below. He contends (1) Ordinance 67 is invalid because it violates the inconsistent-use prohibition of Section 4–62–4(D), and (2) Ordinance 67 is invalid because the 1996 amendment to Ordinance 35 is void in that (a) the Board violated the Open Meetings Act when amending Ordinance 35 without adequate notice, and (b) the Board's actions to

Subsections B through L of this section." Section 4–62–1(A).

amend Ordinance 35 violated the referendum provision of Section 7–20E–10(C).

A. The Inconsistent-Use Prohibition

{13} Throughout this case, the parties have treated the Section 4–62–4(D) inconsistent-use prohibition as the gut issue in the case. Section 4–62–4(D), relating to gross receipts tax revenue bonds, reads:

> No ordinance or resolution may be adopted under the provisions of this section that uses as pledged revenues the county gross receipts tax for a purpose that would be inconsistent with the purpose for which that county gross receipts tax revenue was dedicated. Any revenue in excess of the amount necessary to meet all annual principal and interest payments and other requirements incident to repayment of the bonds may be transferred to any other fund of the county.

{14} Lemire contends the use of the first one-eighth increment and one-half of the third one-eighth increment for payment of the courthouse revenue bond debt is inconsistent with the purposes for which those county gross receipts tax revenues were dedicated in Ordinances 13 and 35. The County counters with the argument that Section 4–62–4(D) does not prohibit the use of pledged revenue for a purpose different than that stated in the existing dedication when a county governing body meets and adopts an ordinance amending the existing dedication and uses the pledged revenue in a manner consistent with the amended dedication. According to the County, Section 4–62–4(D) simply means that a revenue stream from a dedication pledging the taxes for a specific purpose cannot be used for an inconsistent purpose unless and until the dedication clause is amended.

{15} Lemire does not quarrel with the general proposition that a county may amend the dedication in a gross receipts tax ordinance by passing a subsequent ordinance. He contends the County cannot rely on this general proposition when it issues revenue bonds. Lemire argues that when revenue bonds are issued based on pledged gross receipts tax revenues as the source for payment of the bond debt, a county cannot use the bond ordinance to amend a dedication clause to use or pledge the gross receipts tax revenues for a purpose inconsistent with the existing (before-amendment) dedication. More specifically, Lemire argues that Section 4–62–4(D) relates specifically to revenue bonds and is a restriction imposed by the Legislature solely upon the bond ordinance. It is in the section of the statutes specifically confined to revenue bonds A similar statutory section does not appear in the Gross Receipts Act.

{16} As a result, according to Lemire, Section 4–62–4(D) forbids the Ordinance 67 amendment to the Ordinance 13 dedication of a "portion" of the tax revenue for County road purposes, and forbids the Ordinance 67 amendment to the Ordinance 35 dedication of revenue for indigent patient and/or general purposes, because the Ordinance 67 amendments re-dedicate that revenue for payment of revenue bond debt. These Ordinance 67 amendments, Lemire argues, are proscribed by the express language of Section 4–62–4(D) because they constitute the "use[ ] as pledged revenues [of] the county gross receipts tax for a purpose that would be inconsistent with the purpose for which that county gross receipts tax revenue was dedicated." Instead, Lemire would require the County first to repeal the ordinance imposing the tax, and then pass a new tax ordinance with a new dedication specifically pledging the revenue to bond debt repayment, along with a popular vote as required. *See* § 7–20E–11(C) (requiring an election to impose the third one-eighth increment of the county gross receipts tax).

{17} We are not persuaded by Lemire's interpretation of Section 4–62–4(D). Counties are permitted to adopt ordinances that authorize the issuance of gross receipts tax revenue bonds and that designate the source of payment of bond debt. Section 4–62–4(A). By express statutory authorization, the source can be any or all revenue from the first and third one-eighth increments. Section 4–62–1(B). Ordinance 67 is a Section 4–62–4(A) ordinance. The County adopted Ordinance 67 pursuant to Section 4–62–4(A) and, pursuant to Section 4–62–1(B), pledged all of the first and one-half of the third one-eighth increments imposed under the Gross Receipts Act. To effectuate those pledges,

Ordinance 67 repealed parts of prior ordinances inconsistent with Ordinance 67 to the extent of the inconsistency:

> Section 34. *Repealer Clause.* All bylaws, orders, resolutions and ordinances, or parts thereof, inconsistent herewith are hereby repealed to the extent only of such inconsistency. This repealer shall not be construed to revive any bylaw, order, resolution or ordinance, or part thereof, heretofore repealed.

{18} Thus, to the extent the use for bond debt payment of revenue previously dedicated under Ordinance 13 for road fund purposes arguably may have been inconsistent with that prior dedication, Ordinance 67 repealed that dedication and provided by amended dedication that the revenue was to be used to pay bond debt. By repeal, the County eliminated any potential or actual inconsistent use of the revenue that might violate the inconsistent-use prohibition of Section 4–62–4(D). By the amendment, the County used the revenue as authorized in Section 4–62–1(A) and (B).

{19} In regard to Ordinance 35, we determine the use for bond debt payment of revenue previously dedicated in 1996 for general purposes is not inconsistent with the purpose for which the revenue was dedicated and therefore not in violation of inconsistent-use prohibition of Section 4–62–4(D). Even were there an issue as to inconsistent use, the repeal with amendment in Ordinance 67 was effective to eliminate any inconsistency that may have existed or have been created from the prior dedication in Ordinance 35 and to permit the use of the revenue for bond debt payment. Because Ordinance 67 is valid and effective in regard to the pledge of Ordinance 35 gross receipts tax revenue, regardless of the 1996 amendment of the dedication clause, the issues Lemire raises as to the validity of the 1996 amendment to Ordinance 35, i.e., the voter approval and Open Meetings Act issues, are moot and need not be discussed.

{20} Finally, we are not persuaded by Lemire's arguments regarding the use of the first one-eighth for bond debt payments instead of the reserve fund referred to in Section 7–20E–11(A)–(D). Nothing in Ordinance 13 or any state statute ever "dedicated" revenues to the reserve fund as that term is used in Section 4–62–4(D). By later enactment, the Legislature in Section 4–62–1(B) expressly authorized the County to pledge for bond debt repayment "any or all of the revenue" from the first one-eighth increment which necessarily includes any revenue otherwise eligible for the reserve fund referred to in Section 7–20E–11(A)–(D).

CONCLUSION

{21} We affirm the district court's judgment in favor of the County.

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

WE CONCUR: RICHARD C. BOSSON, Chief Judge, JAMES J. WECHSLER, Judge.

2002-NMCA-027

41 P.3d 944

STATE of New Mexico, Plaintiff–Appellee,

v.

Todd FIKE, Defendant–Appellant.

No. 21,723.

Court of Appeals of New Mexico.

Jan. 16, 2002.

Certiorari Denied, No. 27,329, Feb. 26, 2002.

Patricia A. Madrid, Attorney General, Ann M. Harvey, Ass't Attorney General, Santa Fe, NM, for Appellee.

Phyllis H. Subin, Chief Public Defender, Nina Lalevic, Nancy M. Hewitt, Ass't Appellate Defenders, Santa Fe, NM, for Appellant.

OPINION

PICKARD, Judge.

{1} Defendant appeals his convictions and sentence for false imprisonment and battery on a household member. Defendant challenges his convictions on six grounds: (1) the trial court prejudiced the jury against Defendant by repeatedly admonishing Defendant in front of the jury; (2) the trial court should have excluded, as unfairly prejudicial, rebuttal testimony regarding Defendant's altercations while incarcerated; (3) the trial court should have granted a mistrial after the victim in her testimony accused Defendant of bad acts unrelated to the charged offenses; (4) the trial court improperly excluded evidence that the victim had accused two ex-husbands of similar conduct; (5) there was insufficient evidence to convict Defendant of battery on a household member; and (6) cumulative error deprived Defendant of a fair trial. Unpersuaded by Defendant's arguments, we affirm the convictions. After reviewing the record, we find that the trial court's warnings to Defendant and instructions to the jury were not prejudicial. We address the other five issues in more summary fashion. Defendant also challenges the trial court's decision to increase his sentence by six months based on a finding of aggravating circumstances. We hold that Defendant's sentence was increased in accordance with New Mexico law.

FACTS AND PROCEEDINGS

{2} Defendant and the victim lived together in Portales. As a result of two incidents that occurred at their joint residence, Defendant was charged with two counts of false imprisonment and one count of battery on a household member. During the trial, the victim testified that Defendant kept her against her will during each incident, and that during the second incident, Defendant repeatedly grabbed her and threw her to the floor. Defendant, however, maintained that he did not commit any of the acts alleged by the victim. Defendant testified that the victim was the aggressor during each incident, he never harmed her either time, and most of her testimony was false.

{3} The jury found Defendant guilty of both charges stemming from the second incident, but not guilty of the false imprisonment charge from the first incident. The State then moved to increase Defendant's sentence by six months in accordance with NMSA 1978, § 31–18–15.1 (1993), which allows a trial court to increase a sentence for a felony conviction by one-third based on a finding of aggravating circumstances. The basic sentence for false imprisonment, a fourth degree felony, *see* NMSA 1978, § 30–4–3 (1963), is eighteen months, *see* NMSA 1978, § 31–18–

15(A)(6) (1999), and could therefore be increased by six months. At the time Defendant was sentenced, battery on a household member was classified as a petty misdemeanor, *see* NMSA 1978, § 30–3–15(B) (1995, prior to 2001 amendment), which carried a six month sentence, *see* NMSA 1978, § 31–19–1(B) (1984), and could not be increased. Thus, Defendant's basic sentence of twenty-four months could be increased by up to six months if the trial judge found aggravating circumstances.

{4} The trial judge found that he had sufficient basis to aggravate Defendant's sentence based on both a lack of remorse and future dangerousness to the victim. The judge stated that he saw a "consistent and persistent lack of remorse on Mr. Fike's part." He added that Defendant "says a different state of the facts occurred, and it was [the victim's] instability really at work here. So it's that lack of remorse." The judge also found, based on the psychologist's report and the testimony describing Defendant's conduct, that Defendant represented a danger to the victim and the eyewitness. The judge's comments indicated that Defendant was in denial and continued to show contempt for the victim. As a result of these findings, the judge increased Defendant's sentence by six months, for a total of thirty months.

DISCUSSION

I. Challenges to The Convictions

Possible Prejudice Created by the Trial Judge's Remarks

{5} Defendant asserts that the trial judge committed reversible error by reprimanding Defendant in front of the jury and by instructing the jury to disregard Defendant's "gratuitous remarks." During the State's cross-examination of Defendant, the proceedings were stopped four times after Defendant made remarks that went beyond the scope of the question asked and included irrelevant, prejudicial information. First, Defendant mentioned that he had been incarcerated for two years prior to trial. Next, Defendant mentioned that the victim had made conflicting statements to the police regarding the incidents that led to charges against Defendant. Third, Defendant remarked that the victim was taking "psychotropics." Finally, Defendant stated that he had difficulty hearing testimony because he suffered hearing loss after being kicked in the head during a confrontation with police.

{6} Each time this occurred, the trial judge instructed the jury to disregard Defendant's remarks and warned Defendant, in front of the jury, not to continue making such remarks. After the fourth incident, the judge also informed the jury that Defendant's testimony would be stricken if Defendant made any further gratuitous remarks. Defendant complains that the trial judge showed visible anger toward Defendant, thereby prejudicing the jury against him and diminishing Defendant's credibility. He also complains that the judge's instructions were confusing to the jury because he advised them to disregard any "gratuitous" remarks without specifying which remarks were inadmissible, thereby inviting the jury to disregard portions of Defendant's testimony that had been admitted without objection.

{7} A judge must not convey to the jury that the judge favors one side or the other. *See State v. Caputo*, 94 N.M. 190, 191, 608 P.2d 166, 167 (Ct.App.1980). In determining whether a judge has exceeded the bounds of acceptable conduct, the proceedings must be viewed as a whole. *State v. McDonald*, 1998 NMSC 034, ¶ 16, 126 N.M. 44, 966 P.2d 752. The critical inquiry is whether the trial court's behavior was so prejudicial that it denied Defendant a fair, as opposed to a perfect, trial. *Id.*

{8} The State discusses at length Defendant's disruptive behavior during pretrial hearings (in fact devoting eight pages of a thirty-six page brief to detailing these events) to explain why both the State and the trial judge were on guard to prevent any disruptive behavior at trial. The question before us, however, is whether the judge's reaction to Defendant's behavior during trial, in front of the jury, was so severe that it would have prejudiced the jury against Defendant. We do share, to a limited extent, some of Defendant's concerns that the trial judge, in his struggle to prevent Defendant from disrupting the proceedings, might have given jurors an unfavorable impression of Defendant. First, the judge's instruction to

the jury to disregard remarks made "off the cuff or at the end of a sentence or as his answer trails off" could be viewed as vague. The State objected to four specific comments by Defendant, but the judge's instruction could have conceivably invited the jury to disregard other testimony that had not drawn objection. Nor do we think it was strictly necessary to inform the jury that Defendant's testimony could be stricken if Defendant made "any additional comment like that." The jury only needed to know what testimony to consider and what testimony to disregard. The information that Defendant's testimony might be stricken could have led the jury to consider it less vital than other testimony given at trial.

{9} In addition, both the State and the trial judge might have overreacted to Defendant's statement regarding his hearing loss. That comment came as the prosecutor was struggling to get Defendant to acknowledge that his testimony contradicted testimony from the State's witnesses. The prosecutor asked Defendant if he recalled the previous day's testimony. Defendant replied that he was unable to hear large portions of the testimony. The prosecutor asked why. Defendant responded by saying that he was hard of hearing because he had been kicked in the head during a confrontation with police. This response included irrelevant information, and Defendant at that point was on notice that he should answer the specific question asked of him and include no other information. In this instance, however, Defendant's answer was a direct response to the question asked, and the trial court's characterization of responsive testimony as "gratuitous" could have confused the jury.

{10} Nonetheless, we think the trial judge handled a difficult situation as best he could, and we believe the jury understood the remarks to which the judge referred. First, even though some of the instructions were unclear, we think the jury would have understood which of Defendant's comments it was to disregard, because the State's objections immediately followed each comment, and the trial judge issued his curative instructions after sustaining those objections. Moreover, even if the jury did disregard additional testimony, it is unlikely that Defendant suffered prejudice as a result, because much of his testimony had no relevance to the two incidents that led to the charges against him. In addition, we think the judge maintained appropriate judicial decorum throughout the proceedings. Defendant asserts that "[b]y the time the court excused the jury for its final reprimand, it was clear that the judge was angry with Mr. Fike." On a cold record, we cannot evaluate whether or not the judge appeared angry. *See Bendorf v. Volkswagenwerk Aktiengeselischaft*, 90 N.M. 414, 418, 564 P.2d 619, 623 (Ct.App.1977) (recognizing difficulty of evaluating judge's demeanor upon appellate review). After listening to tapes of the proceedings, however, we observe that the judge maintained a respectful and polite tone each time he addressed Defendant. Though the judge's tone became more stern with each warning issued to Defendant, it was appropriate for the judge to issue stern warnings in order to keep the situation from getting further out of hand.

{11} We also note that this Defendant created this situation. Defendant legitimately seemed to have some trouble differentiating relevant from irrelevant information. Nonetheless, he made little effort to answer only the question asked, continually including information designed to elicit sympathy for himself or animus toward the victim. The judge needed to control the course of the trial and prevent the jury from hearing more and more irrelevant, prejudicial testimony. The judge was also trying to avoid a mistrial of Defendant's own making. He did so by asking Defendant to refrain from blurting out extraneous information. If Defendant had complied with the judge's initial requests, additional warnings would not have been necessary.

{12} Finally, we note that nothing the judge said in his instructions or in his warnings to Defendant reflected on Defendant's truthfulness. The judge instructed the jury that Defendant's comments were irrelevant. We do not think this would create the impression that Defendant was not being truthful. We think the jury was free to make up its own mind as to Defendant's credibility.

{13} Ultimately, we do not think that Defendant met his burden to show the trial judge's comments created prejudice. The

trial judge needed to balance Defendant's right to a fair trial against the need for efficient proceedings in which the jury evaluates only relevant evidence. We are not sure what additional steps the trial judge could have taken to protect Defendant's rights when Defendant was unwilling to comply with the judge's clear instructions to answer only the question asked and to refrain from including additional information.

Evidentiary Rulings

{14} Defendant asserts that the trial court erred in allowing the State to rebut his impossibility defense with testimony about altercations that took place while Defendant was incarcerated prior to trial. Defendant testified that he could not have lifted the victim in the air, as she claimed during her testimony, because he cannot lift more than twenty-five pounds from a standing position without forcing his limb into his prosthetic leg. The rebuttal witness, a sheriff's deputy, testified that he saw Defendant lift a corrections officer into the air during a confrontation and that on another occasion it took three officers to subdue Defendant. Defendant first argues that this was improper rebuttal testimony because Defendant was seated during the encounter with the corrections officer, and therefore the testimony did not serve to rebut Defendant's claim that he was unable to lift heavy weights while standing. Defendant also argues that the testimony was inadmissible under the Rules of Evidence because the prejudicial impact of introducing evidence about other violent encounters outweighed any probative value. *See* Rule 11–403 NMRA 2001.

{15} We review the admission of evidence under an abuse of discretion standard. *State v. Allison*, 2000 NMSC 027, ¶ 31, 129 N.M. 566, 11 P.3d 141. The trial court saw the witness's testimony as "classic rebuttal." We agree. Once Defendant testified that he was incapable of performing the acts alleged, the State was entitled to explore Defendant's physical capabilities, particularly the strength he exhibited while engaged in physical struggles. Defendant was free to argue, and did argue, that Defendant's capabilities varied depending on whether he was seated or standing. The trial court was within its discretion, however, to admit the evidence as relevant and allow the jury to decide whether Defendant had the capability to perform the acts alleged. As to the issue of prejudice, the trial court was careful to limit the prosecutor's examination to exclude as much prejudicial information as possible. The trial court did not abuse its discretion in allowing the rebuttal testimony.

{16} Defendant also asserts that the trial judge should have allowed him to introduce evidence that the victim had accused each of her two ex-husbands of similar acts. Defendant argues that he was entitled to question the victim about these incidents under Rule 11–608(B) NMRA 2001, which allows parties to inquire about a witness's specific instances of conduct that are probative of truthfulness or untruthfulness on cross-examination. The rule, however, permits inquiry "in the discretion of the court." *Id.* The trial court found that Defendant had no good faith basis for claiming that the victim had ever made such allegations. Defense counsel conceded that he had no information to support the claim. Without some corroborating evidence, the trial court was within its discretion in refusing to allow the questioning.

Motion for Mistrial

{17} Defendant complains that the trial court should have granted his motion for a mistrial after the victim testified that she believed Defendant was using her social security number without authorization. Defense counsel did not object right away, but moved for a mistrial during the next break, after the victim was through testifying. The trial court agreed that this testimony was irrelevant and constituted inadmissible character evidence, but refused to grant a mistrial, instead instructing the jury to disregard the evidence.

{18} Like evidentiary rulings, the decision to grant or deny a motion for mistrial is within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion. *McDonald*, 1998 NMSC 034, ¶ 26, 126 N.M. 44, 966 P.2d 752. Prejudice caused by an unsolicited remark can usually be dissipated by a curative instruction. *See State v. Wittgenstein*, 119

N.M. 565, 569, 893 P.2d 461, 465 (Ct.App. 1995). Although the trial court's instruction came several hours after the victim's testimony, the court's instruction was sufficient to cure any prejudice caused by the remarks.

Insufficient Evidence

{19} Defendant contends that there was insufficient evidence to convict him of battery of a household member, arguing that the victim did not meet the statutory definition of household member. When reviewing a factual finding on appeal, we determine whether substantial evidence exists to support a verdict of guilt beyond a reasonable doubt with respect to every element, viewing the evidence in the light most favorable to supporting the verdict and indulging all permissible inferences in favor of upholding the verdict. *State v. Apodaca,* 118 N.M. 762, 765–66, 887 P.2d 756, 759–60 (1994). The statutory definition of household member includes "a person with whom a person has had a continuing personal relationship." NMSA 1978, § 30–3–11 (1995). Both the victim and Defendant testified that they lived together in New Mexico for several weeks before the incidents occurred. This evidence alone was sufficient to establish a continuing personal relationship. In fact, there was no basis for the jury to conclude otherwise. To the extent that Defendant disputed the victim's testimony, he claimed that the relationship began earlier and was more intimate than she had admitted. Defendant's claim on this point is without merit.

Cumulative Error

{20} Defendant argues that cumulative error deprived him of a fair trial. However, we have not found that the trial court committed any of the errors claimed by Defendant. Where there is no error, there can be no cumulative error. *State v. Morales,* 2000 NMCA 046, ¶ 18, 129 N.M. 141, 2 P.3d 878.

{21} Defendant's convictions are affirmed.

II. Challenges to the Aggravated Sentence

{22} Defendant challenges the trial court's decision to increase his sentence on two grounds. First, Defendant argues that, pursuant to *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the question of whether aggravating factors existed should have been submitted to the jury and determined beyond a reasonable doubt. We already considered this question in *State v. Wilson,* 2001 NMCA 032, ¶¶ 13, 29, 130 N.M. 319, 24 P.3d 351, and held that it was constitutionally permissible for our judges to either increase or decrease a defendant's sentence within the range provided in Section 31–18–15.1. Second, Defendant argues that the trial judge's use of lack of remorse as an aggravating circumstance violated his Fifth Amendment right against self incrimination because he could not express remorse without admitting his culpability.

{23} The imposition of a harsher sentence based solely on a defendant's refusal to admit guilt violates the defendant's Fifth Amendment right against self incrimination. *See State v. James,* 109 N.M. 278, 284, 784 P.2d 1021, 1027 (Ct.App.1989). Our Supreme Court recognized the "potential . . . for a good deal of mischief" in enhancing a sentence based on a defendant's lack of remorse. *Swafford v. State,* 112 N.M. 3, 17, 810 P.2d 1223, 1237 (1991). The Court observed that "remorse may be equated with a defendant's decision to plead guilty and, accordingly, a lack of remorse might be equated with a decision to proceed to trial. Such an equation raises serious concerns." *Id.* Nonetheless, the *Swafford* Court held that, in appropriate circumstances, a trial judge can permissibly consider the presence or absence of remorse when sentencing a defendant. *Id.*

{24} After *Swafford,* we upheld a trial judge's decision to increase a defendant's sentence based on lack of remorse where the trial judge found "a pattern [ad]efendant had exhibited over the course of several years for not taking responsibility for his own actions and showing little remorse for the effect of his actions on others." *State v. Wilson,* 117 N.M. 11, 20, 868 P.2d 656, 665 (Ct.App.1993) (hereinafter *Wilson I*). We were also recently asked to address the very issue Defendant now raises in *Wilson,* 2001 NMCA 032, ¶ 30, 130 N.M. 319, 24 P.3d 351 (hereinafter *Wilson II*). We did not reach the issue in *Wilson II* because that defendant had not properly preserved the issue below. *Id.*

¶¶ 30–32. Nonetheless, we noted that lack of remorse can be a valid aggravating factor, even when a defendant maintains her innocence. *See id.* ¶ 33. In that case, the defendant was convicted of child abuse resulting in death. *Id.* ¶ 2. We observed that the defendant, despite acknowledging some role in her child's death, never took responsibility for her actions. *Id.* ¶ 33. In those particular circumstances, we noted, the defendant could have assumed responsibility for her role without recanting her defense theories. *Id.* As a result, we indicated that the trial judge was entitled to rely on Defendant's inability to accept responsibility for her actions as a basis for aggravating her sentence. *Id.*

{25} The judge here indicated that his finding of lack of remorse was based in part on the fact that Defendant "says a different state of the facts occurred." If that had been the only basis for the judge's findings, then we would have been obligated to reverse the aggravated portion of the sentence. The judge here, however, made additional, specific findings relating to Defendant's lack of remorse based on the attitude Defendant displayed throughout the proceedings and a psychological evaluation of Defendant performed while Defendant was incarcerated. We think these findings established a constitutionally permissible basis for increasing Defendant's sentence.

{26} First, the trial judge based his finding of lack of remorse on Defendant's insistence that the victim instigated each incident. Throughout the entire process, from pretrial hearings to sentencing, Defendant vehemently asserted that victim made everything up because she was bipolar. Defendant also violated a court order by visiting the victim's apartment. Just as the defendant in *Wilson II* could have accepted some responsibility without admitting guilt, Defendant could have maintained his innocence without continually expressing hostility toward the victim, and in fact could have expressed sympathy for her without admitting that he was guilty of battery or false imprisonment. Second, Defendant, like the defendant in *Wilson I,* displayed a pattern of failing to acknowledge responsibility for his actions and the harm he caused others. *See Wilson I,* 117 N.M. at 20, 868 P.2d at 665. The judge observed Defendant deny responsibility for multiple incidents that occurred while he was incarcerated and successive disagreements with assigned counsel. The forensic psychologist who examined Defendant observed that Defendant had a pattern of deflecting responsibility for any wrongdoing. Based on these findings, we think the trial judge had a sufficient basis to increase Defendant's sentence.

{27} We do note that the trial court could have paid better heed to *Swafford's* instruction that a sentence increase based on lack of remorse should be supported by specific findings. *See Swafford,* 112 N.M. at 17, 810 P.2d at 1237. The State, in arguing that Defendant lacked remorse, discussed Defendant's violation of the court order, his continuing misconduct while in detention, his behavior during trial, and his "longstanding pattern of . . . oppositional defiant behavior," as well as the findings in the psychologist's report. It is not clear to what extent the trial court relied on these factors, if at all, even though each of these factors seems to lend support to the trial court's ultimate finding. Because Defendant's constitutional rights were implicated, we suggest that trial courts take more time in the future to more clearly explain the basis for their rulings.

{28} The trial court also found that Defendant posed a danger to the victim and an eyewitness who testified at trial. This finding alone could have been a sufficient basis for increasing Defendant's sentence. Citing to *Swafford,* Defendant argues that, where the trial judge relies on two different sentencing factors, and one may be impermissible, the appellate court should reverse for resentencing. *See id.* at 17 n. 11, 810 P.2d at 1237 n. 11; *see also James,* 109 N.M. at 284, 784 P.2d at 1027. In those cases, however, one of the factors was clearly impermissible. We have determined that lack of remorse was a permissible sentencing factor in this case, and therefore we do not face the same concern. *See State v. Castillo–Sanchez,* 1999 NMCA 085, ¶ 28, 127 N.M. 540, 984 P.2d 787 (holding that a sentencing decision will be affirmed if challenged factor is permissible and other factors are not challenged). Even if we had doubts about the appropriateness of the trial court's use of lack of remorse as a

sentencing factor, remand would not be necessary in this case. In this particular situation, the trial court's findings that Defendant lacked remorse only bolstered the finding of future dangerousness.

CONCLUSION

{29} For the foregoing reasons, Defendants convictions and sentence are affirmed.

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

We concur: RICHARD C. BOSSON, Chief Judge and MICHAEL D. BUSTAMANTE, Judge.

2002-NMCA-032

41 P.3d 952

STATE of New Mexico, Plaintiff–Appellee,

v.

George LACEY, Defendant–Appellant.

No. 21,502.

Court of Appeals of New Mexico.

Jan. 23, 2002.

Certiorari Denied, No. 27,358, March 7, 2002.

Patricia A. Madrid, Attorney General, William McEuen, Assistant Attorney General, Santa Fe, NM, for Appellee.

Phyllis H. Subin, Chief Public Defender, Sheila Lewis, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

PICKARD, Judge.

{1} This case is the latest in a series of cases involving the double use of prior convictions to increase punishment. In *State v. Keith,* 102 N.M. 462, 463–65, 697 P.2d 145, 146–48 (Ct.App.1985), we held that a prior armed robbery conviction could not be used to raise the defendant's underlying armed robbery conviction from a second degree felony to a first degree felony, and then be used to further enhance the defendant's sentence under the general habitual offender statute.

In *State v. Haddenham,* 110 N.M. 149, 151–54, 793 P.2d 279, 281–84 (Ct.App.1990), we held that a prior felony conviction could not be the basis for a conviction of felon in possession of a firearm, and then be used to further enhance the defendant's sentence under the habitual offender statute. This case requires us to decide whether a prior trafficking conviction may be used to set Defendant's underlying conspiracy to commit trafficking conviction as a second degree felony, and then be used to enhance Defendant's sentence under the habitual offender statute. Notwithstanding the differences in the pertinent statutory language, we hold that it may not be so used.

{2} Defendant was convicted of one count of a second offense of trafficking a controlled substance and one count of conspiracy to commit that offense. He argues that the trial court's use of his 1989 trafficking conviction to prove the charge of conspiracy to commit a first degree felony, as well as to enhance his conspiracy sentence through the habitual offender statute, was an impermissible double use of the prior conviction. Defendant further argues that the trial court erred in admitting evidence of other drug crimes at his trial. Finally, Defendant argues that defense counsel's failure to move to sever the counts constituted ineffective assistance of counsel. We determine that the trial court improperly used Defendant's prior trafficking conviction both to prove the crime of conspiracy to commit a first degree felony and to enhance Defendant's conspiracy sentence under the habitual offender statute. We affirm the remaining issues.

FACTS

{3} At sentencing, the court elevated Defendant's current trafficking charge from a second degree to a first degree felony based on a prior trafficking conviction in 1989. The trial court then determined that the conspiracy charge was a second degree felony because the underlying crime of trafficking was a first degree felony. The penalty for conspiracy is based on the severity of the underlying charge. *See* NMSA 1978, § 30–28–2(B) (1979). After finding that mitigating circumstances existed, the court reduced Defendant's trafficking sentence from eighteen to twelve years and reduced his conspiracy sentence from nine to six years.

{4} The State additionally sought to sentence Defendant as a habitual offender. At the sentencing hearing, Defendant admitted that he had three prior felony convictions. Because the prior 1989 trafficking conviction had already been used to enhance the trafficking charge from a second degree to a first degree felony under the trafficking statute, the court, in accordance with *Keith,* did not use it to enhance Defendant's trafficking sentence under the habitual offender statute. Instead, the court imposed a habitual sentence of four years, instead of eight, on the trafficking charge based only on Defendant's two other prior convictions. However, the court used all three prior convictions, including the 1989 trafficking conviction, to impose an eight year habitual sentence on the conspiracy charge and sentenced Defendant to a total of sixteen years for trafficking and fourteen years for conspiracy, to be served concurrently.

DISCUSSION

Habitual Offender Statute Enhancement

{5} In New Mexico, the court's sentencing authority is limited by statute. *Keith,* 102 N.M. at 463, 697 P.2d at 146. The legislature must give express authorization for a sentence to be imposed. *Id.* Imposition of multiple punishments for the same conduct violates double jeopardy unless the legislature intended for multiple punishments to be applied. *See Haddenham,* 110 N.M. at 151–52, 793 P.2d at 281–82; *Keith,* 102 N.M. at 463, 697 P.2d at 146.

{6} In determining the intent of the legislature, we rely primarily on the language of the statute. *State v. Alderete,* 88 N.M. 150, 151, 538 P.2d 422, 423 (Ct.App. 1975). Statutes authorizing a more severe punishment for subsequent offenses are deemed highly penal and merit a strict construction. *Keith,* 102 N.M. at 465, 697 P.2d at 148; *see also State v. Garcia,* 91 N.M. 664, 665, 579 P.2d 790, 791 (1978). Accordingly, if the legislature truly intends to doubly enhance the penalty for a crime, it must make that intention clear. *Keith,* 102 N.M. at 465, 697 P.2d at 148. We resolve any doubt about the construction of a criminal statute in favor of the rule of lenity. *Id.*

{7} This Court has held that if a prior felony conviction is already taken into account in determining the punishment for a specific crime, the legislature, unless it clearly expresses otherwise, does not intend that it also be used to enhance the conviction under the habitual offender statute. *State v. Peppers,* 110 N.M. 393, 400, 796 P.2d 614, 621 (Ct.App.1990); *Haddenham,* 110 N.M. at 154, 793 P.2d at 284 (holding that the legislature had taken defendant's prior felony conviction into consideration when it set the penalty for felon in possession of a firearm, so that the prior felony could not support a habitual offender enhancement); *Keith,* 102 N.M. at 465, 697 P.2d at 148 (holding that the legislature had already taken into consideration prior felony convictions when it set the penalty for repeat armed robbers, and did not intend for those prior armed robberies to be used to enhance the sentence as a habitual offender); *Alderete,* 88 N.M. at 151–52, 538 P.2d at 423–24 (holding that the legislature did not intend the general habitual offender statute to apply to second or subsequent violations for unlawful possession of heroin, since an enhanced sentence was already provided for under the Controlled Substances Act).

{8} New Mexico's trafficking statute contains its own enhancement provision:

> B. Except as authorized by the Controlled Substances Act, it is unlawful for any person to intentionally traffic. Any person who violates this subsection is:
>
> (1) for the first offense, guilty of a second degree felony . . . ; and
>
> (2) for the second and subsequent offenses, guilty of a first degree felony. . . .

NMSA 1978, § 30–31–20 (1990). It is evident from the language of the trafficking statute that the legislature took prior trafficking convictions into account when setting the penalty for a second trafficking offense.

{9} The trafficking statute and the general habitual offender statute indicate that the two statutes have a common purpose: to deter the commission of second or subsequent offenses and to keep repeat offenders away from society for an extended period of time. Thus, the statutes are in conflict and the more general habitual offender statute does not apply. *Keith,* 102 N.M. at 464, 697 P.2d at 147 (recognizing that where a general statute includes the same matter as a more specific statute, the two statutes are in conflict and the specific act is construed as an exception to the general statute). The trial court properly took the foregoing law into consideration in sentencing Defendant for the substantive offense as a first degree felon and using only two prior convictions for enhancement under the general habitual offender statute.

{10} We now address the more difficult question of whether the legislature intended the habitual offender statute to enhance the penalty for conspiracy when the crime underlying the conspiracy is an offense, such as a second conviction for trafficking, that has its own internal enhancement. We conclude that it did not.

{11} New Mexico's conspiracy statute states:

> B. Whoever commits conspiracy shall be punished as follows:
>
> (1) if the highest crime conspired to be committed is a capital or first degree felony, the person committing such conspiracy is guilty of a second degree felony;
>
> (2) if the highest crime conspired to be committed is a second degree felony, the person committing such conspiracy is guilty of a third degree felony; and
>
> (3) if the highest crime conspired to be committed is a third degree felony or a fourth degree felony, the person committing such conspiracy is guilty of a fourth degree felony.

Section 30–28–2(B). The State contends that when setting the penalty for conspiracy, the legislature did not take any prior convictions into account, but instead, based the punishment simply on the highest degree of crime conspired. Therefore, it argues, the prior trafficking felony may be used to enhance Defendant's conspiracy conviction under the general habitual offender statute.

{12} Absent a showing of permissive legislative intent, multiple use of the same facts to prove a predicate offense and to enhance the sentence is precluded by double jeopardy. *Haddenham,* 110 N.M. at 151–52, 793 P.2d at 281–82. While the State's assertion may be true in some cases of conspiracy, it does not

hold true in this case in which the elevation of the conspiracy charge from a third degree to a second degree felony was based upon Defendant's underlying, already enhanced trafficking conviction. In order for the court to elevate the conspiracy charge to a second degree felony, it was necessary to show that Defendant conspired to commit a first degree felony. *See* § 30-28-2(B)(1). In order to prove that the trafficking charge was a first degree felony, the court was required to find that Defendant had a prior trafficking conviction. *See* § 30-31-20(B)(2). In this case, the prior trafficking offense was used to prove the offense of conspiracy to commit a first degree felony.

{13} The State argues that this case is analogous to *Peppers,* in which the court held that the sentence for failure to appear, which depends upon the severity of the criminal charge for which one must appear in court, could be enhanced under the habitual offender statute, using the felony conviction underlying the proceeding at which the defendant failed to appear. *See Peppers,* 110 N.M. at 401, 796 P.2d at 622. In that case, the defendant had failed to appear for sentencing on a conviction of vehicular homicide. *Id.* at 394, 796 P.2d at 615. Because vehicular homicide is a felony, the defendant's charge of failure to appear was raised from a misdemeanor to a felony. In addition, the court allowed the use of the vehicular homicide conviction to enhance the sentence for failure to appear through the habitual offender statute. *Id.* at 401, 796 P.2d at 622.

{14} We find significant distinction between *Peppers* and the case before us in the nature of the crimes at issue. The crime of felony failure to appear does not require a prior felony conviction. *See* NMSA 1978, § 31-3-9(A) (1999). It requires only that a defendant be charged with a felony and that he or she wilfully fail to appear before any court or judicial officer as required. *Id.* The *Peppers* court reasoned that it could not presume that the legislature had taken the defendant's prior felony conviction for vehicular homicide into account when contemplating the punishment for felony failure to appear, as the statute did not require a prior felony conviction. *Peppers,* 110 N.M. at 401, 796 P.2d at 622. As no prior felony conviction for vehicular homicide was used to increase the defendant's failure to appear charge from a misdemeanor to a felony, the court permitted use of the vehicular homicide conviction to enhance the defendant's sentence for failure to appear under the habitual offender statute. *Id.*

{15} In the case before us, however, Defendant's 1989 trafficking conviction was used both to prove the offense of conspiracy to commit a first degree felony and to enhance Defendant's conspiracy sentence under the habitual offender statute. We discern no clear legislative intent to permit the same facts used to prove conspiracy to commit a first degree felony to also be used to enhance Defendant's sentence under the habitual offender statute. In cases in which the legislature intends to permit such double use, it must clearly indicate that intent. *Id.; Haddenham,* 110 N.M. at 154, 793 P.2d at 284. We believe " '[t]here is sufficient doubt that the penalty for [conspiracy to traffic] should be escalated twice by what may be an unforeseen combination of ... criminal statutes, and in the absence of an explicit legislative authorization, we will construe the law strictly by refusing to give it such an expansive interpretation.' " *Keith,* 102 N.M. at 465, 697 P.2d at 148 (quoting *State v. Cox,* 344 So.2d 1024, 1026 (La.1977)). We presume that the legislature intended that the prior trafficking felony was already taken into account when enhancing the punishment for both trafficking and conspiracy to traffic.

{16} The court's double use of the prior trafficking conviction was improper. We therefore remand this case to the trial court for resentencing. Defendant suggests that the remedy could be either to lower the conspiracy to a mitigated third degree felony (two years) and then tack on the eight year habitual sentence for a total of ten years or to leave the conspiracy as a mitigated second degree felony (six years) and then tack on only four years for a habitual sentence based on two prior convictions for the same total of ten years. Although the math works out the same in this case, our cases teach that the proper result in cases of doubt concerning legislative intent involving the habitual offender statute is to lower the habitual sentence by eliminating the felony that has been

previously used to elevate the underlying sentence or offense. Because our holding in this regard flows so naturally from our prior cases of *Keith* and *Haddenham*, we do not reach Defendant's alternative contention that the legislature did not intend that prior convictions should bear at all on the degree of crime conspired to be committed under Section 30–28–2.

Impermissible Character Evidence

{17} In addition to the counts of trafficking and conspiracy of which Defendant was convicted, he was also charged with one count of trafficking and one count of conspiracy to traffic, arising from an alleged drug sale on June 24, 1999, and one count of embezzlement based on an alleged attempted drug sale on July 27, 1999. At the close of the testimony, the court ordered a directed verdict of not guilty on the June 24 trafficking charge. The jury then acquitted Defendant of the June 24 conspiracy charge, as well as the July 27 embezzlement charge.

{18} Defendant argues that the jury's exposure to the evidence presented on these charges, as well as evidence involving another transaction with a man named Robinson, led to the conclusion that Defendant had a propensity for dealing drugs and that he probably sold drugs to the agents on June 30, 1999. He asserts that admission of such evidence violated the policies behind Rule 11–404(B) NMRA 2002 and, accordingly, asks this Court to remand for a new trial. The State argues that it offered this evidence to prove the properly charged offenses against Defendant for trafficking and conspiracy to traffic on June 24 and embezzlement on July 27, and not merely to show propensity.

{19} Contrary to Rule 12–213(A)(4) NMRA 2002, Defendant has neglected to inform this Court of how this issue was preserved for appellate review. "The brief in chief of the appellant ... shall contain ... a statement explaining how the issue was preserved in the court below...." *Id.* In addition, our review of the record reveals that Defendant never objected to the admission of the above testimony, nor did he, at any time, move to sever any of the charges in the action against him. He has therefore failed to preserve any error for our review. *See* Rule 12–216(A) NMRA 2002 ("To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked...."); *State v. Barr*, 1999–NMCA–081, ¶ 31, 127 N.M. 504, 984 P.2d 185 (stating that failure to object to inadmissible hearsay results in failure to preserve the issue for appellate review); *State v. Lucero*, 104 N.M. 587, 590, 725 P.2d 266, 269 (Ct.App. 1986) (recognizing that to preserve an issue for appeal, appellant must make a timely objection that specifically apprises the district court of the nature of the claimed error and evokes a ruling thereon).

{20} We nevertheless address whether Defendant was unduly prejudiced by this testimony as to merit a new trial. This Court has recognized that prejudice can result when the court erroneously admits evidence of similar charges, which may be interpreted as propensity evidence. *State v. Jones*, 120 N.M. 185, 190, 899 P.2d 1139, 1144 (Ct.App. 1995) (holding that when the trial court abuses its discretion in refusing to grant a motion for severance and thereby erroneously admits other-crimes evidence violating Rule 11–404(B), prejudice is established when there are convictions). However, when the trial court has committed no error in admitting evidence of similar charges, this Court has held that what defendants deem to be prosecutorial overcharging does not necessarily result in prejudice. *State v. Shaulis–Powell*, 1999–NMCA–090, ¶¶ 20–21, 127 N.M. 667, 986 P.2d 463 (holding that although defendant was charged with trafficking, possession with intent to distribute, and possession of marijuana over eight ounces and was convicted only of possession, her conviction was not a result of prejudicial overcharging, as there was sufficient evidence to support the conviction); *State v. Armijo*, 1997–NMCA–080, ¶ 10, 123 N.M. 690, 944 P.2d 919 (holding that the defendant failed to demonstrate prejudice resulting from the court's refusal to sever multiple counts of fraud, in that the jury was properly instructed and showed it could properly apply the facts to the law by acquitting on some counts and convicting on others); *State v. Orgain*, 115 N.M. 123, 125–26, 847 P.2d 1377, 1379–80 (Ct.App.1993) (holding that the jury's acquittal of two of the sixteen counts of forgery and conspiracy to commit forgery showed that it was able to

carefully apply the facts to the law and thus the defendant could not show prejudice and was not entitled to a new trial).

{21} We find that the evidence pertaining to the charges of which Defendant was acquitted did not unduly prejudice the jury. Because Defendant did not move to sever any of the charges in the proceeding, the trial court committed no error in admitting evidence pertaining to these charges. The fact that the jury acquitted Defendant of three of the five counts against him shows that it was able to carefully apply the facts to the law. *See Armijo,* 1997–NMCA–080, ¶ 10, 123 N.M. 690, 944 P.2d 919; *Orgain,* 115 N.M. at 125–26, 847 P.2d at 1379–80. We do not find sufficient prejudice to grant a new trial. Moreover, we will not revisit the rationales of these cases, as Defendant's argument would require us to do.

{22} We also take this opportunity to explicitly reject Defendant's contention, and the argument he constructs to support it, that is based on his speculation about what the jury must have done. He argues that the jury must have believed the agents' testimony in order to convict Defendant at all and therefore its acquittal on certain of the charges was a compromise. Defendant asserts that we must carefully insure that cases are not overcharged in order to discourage such compromises. We have, time and again, held that it is an impermissible technique of appellate argument to parse the testimony and speculate about what the jury must or must not have found in order to show reversible error on a different issue. *See State v. Ruiz,* 119 N.M. 515, 521–22, 892 P.2d 962, 968–69 (Ct.App.1995); *State v. Glen Slaughter & Assocs.,* 119 N.M. 219, 225–26, 889 P.2d 254, 260–61 (Ct.App.1994); *State v. Leyba,* 80 N.M. 190, 195, 453 P.2d 211, 216 (Ct.App. 1969). In fact, the verdicts here do not appear to be a compromise, and instead reflect careful analysis of the strengths and weaknesses of the testimony on the various counts. But even if the verdicts were a compromise, it is well established under the foregoing cases that we would not engage in the type of review Defendant seeks.

{23} Finally, Defendant argues that he was prejudiced by testimony that one agent entered into another drug deal with John Robinson, an acquaintance of Defendant's, that Defendant claims did not involve him at all. In fact, Defendant was present at the beginning of this transaction. On the court's own motion, when the prosecutor acknowledged that the testimony he sought was not relevant to the actual charges, this line of testimony was abandoned.

{24} Again, defense counsel did not, at any time, object to the testimony concerning the drug sale between Robinson and the agent. Defense counsel did not ask the court for a curative instruction, directing the jury to disregard the evidence, nor did she ask for a mistrial. Regardless of Defendant's failure to preserve this issue, we find that the admission of evidence of the transaction between the agent and Robinson does not entitle Defendant to a new trial. The record indicates that the jury heard other evidence, consistent with the conspiracy and trafficking charges, indicating that Defendant and Robinson were part of a cooperative drug distribution network in Roswell, New Mexico. Any implication from the testimony that Robinson sold drugs to the agent, in a transaction that did not directly involve Defendant, was cumulative and did not constitute prejudice. *See State v. Hamilton,* 2000–NMCA–063, ¶ 18, 129 N.M. 321, 6 P.3d 1043 (holding that erroneous admission of uncharged conduct was harmless and not prejudicial where the evidence was cumulative); *State v. Woodward,* 1996–NMSC–012, ¶ 47, 121 N.M. 1, 908 P.2d 231 ("The erroneous admission of cumulative evidence is harmless error because it does not prejudice the defendant."). We deny Defendant's request for a new trial.

Ineffective Assistance of Counsel

{25} Defendant contends that his counsel's failure to file a motion for severance of counts in this case constituted ineffective assistance of counsel and denied him a fair trial. Counsel is considered effective when he or she exercises the skill, judgment, and diligence of a reasonably competent attorney. *State v. Crislip,* 109 N.M. 351, 353, 785 P.2d 262, 264 (Ct.App.1989). To prevail on an ineffective assistance claim, Defendant must show that his counsel fell below the standard of a reasonably competent attorney. *Id.* If there is a plausible, rational strategy or

tactic, which can explain counsel's conduct, then an ineffective assistance claim fails. *State v. Harrison*, 2000 NMSC 022, ¶ 63, 129 N.M. 328, 7 P.3d 478. In addition, Defendant must show that failure to meet the standard resulted in prejudice. *Crislip*, 109 N.M. at 353, 785 P.2d at 264. In order to establish prejudice, " '[t]he 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.' " *State v. Brazeal*, 109 N.M. 752, 757–58, 790 P.2d 1033, 1038–39 (Ct.App.1990) (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

{26} First, there was a potential rational trial strategy for not moving to sever the counts in this case. Defense counsel obtained acquittals on three of the five counts charged. The record reveals defense counsel's attempt to undermine the credibility of all the charges by trying the weaker counts along with the stronger counts. *See State v. Mares*, 112 N.M. 193, 198, 812 P.2d 1341, 1346 (Ct.App.1991) (holding that counsel's failure to move for severance was a reasonable trial tactic, in that the record reflected that defense counsel attempted to transfer the lack of the first victim's confidence to the state's entire case). Using the evidence presented on the June 24 trafficking and conspiracy counts, as well as the July 27 embezzlement count, defense counsel argued at closing that other people were the actual drug dealers, while Defendant merely introduced people to each other. Defendant has failed to show how this strategy was not reasonable.

{27} Second, we find no prejudice resulted from the counts being tried in the same proceeding. Defendant failed to demonstrate that had his counsel moved for severance, the motion would have been granted. *See State v. Gonzales*, 113 N.M. 221, 230, 824 P.2d 1023, 1032 (1992) (holding that to prevail on an ineffective assistance of counsel claim, defendant must first demonstrate that had his counsel moved for severance, the motion would have been granted). Rule 5–203(A) NMRA 2002 provides that if the charges "are of the same or similar character" or "are based on the same conduct or on a series of acts either connected together or constituting parts of a single scheme or plan," then they may be tried together. However, if a defendant will be prejudiced by a joint trial, the court may grant a severance. Rule 5–203(C). Whether or not a trial should be severed lies within the sound discretion of the trial court. *State v. Hernandez*, 104 N.M. 268, 272, 720 P.2d 303, 307 (Ct.App.1986). Here, the offenses all involved the same witnesses and were based upon acts alleged to constitute parts of a single scheme. Therefore, the counts were properly tried together. *See id.* at 272–73, 720 P.2d at 307–08 (holding that two drug deals to the same undercover officer a few days apart were clearly acts of a similar nature and were properly tried together).

{28} Defendant contends that prejudice is shown because in this case, like that of Jones, and unlike that of Hernandez, the element of knowledge was not at issue, and therefore the evidence of other counts served to unduly prejudice him. *See Jones*, 120 N.M. at 189, 899 P.2d at 1143 (distinguishing *Hernandez*). We disagree with Defendant about what was at issue. In this case, like that of Hernandez, the State had to prove that Defendant knew or believed that what he was trafficking was drugs. Defendant's claim for ineffective assistance of counsel is denied.

CONCLUSION

{29} We affirm Defendant's convictions for trafficking and conspiracy to commit trafficking. However, we remand this case to the trial court for resentencing, limiting the habitual offender sentence on the conspiracy conviction to four years.

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

WE CONCUR: JAMES J. WECHSLER, Judge, and JONATHAN B. SUTIN, Judge.

2002-NMCA-033

42 P.3d 272

STATE of New Mexico,
Plaintiff–Appellee,

v.

Joseph Lucas MANTELLI,
Defendant–Appellant.

No. 21,464.

Court of Appeals of New Mexico.

Jan. 29, 2002.

Certiorari Denied, No. 27,368,
March 7, 2002.

Patricia A. Madrid, Attorney General, Max Shepherd, Assistant Attorney General, Santa Fe, NM, for Appellee.

Gerald E. Baca, Las Vegas, NM, Joe M. Romero, Jr., Scott D. Johnson, Albuquerque, NM, for Appellant.

OPINION

BUSTAMANTE, Judge.

{1} Joseph Mantelli (Defendant), a police officer, appeals his conviction for voluntary manslaughter, aggravated assault with a deadly weapon (a firearm), and shooting at a motor vehicle resulting in injury. Defendant argues the trial court erred by: (1) refusing to change venue, (2) refusing to honor Defendant's peremptory notice of excusal of the trial judge, (3) denying Defendant's motion to exclude certain expert testimony offered by the State, (4) failing to instruct the jury on an essential element of shooting at a motor vehicle, (5) refusing to instruct the jury on justifiable homicide by a police officer, and (6) sustaining Defendant's conviction for voluntary manslaughter and aggravated assault

because insufficient evidence supported the convictions.

{2} Concluding that Defendant was entitled to have the jury instructed on justifiable homicide by a police officer in accordance with NMSA 1978, § 30–2–6 (1989), we reverse Defendant's convictions and take this opportunity to discuss the use of deadly force by police officers in New Mexico. We also address the remaining issues—with the exception of Defendant's motion to exclude certain expert testimony which is unlikely to recur—and remand for a new trial.

I. FACTS

{3} Defendant, a uniformed officer with the Las Vegas, New Mexico Police Department (LVPD), shot and killed Abelino Montoya, an eighteen-year-old Robertson High School senior, in the early morning hours of February 14, 1998. At trial Defendant testified that while on duty, wearing his uniform and patrolling in a marked police unit with Sergeant Steve Marquez (Sgt. Marquez), the officers spotted a white Toyota truck near the Las Vegas City Plaza. They believed this was the same vehicle that earlier that night was going the wrong way on a one-way street, causing Sgt. Marquez to swerve to avoid a collision. The truck, driven by Montoya, had in fact eluded Sgt. Marquez after a brief chase that ended when Sgt. Marquez's marked police unit became disabled.

{4} Defendant activated the overhead lights and wig-wag lights on the police unit and moved to get behind the truck. Defendant testified that Montoya reacted to the lights by increasing his speed, and proceeding through an intersection without stopping for a stop signal. During the course of the pursuit, Montoya ran through six or seven stop signs, eventually reaching a dead-end at Valley and Chavez Streets.

{5} What occurred next was disputed at trial. Gabriel Rubio, a passenger in Montoya's truck throughout the evening, testified for the State. Rubio testified that Montoya, in an attempt to avoid being stopped, drove north on Valley Street, which dead-ends at Chavez Street. Montoya apparently was not aware that Valley Street came to a dead-end until he was in the intersection of Valley and Chavez Streets. Once in the intersection Montoya slammed on his brakes and the truck skidded at least a car length past the intersection. Rubio was watching the police car coming at them. Meanwhile, Montoya had put the truck in reverse and was backing up trying to position the truck to avoid a rock wall at the intersection as he attempted to turn the truck onto Chavez Street. Rubio testified the two vehicles collided in the middle of the intersection of Valley and Chavez.

{6} Once the two vehicles collided, Rubio testified that Defendant seemed to immediately be at the driver's side window trying to break the window with the butt of his handgun. At the same time Montoya was shifting the manual transmission of the truck out of reverse and turning the wheel to the right in a continuing attempt to turn down Chavez Street. While they were still in the middle of the intersection, Defendant succeeded in breaking the driver's side window. Montoya put the truck into first gear and began to drive away, going up and over the curb. He had to drive slowly as he turned right down Chavez Street to avoid the rock wall at the intersection. After clearing the wall, Montoya drove the truck fast down Chavez Street. As they were driving away, Rubio heard two shots. With one shot Rubio felt something graze his head and he ducked. He also told Montoya to stop. Rubio described the shots as coming one right after the other. After the shots rang out, the truck went out of control and hit the side of a house some distance down Chavez Street. Montoya suffered one shot in the back and a second in the head, killing him almost instantly. Rubio testified that he did not think that he and Montoya had ever put any officer's life in danger.

{7} The dispatcher tape-recorded Sgt. Marquez's calls as the second chase proceeded. The tape included the sound of the crash at the intersection of Valley and Chavez, and fifteen seconds later Sgt. Marquez saying "shots fired," and forty-one seconds from the crash Sgt. Marquez announcing that there was a death.

{8} The State's theory at trial was that Defendant shot Montoya to prevent him from

escaping. The State also presented testimony from Defendant's roommate, Adrian Crispin, a fellow LVPD officer, that Defendant told him right after the shooting that he had shot at the truck as it was moving away because it was about to get away.

{9} At trial Defendant testified to a different reason for the shooting. Defendant testified he believed at the time of the shooting that the truck was being used as a deadly weapon to attack him and Sgt. Marquez, that their lives were in danger, and that he was therefore justified in using deadly force in self-defense and defense of another.

{10} Defendant testified that he positioned his police car to try to "block-in" the truck so that it could not escape. On cross-examination, Defendant also admitted that he was aware of department policy that an officer was not to use his patrol car as a roadblock without ensuring the pursued vehicle had a way out of the roadblock. Defendant testified that he was shocked and scared when Montoya began to back up the truck. Defendant believed that Sgt. Marquez had exited the police car and then had been knocked down and possibly run over and killed or injured. Thus, standing an arm's length away from the truck, Defendant fired one round into the truck because he believed that his partner was in danger. He fired two more shots to the back of the truck because he thought the truck was backing up a second time to ram them again, and not because Montoya was trying to escape by negotiating the rock wall at the corner of Chavez and Valley. Sgt. Marquez also fired a single shot at the truck.

II. JURY INSTRUCTION ON JUSTIFIABLE HOMICIDE BY A POLICE OFFICER

a. Background

{11} Defendant argues that it was reversible error for the trial court to refuse to instruct the jury on justifiable homicide by a police officer in accordance with Section 30–2–6. Defendant requested one modified uniform jury instruction, based on UJI 14–5173 NMRA 2001, and three non-uniform instructions premised upon the United States Supreme Court decision in *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), which related to justifiable homicide by a police officer. The State does not argue that the requested instructions were incorrect statements of the law.

{12} Defendant asserted that as a commissioned police officer in the line of duty for the LVPD, he was authorized to use deadly force under Section 30–2–6 to apprehend a fleeing felon who had threatened him and Sgt. Marquez with serious harm or deadly force and the jury should have been allowed to consider this defense under proper instructions. Defendant asserts that instructions on this theory specifically applicable to police officers would have allowed him to argue additional and alternative theories of justification for the shooting which went beyond the normal self-defense and defense-of-others theories applicable to the public at large.

{13} The State has never disputed that Defendant was a commissioned police officer and on-duty for the LVPD at the time of the shooting, and that he was justified in pursuing and attempting to apprehend Montoya. However, it argues that *State v. Johnson*, 1998–NMCA–019, 124 N.M. 647, 954 P.2d 79, requires a defendant requesting a justifiable homicide instruction to establish that his conduct satisfied a standard of "objective reasonableness" for the use of the deadly force prior to receiving such an instruction. *Id.* ¶ 13. The State contends that Defendant's actions in shooting at Montoya as he fled, exceeded Defendant's authority under Section 30–2–6 to use deadly force and cannot be considered reasonable as a matter of law. The State dramatized this point to the jury in its closing argument by repeatedly stating that police officers in New Mexico are not allowed to "shoot at a fleeing suspect."

{14} The State also argues that Defendant did not present evidence that he shot Montoya in an attempt to arrest him for committing a felony per Section 30–2–6. Instead, it argues that under Defendant's version of events, the proper instruction was that the killing was justified as occurring in self-defense or defense of another and not "necessarily committed" in order to prevent the escape of a felon. Defendant was granted

the UJI 14–5171 NMRA 2001 self-defense instruction.

{15} The trial judge, persuaded by the State's arguments, refused to instruct the jury on justifiable homicide because sufficient evidence was not presented by Defendant for the court to believe that Defendant's actions could be considered objectively reasonable. At the hearing on Defendant's motion for a new trial, the trial judge also explained that he believed Defendant's theory was self-defense and defense of another and that he had not argued that the killing of Montoya was justifiable homicide.

b. Standard of Review

{16} The trial court's rejection of Defendant's submitted jury instructions is reviewed by this Court de novo. *State v. Lucero,* 1998–NMSC–044, ¶ 5, 126 N.M. 552, 972 P.2d 1143. A "defendant is entitled to a jury instruction on the theory of his case as long as the evidence exists to support it" which is sufficient to allow reasonable minds to differ with respect to all elements of the defense. *State v. Arias,* 115 N.M. 93, 96, 847 P.2d 327, 330 (Ct.App.1993). This is true whether the evidence raising the defense is adduced by the State or by defendant. *State v. Akin,* 75 N.M. 308, 310, 404 P.2d 134, 136 (1965); *State v. Heisler,* 58 N.M. 446, 454, 272 P.2d 660, 665 (1954). "The adequacy of a jury instruction is evaluated in the context of all the instructions given to the jury, in order to determine whether the instruction accurately states the law." *State v. Sosa,* 1997–NMSC–032, ¶ 25, 123 N.M. 564, 943 P.2d 1017.

c. Use of Deadly Force and *Tennessee v. Garner*

{17} The use of deadly force by police officers to prevent the escape of a felony suspect originated in the common law. The common law rule "allowed the use of whatever force was necessary to effect the arrest of a fleeing felon, though not a misdemeanant." *Garner,* 471 U.S. at 12, 105 S.Ct. 1694. Under the common law rule, which New Mexico accepted for much of its history, the reasonableness and necessity of the officer's resort to deadly force was frequently judged solely on the basis of whether the officer could have arrested the suspect without shooting him. *Alaniz v. Funk,* 69 N.M. 164, 166–67, 364 P.2d 1033, 1034 (1961). Under this approach, it made no difference that the felon was nonviolent or that the felon posed no danger to the safety of others.

{18} In *Garner,* the father of Edward Garner, a fifteen-year-old boy who was shot and killed by a police officer while fleeing from the burglary of an unoccupied house, brought a wrongful death action under the Federal Civil Rights Act, 42 U.S.C. § 1983, against the police officer who fired the shot, the police department, as well as others. *Garner,* 471 U.S. at 5, 105 S.Ct. 1694. The shooting occurred after the officer responded to a report of a nighttime burglary and saw Garner running across the backyard of the house to a six-foot-high chain-link fence. *Id.* at 3, 105 S.Ct. 1694. The officer, using a flashlight, saw Garner's face and hands, but saw no sign of a weapon. *Id.* When Garner began to climb over the fence after the officer's warning to halt, the officer shot and mortally wounded him. *Id.* at 4, 105 S.Ct. 1694. The officer testified that if Garner would have successfully scaled the fence he would have escaped capture. *Id.* at 4 n. 3, 105 S.Ct. 1694.

{19} In using deadly force, the officer acted in accordance with a Tennessee statute permitting the use of deadly force to effect the arrest of a felon fleeing from or resisting arrest. *Id.* at 4, 105 S.Ct. 1694. The statute reflected the common law fleeing-felon doctrine. However, the Supreme Court in *Garner* held that a police officer may not use deadly force to apprehend a fleeing felon who does not pose a "significant threat of death or serious physical injury to the officer or others." *Id.* at 3, 105 S.Ct. 1694. The Supreme Court reasoned that apprehension using deadly force is a "seizure" subject to the reasonableness requirement of the Fourth Amendment of the United States Constitution, and that the indiscriminate use of deadly force to prevent escape of all felony suspects is constitutionally impermissible. *Id.* at 7, 105 S.Ct. 1694. Almost all of the states have modified their police deadly force laws and policies in response to *Garner.* *See gen-*

erally "Police Use of Deadly Force: How Courts and Policy–Makers Have Misapplied Tennessee v. Garner." 7 Kan. J.L. & Pub. Pol'y 100 (1998).

{20} The Court explained that in determining whether a deadly-force seizure is reasonable, the suspect's rights under the Fourth Amendment had to be balanced against the government's interests in effective law enforcement. *Garner*, 471 U.S. at 9, 105 S.Ct. 1694. The factors that weigh heavily against the use of deadly force are "[t]he suspect's fundamental interest in his own life," the unmatched "intrusiveness of a seizure by means of deadly force," and "the interest of the individual, and of society, in judicial determination of guilt and punishment," which is frustrated by the use of deadly force. *Id.* The Supreme Court found that these factors outweigh the government's interest in the use or threat of use of deadly force to encourage suspects to submit peacefully to arrest. Thus, "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." *Id.* at 11, 105 S.Ct. 1694. The Court framed the inquiry as one designed to determine "whether the totality of the circumstances justified a particular sort of search or seizure." *Id.* at 8–9, 105 S.Ct. 1694.

{21} While the Court held that "[t]he Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such [unarmed and non-dangerous] fleeing suspects," the Court also held that the statute was not unconstitutional on its face. *Id.* at 11, 105 S.Ct. 1694. The Court stated "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not unconstitutionally unreasonable to prevent escape by using deadly force." *Id.* Thus, it should be clear that under *Garner* the constitutionality of deadly force statutes should not be considered in the abstract; instead, courts should focus on the constitutionality of specific applications of a challenged statute to specific factual circumstances. Finally, *Garner* rejected the felony-misdemeanor distinction as a guide for deciding when deadly force may be used.

{22} In *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), the Court clarified its holding in *Garner* and ruled that excessive force claims brought against police officers are to be analyzed under the "objective reasonableness" standard of the Fourth Amendment. The Court cautioned that the "proper application" of this reasonableness standard "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396, 109 S.Ct. 1865. With these facts and circumstances in mind, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* The Court emphasized that this is an objective standard "without regard to [the actual officer's] underlying intent or motivation." *Id.* at 387, 109 S.Ct. 1865.

d. Section 30–2–6

{23} Section 30–2–6, "Justifiable homicide by public officer or public employee," has evolved in response to the Supreme Court's pronouncements on the use of deadly force by law enforcement officers. (Emphasis omitted.) Specifically, the Legislature added Section 30–2–6(B), in response to *Garner*. *Johnson*, 1998–NMCA–019, ¶ 11, 124 N.M. 647, 954 P.2d 79. Section 30–2–6 provides in pertinent part:

> A. Homicide is justifiable when committed by a public officer or public employee or those acting by their command and in their aid and assistance:
>
> . . . .
>
> (2) when necessarily committed in overcoming actual resistance to the execution of some legal process or to the discharge of any other legal duty;
>
> (3) when necessarily committed in retaking felons who have been rescued or who have escaped or when necessarily committed in arresting felons fleeing from justice; or

(4) when necessarily committed in order to prevent the escape of a felon from any place of lawful custody or confinement.

B. For the purposes of this section, homicide is necessarily committed when a public officer or public employee has probable cause to believe he or another is threatened with serious harm or deadly force while performing those lawful duties described in this section. Whenever feasible, a public officer or employee should give warning prior to using deadly force.

Section 30–2–6(B) requirement that a homicide be "necessarily committed" places a limit on the use of deadly force by law enforcement officers in New Mexico that was envisioned in *Garner*.[1]

{24} In remarkably similar language, the *Garner* court stated:

> Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Garner, 471 U.S. at 11–12, 105 S.Ct. 1694.

{25} Under Section 30–2–6, the crucial consideration is the conduct and dangerousness of the suspect, not the classification of the crime that he or she has committed or is alleged to have committed. It is also apparent, through the inclusion of "probable cause" in Section 30–2–6(B), that the reasonableness of an individual police officer's actions is an objective analysis evaluated from his perspective at the time of the incident and is necessarily a factual inquiry.

{26} We discussed extensively the use of deadly force under Section 30–2–6 in *Johnson*, even though *Johnson* itself involved New Mexico's statute on justifiable homicide by a private citizen, NMSA 1978, § 30–2–7(C) (1963). In *Johnson*, the defendant—a private citizen—shot and killed a man he had observed fleeing from a parking lot where a vehicle had just been burglarized. The defendant never asserted he acted in self-defense. *Johnson*, 1998–NMCA–019, ¶ 2, 124 N.M. 647, 954 P.2d 79. The defendant pled guilty to involuntary manslaughter reserving the right to appeal the district court's refusal to give a justifiable homicide instruction. The instruction would have permitted the jury to consider whether the death of the victim was justified if the defendant was attempting to make a citizen's arrest of a fleeing felon. *Id.* ¶ 3.

{27} This Court upheld the trial judge's denial of the jury instruction on justifiable homicide on the grounds that there was no evidence the defendant could have satisfied the reasonableness standard for use of deadly force by a citizen in the apprehension of a fleeing felon. *Id.* ¶ 28. We noted that the "reasonableness in the use of force is generally, [but not always], a matter for the jury," *id.* ¶ 16, by analogizing the statute in question with Section 30–2–6, and stated that "Defendant's actions, if performed by a police officer, would never be tolerated." *Id.* ¶ 12. We observed that the *Garner* decision had wrought a change in New Mexico law on the use of deadly force, noting that the Supreme Court "required that officers have probable cause to believe that they or others are threatened with serious harm before the use of deadly force could be constitutionally reasonable under the Fourth Amendment." *Johnson*, 1998–NMCA–019, ¶ 8, 124 N.M. 647, 954 P.2d 79.

{28} Similarly, in *Archuleta v. LaCuesta*, 1999–NMCA–113, 128 N.M. 13, 988 P.2d 883, we discussed the issue of the use of deadly force by police officers in the context of a tort action. The case involved a suit for wrongful death, brought under 42 U.S.C. § 1983 (1994) and the State Tort Claims Act, NMSA 1978, §§ 41–4–1 to –27 (1976 as amended through 2001), by the estate of a domestic violence suspect who was shot and killed by a state police officer. *Archuleta*,

1. While Section 30–2–6 speaks of justifiable homicide, we read it as authorizing the use of deadly force by law enforcement officers whether or not the suspect is ultimately killed. *Graham*, 490 U.S. at 395, 109 S.Ct. 1865 ("All claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest . . . of a free citizen should be analyzed under the Fourth Amendment and its '[objective] reasonableness' standard.") (emphasis omitted).

1999–NMCA–113, ¶ 2, 128 N.M. 13, 988 P.2d 883.

{29} In *Archuleta*, this Court stated:

> Whether an officer's [use of deadly force] was reasonable is heavily fact dependent. The reasonableness of the use of deadly force in any particular situation is an objective test from the perspective of the officer on the scene, with the understanding that officers must often make split-second decisions in difficult situations about what force is necessary.

Id. ¶ 8 (citations omitted). We held that the "reasonableness" of the force used in the case involved a factual dispute "surrounding the circumstances immediately connected to the shooting which includes passing on the credibility of witnesses," and should therefore be decided by the jury. *Id.* ¶ 14.

{30} The *Johnson* Court's discussion of Section 30–2–6, despite being dicta, and the *Archuleta* Court's announcements on the use of deadly force provide a framework to evaluate the issue presented in this case.

e. Discussion

{31} The crux of this issue is whether a jury could find that Defendant had probable cause to believe Montoya posed a threat of serious harm or deadly force to him or Sgt. Marquez, and that the use of deadly force was necessary to avert the threat. In order to be entitled to a jury instruction on justifiable homicide, Defendant was required to introduce or identify evidence that would support an argument that he reasonably and objectively believed that Montoya threatened him or Sgt. Marquez with serious physical harm or deadly force. If such evidence was present it was for the jury to decide if Defendant's use of deadly force was reasonable, considering the totality of the circumstances, and therefore constituted justifiable homicide. *See Johnson*, 1998–NMCA–019, ¶ 16, 124 N.M. 647, 954 P.2d 79.

{32} In *State v. Lopez*, 2000–NMSC–003, ¶ 23, 128 N.M. 410, 993 P.2d 727, (quoting *State v. Duarte*, 121 N.M. 553, 556, 915 P.2d 309, 312 (Ct.App.1996)), our Supreme Court clearly stated the standard to be applied by the trial court in ruling whether a request for an instruction on a claim of self-defense or defense of another should be granted. The Court stated:

> "[W]here self-defense is involved in a criminal case and there is any evidence, although slight, to establish [such defense], it is not only proper for the court, but its duty as well, to instruct the jury fully and clearly on all phases of the law on [that] issue." ... However, we interpret this standard to require evidence that is "sufficient to allow reasonable minds to differ as to all elements of the defense." We affirm [*State v.*] *Branchal* [101 N.M. 498, 684 P.2d 1163 (Ct.App.1984)]: a self defense instruction is required "whenever a defendant presents evidence sufficient to allow reasonable minds to differ as to all elements of the defense."

Id. (citations omitted). This is also the standard that should be applied when determining if the jury should be instructed on justifiable homicide by a police officer in accordance with Section 30–2–6. We also note that the identity of the party introducing the evidence, Defendant or the State, is irrelevant. *Akin*, 75 N.M. at 310, 404 P.2d at 136; *Heisler*, 58 N.M. at 454, 272 P.2d at 665. What is important is that the evidence was presented to the jury.

{33} Defendant, a commissioned police officer on duty for the LVPD, was pursuing Montoya with Sgt. Marquez. The prosecution's case, as discussed above, was premised on the theory that Montoya was fleeing the scene in order to evade capture. In fact, the State's closing argument began with the assertion that "[w]e do not shoot at a fleeing suspect" because to do so would be against the law. The State argued that if the physical evidence showed Montoya was not in the process of backing up the Toyota in the direction of Defendant and Sgt. Marquez at the time of the shooting, the jury must convict because under such a scenario Defendant could not have acted in self-defense or defense of another. The State characterized Defendant's theory of self-defense and defense of another as a "backward attack theory" which was not supported by the physical evidence that suggested that Montoya had

cleared the rock wall and had begun to flee down Chavez Street.

{34} Defendant testified that, upon arrival at the intersection of Valley and Chavez Streets, he positioned his police cruiser to execute a "felony stop." He also testified that the Toyota truck began to accelerate in reverse toward the officers and that there was an impact between the two vehicles.

{35} Defendant testified that he was shocked and scared by the driver's actions. Defendant then testified that he drew his weapon, ran up to the side of the truck on the driver's side door, planning to pull the driver out of the truck. Sgt. Marquez instructed Defendant to "stop him, stop him" multiple times. Defendant testified that during this time he lost sight of Sgt. Marquez and that he thought Marquez had exited the police cruiser, had been knocked down and possibly run over and killed or injured. In response, standing an arm's length away from the truck, Defendant testified he fired one round into the truck. After he fired the first round, believing that the truck was coming back to ram them again, he testified he fired two more rounds into the back of the truck. Sgt. Marquez also fired a single shot at the truck.

{36} Defendant testified his belief at the time was that the truck was being used as a deadly weapon to attack him and Sgt. Marquez, that their lives were in danger, and that he was therefore justified in using deadly force. He also testified that his training taught him to use deadly force if necessary in this situation. Sgt. Marquez testified similarly.

{37} Tom Gillespie testified on behalf of Defendant and was qualified as an expert witness in the area of police training, procedures, and the use of deadly force. Mr. Gillespie testified that Defendant's actions in firing his weapon to stop the alleged attack was consistent with his training and the policies and procedures of the LVPD. He also opined that the ramming of the police cruiser by Montoya constituted an aggravated battery on the police officers, a felony under New Mexico law. NMSA 1978, § 30–22–25 (1971)

{38} We hold that Defendant submitted sufficient evidence to warrant a jury instruction on justifiable homicide by a police officer. A reasonable jury, if it believed Defendant's version of the facts, could have concluded that Defendant was justified in using deadly force to protect himself and his partner. It is important to note that this entire incident began and ended very rapidly and the testimony contains many factual disputes that turn on the credibility accorded the witnesses. In our view, the reasonableness of Defendant's actions in using deadly force was for the jury to decide under instructions reflecting the provision of Section 30–2–6(B). *Archuleta*, 1999 NMCA 113, ¶ 14, 128 N.M. 13, 988 P.2d 883.

{39} The State reminds us that the jury was given UJI 14–5171, the general self-defense instruction and argues that it adequately addressed Defendant's concerns, so that refusing the justifiable homicide instruction was harmless error. We believe that Section 30–2–6(B) is intended to provide police officers a wider scope of privilege than the general public with regard to the use of deadly force. *Garner* and Section 30–2–6(B) do not work to make police officer justifiable homicide equal to or indistinguishable from normal self-defense. As detailed in Section 30–2–6(A), a police officer may be legally justified in using deadly force in a variety of situations that would not apply to self-defense and the ordinary citizen. Police officer justifiable homicide is sufficiently different from self-defense or defense of others that giving UJI 14–5171 does not render harmless the refusal to give Defendant's instruction.

{40} To support an instruction on ordinary self-defense, there must be evidence that defendant was put in fear by an apparent danger of immediate death or great bodily harm, that the killing resulted from that fear, and that defendant acted as a reasonable person would act under those circumstances. UJI 14–5171. The requirement for the immediacy of the threat that is necessary for self-defense or defense of others does not appear in Section 30–2–6. Further, Section 30–2–6(B) states that the public officer may use deadly force if he has "probable cause to believe he or another is threatened with seri-

ous harm" and differs from the requirement under UJI 14–5171 that an individual face "apparent danger of immediate death or great bodily harm." It is unclear how temporally proximate and severe the suspect's threatening actions must be to justify the use of deadly force by a police officer. And, as previously stated, this factual and situational inquiry explores the definition of "reasonableness" under the Fourth Amendment and is generally, but not always, a matter for the jury. *Johnson*, 1998–NMCA–019, ¶ 16, 124 N.M. 647, 954 P.2d 79.

{41} For example, one could foresee situations in which a police officer, even though not himself in immediate danger, might be justified in using deadly force to prevent a dangerous felon from evading capture and threatening serious harm to others outside the immediate scope of activity. A police officer shoulders that responsibility as part of his duty to protect the public. A private citizen's privilege, on the other hand, would be more narrowly contained to the immediate threat posed to the citizen and others in the immediate vicinity. This is one way in which the ordinary self-defense instruction simply does not convey the breadth of the use-of-deadly-force privilege that accompanies a police officer.

{42} Another example lies in Instruction 17 given by the Court at the request of the State. It states,

> Self-defense is not available to the defendant if he was the aggressor unless;
>
> (1) The defendant was using force which would not ordinarily create a substantial risk of death or great bodily harm; and
>
> (2) Abelino Montoya responded with force which would ordinarily create a substantial risk of death or great bodily harm.

Private citizens ordinarily may not be the aggressor and then claim self-defense. Police officers, however, sometimes may have a lawful duty to be aggressors in the course of fulfilling their responsibilities to the public. It very much depends on the facts and circumstances of a given case. Instruction 17, while appropriate to ordinary self-defense, creates a fatal inconsistency as applied to the privilege of police officers. That is one more reason why the instruction on self-defense falls short of defining the privilege available under law to police officers.

{43} Given these differences, we find it curious that the trial court could conclude that there was sufficient evidence to support a jury instruction on self-defense and defense of another, with its heightened requirements that the danger being threatened be grievous and immediate, but not enough to support an instruction on justifiable homicide. To the contrary, there may be situations of justifiable homicide applicable to a police officer that would not fit comfortably within the confines of ordinary self-defense and defense of another as applied to the public at large.

{44} We recognize that in this particular case the *only* harm allegedly threatened to Defendant and his partner was "immediate." That is, Defendant was not claiming a privilege to use deadly force to defend against any later, non-immediate threat. Thus, it might be argued that in this particular case the justifiable homicide instruction, as applied, was no broader than the ordinary self-defense instruction.

{45} We are not persuaded, however, that the error in rejecting Defendant's instruction can be so easily explained away. Either expressly or tacitly, rejection of the justifiable homicide instruction stripped Defendant of a defense uniquely applicable to police officers and others similarly situated. That rejection placed Defendant in the smaller shoes of an ordinary citizen. Yet the circumstances in which Defendant found himself and which provoked his shooting of Montoya, were anything but the circumstances of an ordinary citizen.

{46} Whether reversal is required is a close question. The error was preserved and the Court as a whole agrees that there is evidence supporting the justifiable homicide instruction. Thus, Defendant was entitled to the instruction. *State v. Rubio*, 1999–NMCA–018, ¶ 18, 126 N.M. 579, 973 P.2d 256. There is also an arguable view of the evidence which supports the argument that in this particular case the correct instruction would not add anything material to the defense. However, we cannot say as a matter of law that the evidence could not support a

jury finding of justifiable homicide. *See State v. Orosco,* 113 N.M. 780, 783–84, 833 P.2d 1146, 1149–51 (1992) (failing to instruct on an element of a case is not reversible error if there was no dispute that the element was established by the evidence). Thus, we cannot say the error was harmless beyond a reasonable doubt. *Cf. State v. Pettigrew,* 116 N.M. 135, 142, 860 P.2d 777, 784 (Ct.App.1993) (even constitutional error does not require reversal if it was harmless beyond a reasonable doubt). In such close circumstances, where the error involves the central issue in the case, it is the better policy to require a new trial under the correct instruction. Requiring a new trial obviates any need or opportunity for us to speculate as to how the jury might have resolved—or will resolve—the case under the correct instruction. Reversal also honors prior authorities requiring reversal for error in jury instructions where there is the slightest evidence of prejudice. *Kennedy v. Dexter Consol. Sch.,* 2000–NMSC–025, ¶ 27, 129 N.M. 436, 10 P.3d 115; *Bachicha v. Lewis,* 105 N.M. 726, 729, 737 P.2d 85, 88 (Ct.App.1987).

{47} In reaching our conclusion, we do not retreat from our holding in *Johnson.* In *Johnson,* the defendant submitted no evidence that he acted in self-defense or that he or anyone else was in any way physically threatened by the victim in that case. The circumstances in *Johnson* would not have supported an instruction on justifiable homicide if the shooting had been done by a police officer. *Id.* ¶ 2. Defendant has presented evidence that at a certain point the suspect presented a real threat to him and others. Whether that threat had dissipated sufficiently by the time he fired the fatal rounds to make his use of deadly force unreasonable was for the jury to decide.

{48} Finally, we note that UJI 14–5173 has not been modified to meet the requirements of Section 30–2–6(B) as amended in 1989, and does not reflect the current law of New Mexico on justifiable homicide by a public officer or public employee. *State v. Wilson,* 116 N.M. 793, 796, 867 P.2d 1175, 1178 (1994) (holding that this Court "has authority to question uniform jury instructions" that have been adopted by the Supreme Court, and may "amend, modify, or abolish [an erroneous] instruction" if the instruction has not been previously challenged). As a service to the bar and a suggestion to the parties, UJI 14–5173 could be modified as follows:

14–5173. Justifiable homicide; public officer or employee.

Evidence has been presented that the killing of _____ (name of victim) was justifiable homicide. A homicide is justifiable when it is necessarily committed by a public officer or public employee while

[overcoming the actual resistance of _____ (name of victim) to the execution of _____ (describe legal process)]

[overcoming the actual resistance of _____ (name of victim) to the discharge of _____ (describe other legal duty)]

[retaking _____ (name of victim) (name of person), who committed _____ (name felony) and who had (been rescued) (escaped)]

[arresting _____ (name of victim) (name of person) who committed _____ (name felony) and was fleeing from justice]

[attempting to prevent the escape from _____ (name place of lawful custody or confinement) by _____ (name of victim) (name of person) who committed _____ (name felony)].

Homicide is necessarily committed when a public officer or public employee has probable cause to believe he or another is threatened with serious harm or deadly force while performing those lawful duties described above. For there to be probable cause, the facts must be such as would warrant a belief by a reasonable officer based upon the expertise and experience of the officer. [When feasible, a public officer or employee should give warning prior to using deadly force.]

The burden is on the state to prove beyond a reasonable doubt that the killing was not justifiable. If you have reasonable doubt as to whether the killing was justifiable, you must find the defendant not guilty.

III. CHANGE OF VENUE

{49} Defendant moved for a change of venue pursuant to NMSA 1978, § 38-3-3(A)(2)(c) (1965), arguing that there had been extensive and prejudicial media coverage of the shooting which created an inordinate amount of public excitement and prejudice towards Defendant. After conducting an evidentiary hearing on the motion, the trial court denied the motion, but approved a supplemental jury questionnaire to gauge the jury panel's susceptibility to the media, prejudgment of the case, and bias. The trial court also reserved the right to grant the motion after voir dire. Defendant renewed his motion after voir dire and that motion was also denied. Defendant argues that the trial court abused its discretion in denying the motion and thereby violated his right to a fair trial.

{50} At the hearing, seven witnesses testified in support of the motion. All of the witnesses were community leaders or persons with direct involvement in the local media. Most of them felt it unlikely that the officers could receive a fair trial in San Miguel County. Multiple exhibits, including articles from the Las Vegas Daily Optic, the Albuquerque Journal and Journal North, the Santa Fe New Mexican and the Santa Fe Reporter, were admitted. Videotapes from three television stations, KOB, KOAT and KRQE, affiliated with the major networks were also presented as evidence.

{51} After reviewing the evidence, the trial court found that all but a few of the articles were neutral, unbiased, unemotional, and not inflammatory. The trial court also observed that most of the articles and on-air news reports had appeared in February and March of 1998 right after the shooting, and nineteen months before trial.

{52} There were one-hundred-thirty-four individuals on the available jury panel. One-hundred-thirteen individuals returned the supplemental questionnaires. Thirty-nine were determined to have prejudged the case and were excused from service based on their responses to the questionnaires. Twenty-one failed to return the questionnaire and were also excused from service. Sixty-nine persons appeared for voir dire. Five of those people professed a bias and were excused for cause.

{53} After voir dire, a jury of twelve persons and two alternates were selected to serve. None of the jurors selected for the petit jury indicated that they had any prejudice against Defendant, and would be anything but fair and impartial.

{54} The New Mexico constitution guarantees a criminal defendant a trial before an impartial jury. N.M. Const. Art. II, § 14; *see also State v. House*, 1999-NMSC-014, ¶ 26, 127 N.M. 151, 978 P.2d 967. To this end, Section 38-3-3 grants an accused the right to seek a change of venue. "In a case in which there [has] been no preceding changes of venue, this right to a venue change is generally mandatory and must be granted. . . ." *House*, 1999-NMSC-014, ¶ 29, 127 N.M. 151, 978 P.2d 967. However, if the trial court determines that evidence in support of the motion is required, it may hold an evidentiary hearing. Upon the need for a evidentiary hearing, the "first change of venue ceases to be mandatory and is left to the court's discretion." *Id.* (citing *State v. Turner*, 90 N.M. 79, 81, 559 P.2d 1206, 1208 (Ct.App.1976)). The trial court's discretion in granting or denying a change of venue is "broad and will not be disturbed on appeal unless a clear abuse of that discretion can be demonstrated." *House*, 1999-NMSC-014, ¶ 31, 127 N.M. 151, 978 P.2d 967. "The burden of establishing an abuse of discretion is borne by the party that opposes the trial court's venue decision." *Id.* In determining if the trial court abused its discretion, we examine whether its decision is supported by substantial evidence in the record. *Id.* ¶ 32.

{55} In this case, the trial court heard evidence on the presumed prejudice of the residents of San Miguel County as a result of the surrounding publicity. Presumed prejudice makes inferences about the effect of publicity on the community as a whole, while actual prejudice is based upon direct evidence of bias in the minds of the individual prospective jurors. In *House*, our Supreme Court discussed the nature of the inquiry into presumed prejudice. *Id.* ¶ 46. A "change of venue should be granted if

evidence shows that the community is so saturated with inflammatory publicity about the crime that it must be presumed that the trial proceedings are tainted." *Id.*

{56} Upon hearing and viewing the evidence presented by Defendant at the hearing on his motion to change venue, the trial court was not persuaded that the news coverage of this case had been so biased and recent that an impartial jury could not be seated within San Miguel County and chose to conduct voir dire of prospective jurors. As with all aspects of a venue change, the choice of waiting until voir dire before granting or denying a motion to change venue rests with the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *Id.* ¶ 55. Defendant has not carried his burden to establish that the trial court's decision to wait until voir dire before granting or denying his motion for change of venue was an abuse of discretion.

{57} The trial court's decision to conduct a voir dire of prospective jurors was a decision to conduct a direct examination of the actual prejudices of prospective jurors to establish whether there was such "widespread and fixed prejudice within the jury pool that a fair trial in that venue would be impossible." *Id.* ¶ 46. Defendant cites no such evidence and instead argues that the "mere possibility of undisclosed, actual juror prejudice is a strong argument in favor of changing venue." Defendant cites *State v. Shawan,* 77 N.M. 354, 358, 423 P.2d 39, 42 (1967), and asserts that "[t]o expect a juror to confess prejudice is not always a reliable practice." "We [are] mindful that it is the role of the trial court, and not the appellate court, to weigh the evidence and determine the credibility of witnesses." *House,* 1999-NMSC-014, ¶ 33, 127 N.M. 151, 978 P.2d 967. By failing to cite any evidence that the petit jury's opinions about the case were so fixed that jurors would be unlikely to lay aside their preconceived notions and base their judgments exclusively on the evidence presented at trial, Defendant has not carried his burden that the trial court's decision to deny a change of venue was an abuse of discretion. Any future change of venue shall remain at the discretion of the trial court.

IV. EXCUSAL OF THE TRIAL JUDGE

{58} Defendant filed a peremptory notice of excusal, pursuant to Rule 5-106 NMRA 2001, to excuse the trial judge from hearing this case. The trial court refused to honor the notice of excusal, stating that it was untimely because Defendant previously requested the court to exercise its discretion in the case. Defendant argues that his notice was timely because it was filed within ten days of the date of his arraignment as required by Rule 5-106(C).

{59} The issue whether a party's peremptory disqualification of a trial judge is timely under Rule 5-106 presents a mixed question of historical facts and the application of the law to those facts. The court's findings as to historical facts are reviewed to determine whether they are supported by substantial evidence, and the application of law to those facts is reviewed de novo. *See State v. Attaway,* 117 N.M. 141, 144, 870 P.2d 103, 106 (1994).

{60} On October 14, 1998, agent Frank Jacoby of the New Mexico State Police filed a Criminal Complaint charging Defendant with numerous crimes arising from the shooting of Montoya, and the shooting at Rubio. Judge Eugenio S. Mathis was assigned to the case and set the preliminary hearing for December 14, 1998. On December 14, 1998, Defendant filed a motion to dismiss Counts VI and VII of the complaint. On January 28, 1999, Judge Mathis entered an order binding Defendant over on six of the charged offenses, and he dismissed Count II, Conspiracy to Commit Second Degree Murder. On that same day the Special Prosecutor filed the Criminal Information. Defendant's arraignment was set for February 18, 1999. On February 16, 1999, Defendant filed his Notice of Excusal under Rule 5-106.

{61} Under these facts, Defendant's argument that his notice of excusal was timely under Rule 5-106, because he filed it within ten days of the date of his arraignment of February 18, 1999, is without merit. It is well-settled in New Mexico that a party may not excuse a judge after the party has

requested that judge to perform a discretionary act. *See JMB Retail Props. Co. v. Eastburn*, 114 N.M. 115, 118, 835 P.2d 831, 834 (1992). Subsection A of Rule 5–106 does not set any time limit on this rule. Specifically, subsection A does not state it applies only if the party has requested the judge to perform a discretionary act during the period within which a notice of excusal must be filed under subsection C of Rule 5–106 to be considered timely.

{62} In our view, the time limits set forth in subsection C are subject to and conditioned on the rule of subsection A. In other words a notice of excusal is timely if filed within the period set forth in subsection C unless the party has asked the court to perform a discretionary act at some time before the notice is filed.

{63} In this case the preliminary hearing was conducted before the judge who had been assigned to hear the case, Judge Mathis. Defendant, on December 14, 1998, asked the judge, before whom that same matter was to be tried, to dismiss two counts of the criminal complaint. Thus, Defendant asked the trial court to exercise its discretion on a material matter in this case and the notice of excusal was untimely despite being filed within ten days of his arraignment.

V. JURY INSTRUCTIONS FOR SHOOTING AT A MOTOR VEHICLE

{64} Defendant argues that the trial court erred when it refused to give the jury instruction he tendered addressing shooting at a motor vehicle contrary to NMSA 1978, § 30–3–8 (1993). Specifically, Defendant argues that the court erred because the instruction given omitted the element found in subsection C of Section 30–3–8 that provides that the section does not apply to a law enforcement officer discharging a firearm in the lawful discharge of his duties.

{65} In this case, the trial court gave the instruction that was tendered by Defendant. The instruction tendered by Defendant did not include a modified version of subsection four of UJI 14–343 NMRA 2001 that reads "The Defendant was not a law enforcement officer engaged in the lawful performance of duty." Instead the instruction tendered by Defendant and given by the court modified UJI 14–343 to include as an element that the State was required to prove that "the Defendant was not acting in self-defense or defense of others."

{66} When a defendant does not object to a jury instruction as given, we review only for fundamental error. *State v. Cunningham*, 2000–NMSC–009, ¶ 8, 128 N.M. 711, 998 P.2d 176. Because we are remanding for a new trial, we need not inquire if the tendered jury instruction rises to the level of fundamental error. However, in the event of a new trial on this count, the jury should be instructed on the element found in subsection C of Section 30–3–8.

VI. SUFFICIENCY OF THE EVIDENCE TO SUPPORT CONVICTION FOR VOLUNTARY MANSLAUGHTER AND AGGRAVATED BATTERY

{67} Defendant contends that no reasonable jury could have reasonably determined that the shooting was not in self-defense or the defense of Sgt. Marquez and as a result his conviction is not based on sufficient evidence. In reviewing a challenge to the sufficiency of the evidence to support a criminal conviction, we review the record to determine whether substantial evidence, either direct or circumstantial, exists such that a rational jury could have found proof beyond a reasonable doubt with respect to every element of the charged offense. *State v. Ungarten*, 115 N.M. 607, 609, 856 P.2d 569, 571 (Ct.App.1993). In applying this standard we view the evidence in a light most favorable to the State and resolve all conflicts and indulge all permissible inferences in favor of upholding the verdict of the jury. *Id.* We have reviewed the record and find there was substantial evidence to sustain Defendant's convictions—even under proper instructions—for voluntary manslaughter, and aggravated assault with a deadly weapon, and shooting at a motor vehicle resulting in injury. *See State v. Foxen*, 2001–NMCA–061, ¶ 18, 130 N.M. 670, 29 P.3d 1071.

VII. CONCLUSION

{68} The judgment and sentence of the district court is reversed and the matter is remanded with instructions that Defendant be granted a new trial.

{69} IT IS SO ORDERED.

WE CONCUR: RICHARD C. BOSSON, Chief Judge.

JAMES J. WECHSLER, Judge, (concurring in part and dissenting in part).

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

{70} I agree that there is a view of the evidence such that Defendant could construct a defense of justifiable homicide. However, I do not believe that a jury instruction on justifiable homicide would have made a material difference in this case. With that belief, I respectfully dissent from the majority's holding reversing and remanding for a new trial on the voluntary manslaughter and aggravated assault with a deadly weapon charges.

{71} The defense of justifiable homicide permits a law enforcement officer to use deadly force to arrest a fleeing felon when the officer has probable cause to believe that the officer or another is threatened with serious harm or deadly force. Section 30–2–6. Defendant was trying to stop Abelino Montoya, there was testimony that Mr. Montoya had committed a felony, and Defendant testified that he used deadly force because he believed that Mr. Montoya was attacking Sergeant Marquez and himself. The issue of whether Mr. Montoya was fleeing at the time was an issue of fact for the jury. On this basis, Defendant was entitled to the justifiable homicide instruction. *State v. Nieto,* 2000–NMSC–031, ¶ 15, 129 N.M. 688, 12 P.3d 442 (stating that a defendant is entitled to have the jury instructed on his theory of the case if supported by the evidence).

{72} However, the failure to give the instruction is not reversible error in the absence of prejudice. *State v. Ho'o,* 99 N.M. 140, 145, 654 P.2d 1040, 1045 (Ct.App.1982); *State v. Ramos,* 116 N.M. 123, 130, 860 P.2d 765, 772 (Ct.App.1993) (stating that a defendant must show prejudice as a result of rejecting proffered instruction to establish error).

{73} Defendant fairly raised the question of whether he acted to protect Sergeant Marquez or himself. He testified at trial that he placed his car in a position to block Mr. Montoya's truck so that he could execute a "felony-stop." He was very clear in his testimony that the truck reversed twice toward his car. He testified that he believed that the truck was coming back to hit him once again when he fired his second and third shots to the back of the truck. He was specific in his testimony that he believed at the time that Mr. Montoya was attacking both Sergeant Marquez and him with the truck such that his use of deadly force was justified. Sergeant Marquez testified that he fell out of the car as the truck pushed the car backward. He said that he saw the truck's tires coming at him and he fired because he feared his life was in danger.

{74} Defendant's testimony supported instructions on self-defense and defense of another, which the jury received. With these instructions, the jury was instructed that if Defendant believed that he or Sergeant Marquez was in immediate danger of death or great bodily harm, and that Defendant shot Mr. Montoya to prevent the death or great bodily harm and acted as a reasonable person in the same circumstances would have, the jury should find Defendant not guilty. UJI 14–5171, UJI 14–5172 NMRA 2001. Defendant does not contend that there is any significant difference in this case between these requirements and the requirements of justifiable homicide that an officer have probable cause to believe the officer or another is threatened with serious harm or deadly force. Faced squarely with this determination, the jury concluded that Defendant did not act in self-defense or defense of another.

{75} I agree with the majority that the defense of justifiable homicide is broader in the general sense than self-defense or defense of another. It is uniquely available to law enforcement officers who may have to be aggressors in their protection of the public and whom we do not want to handicap in the performance of their lawful duties.

{76} As the majority points out, a justifiable homicide defense embraces more than the immediate situation addressed by self-defense or defense of another. In justifiable homicide, an officer may indeed use deadly force to prevent the escape of a fleeing felon who is a threat of serious harm or deadly force to other persons who are not at the flight scene. But, most significantly, there were no material issues of such threats of harm in this case. Defendant testified that he acted to prevent the immediate harm to himself or Sergeant Marquez. Tom Gillespie, who testified on Defendant's behalf as an expert on police training, procedure, and the use of force, presented testimony that Defendant acted in accordance with his training when Defendant thought the truck was going to come back to him. But, Mr. Gillespie did not testify that the circumstances justified the use of deadly force to avoid harm to unidentified persons or any person other than Defendant or Sergeant Marquez. Thus, although I agree that the defense of justifiable homicide could, under certain circumstances, permit the use of deadly force for the protection of the public even if an officer was not acting under an immediate threat of harm that could justify self-defense or defense of another, such issues were not material ones in this case.

{77} Moreover, the jury was entitled to consider Defendant's position as a law enforcement officer. In addition to the elements concerning the reasons for a defendant's actions, self-defense and defense of another require that a defendant act as would a reasonable person under the same circumstances. UJI 14–5171, 5172. A person under the same circumstances in this case is a law enforcement officer. Defendant presented evidence, including an expert witness, and argued that he acted as a reasonable law enforcement officer under the circumstances. As a result, I do not believe there was prejudice in this case because the self-defense and defense of others defenses required the jury to address all the elements essential to Defendant's defenses on the evidence adduced at trial, including justifiable homicide.

{78} Defendant contends that he was prejudiced by his inability to counter the State's statements to the jury about the illegality of shooting a fleeing suspect. However, although Defendant moved for a new trial based on these statements, he did not, as he could have, object to them during argument. *See State v. Carmona*, 84 N.M. 119, 121, 500 P.2d 204, 206 (Ct.App.1972) ("Objections made after the close of the district attorney's argument came too late in the day."). In addition, Defendant testified that he did not act in any such manner.

{79} Nor does Jury Instruction No. 17 concerning the limitation of self-defense based on who was the aggressor, which was given by the court, indicate prejudice to Defendant. Under Defendant's theory of the case, he was not the aggressor. Jury Instruction No. 17 did not limit self-defense, even if Defendant was the aggressor, if (1) Defendant "was using force which would not ordinarily create a substantial risk of death or great bodily harm; and" (2) "Abelino Montoya responded with force which would ordinarily create a substantial risk of death or great bodily harm." The first element was not an issue in this case. The State did not argue that Defendant used force as an aggressor that would ordinarily create a risk of death or great bodily harm. The second element of the instruction was not a factor because, under Defendant's theory, it was necessary that the jury find that Mr. Montoya acted essentially with the same force required under the second element to support a justifiable homicide defense. Therefore, while it is true, as the majority states, that a justifiable homicide defense is broader than self-defense because it enables an officer to argue, as a private citizen may not, that the officer was initially the aggressor, but then acted in self-defense, there is no inconsistency when the defense of justifiable homicide is applied to the facts as argued in this case.

{80} Defendant is entitled to a fair trial, not a perfect one. *State v. Allen*, 2000–NMSC–002, ¶ 95, 128 N.M. 482, 994 P.2d 728. Defendant raised a defense based upon protecting Sergeant Marquez and himself. He was entitled to raise this defense by self-defense and defense of another as

well as justifiable homicide. Generally, the justifiable homicide instruction states the defense for a law enforcement officer in a broader manner such that arguments are available to an officer that are not permissible for an ordinary citizen. However, in the circumstances of this case, in which the essential issues involved Defendant's actions in response to the immediacy of a threat to himself and Sergeant Marquez, the broader arguments available under the justifiable homicide defense were immaterial. I do not believe that Defendant was prejudiced by the failure of the court to provide a justifiable homicide instruction.

{81} I concur in all other aspects of the majority's opinion and would, therefore, affirm Defendant's conviction of voluntary manslaughter and aggravated assault with a deadly weapon and address Defendant's argument concerning his conviction of shooting at a motor vehicle resulting in injury.

2002-NMSC-005

42 P.3d 814

STATE of New Mexico,
Plaintiff–Appellee,

v.

Chris TRUJILLO, Defendant–Appellant.

No. 26,108.

Supreme Court of New Mexico.

Feb. 5, 2002.

Rehearing Denied March 19, 2002.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Freedman, Boyd, Daniels, Hollander, Goldberg & Cline, P.A., Lisa N. Cassidy, Albuquerque, NM, Phyllis H. Subin, Chief Public Defender, Nancy M. Hewitt, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

Patricia A. Madrid, Attorney General, M. Anne Kelly, Assistant Attorney General, Santa Fe, NM, for appellee.

OPINION

BACA, Justice.

{1} Defendant Chris Trujillo was convicted of first-degree depraved-mind murder, conspiracy to commit first-degree depraved-mind murder, aggravated assault, conspiracy to commit aggravated battery, conspiracy to commit shooting at a dwelling or occupied building (great bodily harm), conspiracy to commit shooting at a dwelling or occupied building (resulting in injury), shooting at a dwelling or occupied building (no injury), and conspiracy to commit shooting at a dwelling or occupied building (no injury).[1] The jury found Defendant not guilty of aggravated battery, aggravated assault, shooting at a dwelling or occupied building (great bodily injury), and shooting at a dwelling or occupied building (resulting in injury).

{2} Pursuant to Rule 12–102(A)(1) NMRA 2002, Defendant raises the following issues on appeal: (1) the admission of the tape and transcript of Joseph Ortiz's out-of-court statement violated Defendant's constitutional right to confrontation and due process because it was inadmissible impeachment and hearsay evidence; (2) his conviction for first-degree depraved-mind murder violated due process of law because sufficient evidence did not support the conviction on any theory; (3) Defendant was convicted of a crime that does not exist—conspiracy to commit depraved-mind murder; (4) there was no evidence that Defendant shot at a dwelling or occupied building; (5) Defendant's trial counsel's performance constituted ineffective assistance of counsel; (6) the prosecutor's acts of misconduct distorted the evidence on the issue of identification, depriving Defendant of due process and a fair trial; (7) the conspiracy charges and Defendant's convictions violate the Double Jeopardy Clause because there is no evidence of any agreement or agreements to support separate charges; (8) the above constitute cumulative error that denied Defendant due process and a fair trial; and (9) Defendant's sentence is disproportionate and in violation of the state and federal constitutional prohibitions against cruel and unusual punishment. We affirm Defendant's convictions for first-degree depraved-mind murder and conspiracy to commit aggravated battery. We vacate Defendant's conviction for conspiracy to commit depraved-mind murder and reverse Defendant's convictions for conspiracy to commit shooting at a dwelling or occupied building (great bodily harm), conspiracy to commit shooting at a dwelling or occupied building (resulting in injury), shooting at a dwelling or occupied building (no

1. Pursuant to NMSA 1978, § 30–2–1(A)(3) (1994) (first-degree depraved-mind murder); § 30–2–1(A)(3) and NMSA 1978, § 30–28–2(B)(1) (1979) (conspiracy to commit first-degree depraved-mind murder); NMSA 1978, § 30–3–2(A) (1963) and NMSA 1978, § 31–18–16 (1993) (aggravated assault); NMSA 1978, §§ 30–3–5(A) & (C) (1969) and NMSA 1978, § 30–28–2(B)(3) (1979) (conspiracy to commit aggravated battery); NMSA 1978, § 30–3–8(A) (1993) and NMSA 1978, § 30–28–2(B)(2) (1979) (conspiracy to commit shooting at a dwelling or occupied building (great bodily harm)); § 30–3–8(A) and § 30–28–2(B)(3) (conspiracy to commit shooting at a dwelling or occupied building (resulting in injury)); § 30–3–8 (shooting at a dwelling or occupied building (no injury)); and § 30–3–8(A) and § 30–28–2(B)(3) (conspiracy to commit shooting at a dwelling or occupied building (no injury)).

injury), and conspiracy to commit shooting at a dwelling or occupied building (no injury).

I.

{3} On July 3, 1997, Defendant and Charlie Allison were outside on a second-floor apartment balcony in the Barelas neighborhood of Albuquerque when they became involved in an argument with four men located at ground level: Joseph Ortiz, Juan Ortega, Jesus Canas, and Javier Mendez. As a result of this argument, shots were fired from the upstairs balcony at a downward angle, killing Mendez and wounding Canas. The State introduced evidence that Defendant and Allison were members of the Barelas gang, and that Ortega, Canas, and Mendez were members of a rival gang, the Juaritos Maravilla.

{4} Ortiz, Allison's cousin, was a former Barelas gang member who had been "ranked out" and was apparently no longer welcome in the area. He testified that he had planned to meet up with Mendez at the apartments on the day of the shooting and that soon after he arrived he heard an argument and gunshots. Shortly after the shots were fired, Ortiz ran after Mendez and found him lying face down in the alley. However, Ortiz apparently could not recall more specific details of the shooting, including who fired the gun. As a result, the prosecutor played the tape of an interview between Ortiz and Detective Shawn conducted a few hours after Mendez was killed. In that interview Ortiz stated that he did not recognize the shooters but described them as a "little guy" wearing light blue jeans and a striped shirt, presumably Defendant, and a "big guy" wearing black jeans and a black t-shirt, presumably Allison. According to Ortiz, even though the bigger guy asked for the gun, the little guy did not want to give it to him, telling the four down below, "You guys think I'm joking," before he began shooting.

{5} Ortega testified that someone on the balcony asked the four men what they were doing in the Barelas neighborhood and that Mendez responded, "We could be anywhere we want, Juaritos." Immediately thereafter shots were fired down at them from the balcony. Ortega stated that Allison was the original shooter, firing two or three times at Mendez, and then Defendant took the gun and shot at Canas and Ortega. On the night of the shooting, Ortega identified Defendant as one of the shooters from a photo array shown to him by Detective Shawn. Ortega again identified Defendant at. trial as the second shooter.

{6} Detective Doug Shawn, the officer assigned to the case, testified that he interviewed several eyewitnesses to the shooting, all of whom identified Defendant as one of the shooters and indicated that only one gun had been used. Detective Shawn stated that on the night of the shooting Ortega identified Defendant as one of the shooters from a photo lineup and that he recorded this identification. He also testified that Ortiz identified Defendant as one of the shooters from a photo lineup as well but refused to have his identification recorded.

II.

{7} Defendant was tried, convicted, and sentenced for first-degree murder as a serious youthful offender pursuant to NMSA 1978, § 31–18–15.3(D) (1993), which allows a district court to "sentence the offender to less than, but not exceeding, the mandatory term for an adult." NMSA 1978, § 31–18–14(A) (1993) grants the district court discretion in sentencing minors who have been convicted of a capital felony: "[I]f the defendant has not reached the age of majority at the time of the commission of the capital felony for which he was convicted, he *may be* sentenced to life imprisonment but shall not be punished by death." (Emphasis added.) Exercising this discretion, the trial court sentenced Defendant to a "term of THIRTY (30) YEARS, BUT NOT LIFE" for his first-degree murder conviction. The trial court also provided that "[i]t is this Court's intention that the Defendant be eligible for good time credit as to the sentence imposed." (Emphasis omitted.) Defendant invoked this Court's mandatory appellate jurisdiction based on his first-degree murder conviction and because he was sentenced to thirty years in prison.

{8} This Court's mandatory appellate jurisdiction is not based on a prison sentence to a term of years, nor is it based on a first-degree murder conviction. Our mandatory appellate jurisdiction is constitutional and is limited to "[a]ppeals from a judgment of the district court imposing a sentence of death or life imprisonment." N.M. Const. art. VI, § 2. This Constitutional provision is buttressed by Rule 12–102(A)(1) and NMSA 1978, § 34–5–8(A)(3) (1983) which reiterate this limitation to our jurisdiction. Rule 12–102(A)(1) provides that "appeals from the district courts in which a sentence of death or *life imprisonment* has been imposed" shall be taken to the Supreme Court. Section 34–5–8(A)(3) indicates that the Court of Appeals has appellate jurisdiction over criminal actions, "except those in which a judgment of the district court imposes a sentence of death or *life imprisonment.*" (Emphasis added.) While a life sentence has never been interpreted to mean a sentence to imprisonment for the duration of the defendant's natural life, it has been interpreted to mean thirty years of imprisonment before the possibility of parole or reduction of sentence through good time credits. *See Martinez v. State,* 108 N.M. 382, 383, 772 P.2d 1305, 1306 (1989). Defendant in this case was sentenced to thirty years of imprisonment, with the judge explicitly providing that he be eligible for good time credit. This case raises the unique jurisdictional issue of whether a serious youthful offender convicted of first-degree murder is allowed to invoke our mandatory appellate jurisdiction even though he is sentenced to less than life imprisonment due to the discretion afforded district court judges when sentencing serious youthful offenders convicted of a capital felony.

{9} We conclude that serious youthful offenders convicted of first-degree murder shall be allowed to invoke this Court's mandatory appellate jurisdiction under Article VI, Section 2 of the New Mexico Constitution and Rule 12–102(A)(1). In New Mexico, "[w]hoever commits murder in the first degree is guilty of a capital felony." Section 30–2–1. "When a defendant has been convicted of a capital felony, he shall be punished by life imprisonment or death." Section 31–18–14(A). Thus, under our law, adults convicted of first-degree murder may appeal directly to the Supreme Court, as of right, because they will always be sentenced to life imprisonment or death, while it appears juvenile offenders convicted of first-degree murder may not be able to appeal their convictions directly to the Supreme Court because the trial court has discretion to sentence them to less than a life sentence. From the onset of New Mexico jurisprudence, first-degree murder convictions have been appealed directly to this Court, and even after the creation of the Court of Appeals, this Court retained this crucial area of jurisdiction. We have developed the entire body of New Mexico case law for first-degree murder cases, and it would only create confusion and inconsistency for the rare case of a serious youthful offender convicted of first-degree murder but sentenced to less than life imprisonment to proceed first to the Court of Appeals when all other first-degree cases proceed directly to this Court. It is unlikely that either the drafters of Article VI, Section 2 of the New Mexico Constitution, or this Court when it adopted Rule 12–102(A)(1), considered, or even foresaw, this issue when adopting the language limiting our mandatory appellate jurisdiction for criminal appeals to only those "[a]ppeals from a judgment of the district court imposing a sentence of death or life imprisonment." N.M. Const. art. VI, § 2. It makes little sense to allow adults convicted of first-degree murder to appeal directly to this Court, but to force juveniles convicted of the same crime to first appeal to the Court of Appeals.

{10} " 'It is the duty of this court to interpret the various provisions of the Constitution to carry out the spirit of that instrument.' " *Bd. of County Comm'rs v. McCulloh,* 52 N.M. 210, 215, 195 P.2d 1005, 1008 (1948) (quoting *State ex rel. Ward v. Romero,* 17 N.M. 88, 100, 125 P. 617, 621 (1912)). Furthermore, it is the policy of this Court to construe its rules liberally so that causes on appeal may be determined on their merits. *See Danzer v. Prof'l Insurors, Inc.,* 101 N.M. 178, 180, 679 P.2d 1276, 1278 (1984); *see also Govich v. N. Am. Sys.,* 112 N.M. 226, 230, 814 P.2d 94, 98 (1991); *Lowe v. Bloom,* 110 N.M. 555, 555, 798 P.2d 156,

156 (1990). Accordingly, we hold that serious youthful offenders convicted of first-degree murder shall be allowed to invoke this Court's mandatory jurisdiction under Article VI, Section 2 of the New Mexico Constitution and Rule 12–102(A)(1). Thus, jurisdiction in this case is proper and we review Defendant's appeal on the merits.

III.

{11} Defendant's first argument is that the trial court erred by admitting the tape and transcript of Ortiz's out-of-court statements. Defendant's argument on this point is twofold: (1) the trial court's admission of the evidence violated Defendant's constitutional right to confront the witnesses against him; and (2) the trial court erred in ruling that the evidence was admissible.

A.

{12} Defendant first argues that the admission of the tape and transcript of Ortiz's out-of-court statement violated his right to confront the witness against him under the Sixth Amendment to the United States Constitution as applied to the States by the Fourteenth Amendment, and under Article II, Section 14 of the New Mexico Constitution. Defendant asserts that, as a result, the admissibility of this evidence should be reviewed de novo rather than for an abuse of discretion. *See State v. Lopez,* 2000–NMSC–003, ¶ 10, 128 N.M. 410, 993 P.2d 727. As a preliminary matter, we must first consider the question of whether Defendant "preserved the confrontation issue for appellate review." *Id.* ¶ 11 (quoting *State v. Ross,* 1996–NMSC–031, 122 N.M. 15, 22, 919 P.2d 1080, 1087) (internal quotation marks omitted).

{13} At trial, Defendant objected to the admission of Ortiz's taped statement on general impeachment and hearsay grounds. However, he did not object to the admission of this evidence on confrontation grounds, nor did he raise or allude to any general constitutional violations which would occur as a result of its admission. As a result, we do not address Defendant's confrontation concerns on appeal. *See State v. Mora,* 1997–NMSC–060, ¶ 47 n. 1, 124 N.M. 346, 950 P.2d 789 (finding that defendant did not preserve the confrontation issue for appellate review because he "did not timely object to the admission of [the deceased witness's] statement on confrontation grounds, nor did he timely object on general constitutional grounds"); *cf. Lopez,* 2000–NMSC–003, ¶¶ 9–21, 128 N.M. 410, 993 P.2d 727 (reviewing defendant's confrontation concerns after determining that the confrontation issue had been preserved at trial because defendant objected to his inability to cross examine or confront the witness).

B.

{14} At trial, the State called Ortiz as an eyewitness to testify regarding the details of the shooting. On the stand Ortiz stated that he could not recall the particular details of the crime. The prosecutor then requested that the court allow him to play for the jury the tape of Ortiz's July 3rd statement to Detective Shawn in which Ortiz gave a more detailed account of the events. Defendant objected to the tape being played to the jury, claiming that this was improper impeachment and inadmissible hearsay under Rules 11–613(B), 11–803(E), 11–801(D)(1)(c), 11–804(A)(3), and 11–803(X) NMRA 2002. Despite Defendant's objections, the court admitted the evidence pursuant to Rules 11–803(E), 11–803(X), 11–804(A)(3), and 11–612 NMRA 2002.

{15} As a general rule, the "[a]dmission of evidence is entrusted to the discretion of the trial court, and rulings of the trial judge will not be disturbed absent a clear abuse of discretion." [2] *State v. Worley,* 100

2. The dissent agrees that as a general matter we should defer to the discretion of the trial judge on evidentiary matters, but argues that "[s]uch deference . . . has less force in this case, where it is less than clear from the record that the trial court relied upon Rule 11–803(X) in its ruling." Dissent ¶ 80. We think the record makes clear that the trial judge relied on Rule 11–803(X), even though it may not have been the cornerstone of its ruling. The dissent cites to no authority to support its conclusion that less deference is due when the trial court admits evidence under a rule that it did not principally rely on, and without some contrary authority, we believe

N.M. 720, 723, 676 P.2d 247, 250 (1984); *see also Lopez,* 2000–NMSC–003, ¶ 10, 128 N.M. 410, 993 P.2d 727; *State v. Torres,* 1998–NMSC–052, ¶ 15, 126 N.M. 477, 971 P.2d 1267; *State v. Stout,* 96 N.M. 29, 32, 627 P.2d 871, 874 (1981). In order to find that the trial court abused its discretion in admitting the tape and transcript of Ortiz's interview with Detective Shawn, we must conclude that the trial court's decision was " 'obviously erroneous, arbitrary or unwarranted.' " *State v. Brown,* 1998–NMSC–037, ¶ 39, 126 N.M. 338, 969 P.2d 313 (quoting *State v. Stills,* 1998–NMSC–009, ¶ 33, 125 N.M. 66, 957 P.2d 51).

{16} The trial court found the statement admissible under Rule 11–803(X), and we conclude that it did not abuse its discretion by admitting Ortiz's statement under this Rule. Rule 11–803(X) allows hearsay statements to be admitted if not specifically covered by any other hearsay exception so long as there are "equivalent circumstantial guarantees of trustworthiness" and the court determines that:

(1) the statement is offered as evidence of a material fact;

(2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(3) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Id. The dissent argues that our analysis under Rule 11–803(X) is misplaced because this exception " 'cannot be read to mean that hearsay which almost, but not quite, fits another specific exception, may be admitted under the 'other exceptions' subsection. . . .' " Dissent ¶ 82 (quoting *State v. Barela,* 97 N.M. 723, 726, 643 P.2d 287, 290 (Ct.App. 1982)). Rather, the dissent urges, the rule "should be used in a novel situation not considered by the drafters and not 'specifically covered by any of the foregoing exceptions. . . .' It should not be used when the statement is of a type expressly considered by other exceptions, but which does not satisfy the rules those exceptions establish." *Id.* This narrow interpretation of the rule has been rejected by a majority of circuits, and we decline to adopt it in our jurisdiction. *See* 5 Jack B. Weinstein & Margaret A. Berger, *Weinsteins's Federal Evidence* § 807.03[4], at 807–26 (Joseph M. McLaughlin ed., 2d ed. 2001) ("Although there was initially some debate about the meaning of this phrase, ['not specifically covered by any of the foregoing exceptions,'] the majority of circuits have concluded that the phrase means only that, if a statement is *admissible* under one of the hearsay exceptions, that exception should be relied on instead of the residual exception. If a hearsay statement is similar to those defined by a specific exception but does not actually qualify for admission under that exception, these courts allow the statement to be considered for admission under the residual exception."). While we agree that the rule cannot be used to supply the missing elements to admit evidence which almost, but not quite, meets the requirements of another specific exception, it can be used to admit out-of-court statements that otherwise bear indicia of trustworthiness equivalent to those other specific exceptions. In other words, "if a statement is inadmissible under a prior hearsay exception, the statement may nonetheless be considered for admission under the catch-all exception." *United States v. Earles,* 113 F.3d 796, 800 (8th Cir.1997). If we were to adopt the dissent's reading of this rule, we would deprive the jury of reliable probative evidence relevant to the jury's truth-seeking role. Accordingly, we respectfully disagree with the dissent's reasoning on this point.

{17} "In determining whether a statement is sufficiently trustworthy the statement must be inherently reliable at the time it is made." *State v. Williams,* 117 N.M. 551, 561, 874 P.2d 12, 22 (1994). "The test under the catch-all rules is whether the out-of-court statement—not the witness's

we are obligated to review the trial court's ruling under the well-established abuse of discretion standard. *See State v. Salgado,* 1999–NMSC–008, ¶¶ 5–11, 126 N.M. 691, 974 P.2d 661; *see also State v. Beachum,* 83 N.M. 526, 527, 494 P.2d 188, 189 (Ct.App.1972) ("A decision of the trial court will be upheld if it is right for any reason.").

testimony—has circumstantial guarantees of trustworthiness."[3] *Id.* This Court has recognized four primary dangers of hearsay which can potentially make a hearsay statement unreliable.

> They are:
>
> (1) Ambiguity—the danger that the meaning intended by the declarant will be misinterpreted by the witness and hence the jury; (2) Lack of candor—the danger the declarant will consciously lie; (3) Faulty memory—the danger that the declarant simply forgets key material; and (4) Misperception—the danger that the declarant misjudged, misinterpreted, or misunderstood what he saw.

Id. at 560, 874 P.2d at 21 (quoting *State v. Taylor,* 103 N.M. 189, 197, 704 P.2d 443, 451 (Ct.App.1985)).

{18} With respect to ambiguity, we conclude that there is no danger that the meaning intended by Ortiz will be misinterpreted because the taped statement was played to the jury and the jury had the opportunity to interpret Ortiz's statement themselves rather than rely on some other witness's interpretation. As to lack of candor, we find the fact that Ortiz was not a suspect in the shooting and therefore had no reason to shift blame away from himself, the fact that he implicated his own cousin, Allison, in his statement, and the fact that he likely placed himself and his family in grave danger by giving Detective Shawn a physical description of the shooters, make it less likely that Ortiz would have consciously lied to Detective Shawn about what he observed that night. Similarly, the danger that Ortiz might have a faulty memory is not present here, because Ortiz gave his statement just hours after the shooting. Finally, we find there was little danger that Ortiz misjudged, misinterpreted, or misunderstood what he saw that evening because there were no impediments to his perception and because he was present throughout the event.

{19} The dissent concludes that with respect to the second danger, lack of candor, Ortiz did in fact have a motive to lie and "therefore his statement lacked circumstantial guarantees and was inherently untrustworthy." Dissent ¶ 74. The essence of the dissent's argument on this point is that while one could reason that Ortiz would not have implicated a family member unless he believed it to be true, equally one could reason that he had a motive to shift the blame from his cousin to Defendant because of familial loyalty, fear of retaliation, and his presumed belief that his cousin would be less culpable. Dissent ¶¶ 75–78. However, this argument does not adequately take into account the fact that Ortiz did not have to implicate his cousin at all. Furthermore, even if Ortiz had believed that his cousin would be less culpable had he not fired the fatal shots, one could also speculate that he would have believed his cousin to be even less culpable had he not fired *any* shots. While we agree that the subjective beliefs of the declarant about legal culpability can be relevant in determining the admissibility of hearsay, *see Torres,* 1998–NMSC–052, ¶ 18, 126 N.M. 477, 971 P.2d 1267, Ortiz never testified as to what his subjective beliefs were and we refuse to engage in speculation on that point. *See id.*

{20} Turning to the other three criteria required by the Rule, first, the statement was offered as evidence of a material fact—the identity of the shooters. Second, the statement was more probative of the identity of the shooters than any other evidence the

3. The dissent notes that the statement lacks circumstantial guarantees of trustworthiness because Detective Shawn, the "person in the best position to gauge the candor of the out of court statement" felt that Ortiz was lying to him. Dissent ¶ 79. We respectfully believe this conclusion is unfounded. First, the dissent's discussion suggests that Detective Shawn found Ortiz's statement generally untruthful. However, Detective Shawn testified that he believed Ortiz was generally telling the truth, but that he was withholding the actual names of the shooters and was only willing to give a physical description of them. Furthermore, Detective Shawn also testified that he believed Ortiz's statement was truthful because it was consistent with other witnesses' testimony and the physical evidence found at the scene. In any event, we do not agree that Detective Shawn is the person in the best position to gauge the candor of Ortiz's statement. It is the court's duty to determine preliminary questions concerning the admissibility of evidence, *see* Rule 11–104(A) NMRA 2002, and this Court reviews the trial court's rulings for an abuse of discretion. *See Lopez,* 2000–NMSC–003, ¶ 10, 128 N.M. 410, 993 P.2d 727.

State could procure through reasonable efforts—in Ortiz's taped statement he indicated that there was a "big guy" wearing black jeans and a black t-shirt, presumably Allison, and a "little guy" wearing light blue jeans and a striped shirt, presumably Defendant, on the balcony and that the "little guy" did the shooting. However, at trial, after Ortiz had time to appreciate the danger of gang retaliation, and after testifying that it was unacceptable to "rat out" a gang member and that he or one of his family members could be killed for it, Ortiz changed his story and repeatedly stated that he could not recall the details of the shooting on July 3rd, which made the taped statement the most probative evidence on this point that could be procured through reasonable efforts. Finally, the general purposes of these rules and the interests of justice will best be served by the admission of Ortiz's taped statement into evidence, as the circumstances surrounding the statement indicate trustworthiness equivalent to evidence admitted under the other hearsay exceptions.

{21} Under these circumstances, we find that the taped statement and transcript were reliable and important for the jury to consider, as it went to the identity of the shooters. Furthermore, Ortiz was present and available for cross-examination, which meant the jury could observe his demeanor and make its own determinations regarding Ortiz's credibility. *See State v. Sanchez,* 112 N.M. 59, 65, 811 P.2d 92, 98 (Ct.App.1991) ("In ruling upon the admissibility of the statement the trial court does not determine the ultimate questions of the declarant's credibility; instead, this is the province of the jury"); *see also* UJI 14–5020 NMRA 2002. We also note that in a recent opinion this Court unanimously concluded that the district court, under the same exact facts, did not abuse its discretion by admitting Ortiz's prior statement under Rule 11–803(X). *State v. Allison,* 2000–NMSC–027, ¶¶ 27–31, 129 N.M. 566, 11 P.3d 141. Although we did not have an extensive analysis on this issue and we noted that the defendant did not persuade us otherwise, we recognized that the district "court found 'that the circumstances of the original statement, the proximity in time to the shooting itself, all are indicia of reliability in that statement.' " *Id.* ¶ 27. Based on these facts, we find that there are equivalent circumstantial guarantees of trustworthiness to make this statement admissible under Rule 11–803(X) and conclude that the trial court's determination that the evidence was admissible was not erroneous, arbitrary, or unwarranted. We therefore hold that the trial court did not abuse its discretion by admitting the tape and transcript into evidence under Rule 11–803(X).

IV.

{22} Defendant next argues that insufficient evidence supports his conviction for first-degree depraved-mind murder on either a principal or accessory liability theory. Defendant argues that the only evidence presented at trial suggesting that he was the one who shot directly at Mendez was improperly before the court and that no evidence supports the finding that Defendant intended that Allison shoot Mendez or that he encouraged him to shoot. We are unpersuaded by Defendant's arguments and find that there was sufficient evidence at trial to convict Defendant of first-degree depraved-mind murder.

{23} Under a sufficiency of the evidence analysis, we must first determine "whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Sutphin,* 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988). "A reviewing court must view the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict." *Id.; see also State v. Lankford,* 92 N.M. 1, 2, 582 P.2d 378, 379 (1978). The appellate court has a duty "to determine whether *any* rational jury could have found each element of the crime to be established beyond a reasonable doubt." *State v. Garcia,* 114 N.M. 269, 274, 837 P.2d 862, 867 (1992). "[W]here a jury verdict in a criminal case is supported by substantial evidence, the verdict will not be disturbed on appeal."

State v. Anaya, 98 N.M. 211, 212, 647 P.2d 413, 414 (1982).

{24} Depraved-mind murder is "the killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused . . . by any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life." Section 30–2–1(A)(3). In order to convict Defendant of this offense, the State had to prove beyond a reasonable doubt that Defendant committed the crime of depraved-mind murder either as a principal or an accessory. We find there was sufficient evidence to convict Defendant of first-degree depraved-mind murder on either of these theories.

A.

{25} In order to convict Defendant of first-degree depraved-mind murder as a principal, the state had to prove beyond a reasonable doubt each of the following elements of the crime:

> (1) The defendant discharged a firearm several times from the balcony of an apartment dwelling;
>
> (2) The defendant's act caused the death of Javier Mendez;
>
> (3) The act of the defendant was greatly dangerous to the lives of others, indicating a depraved mind without regard for human life;
>
> (4) The defendant knew that his act was greatly dangerous to the lives of others;
>
> (5) This happened in New Mexico on or about the 3rd day of July, 1997

See UJI 14–203 NMRA 2002. Because causation was at issue here, the jury was also instructed that:

> The cause of death is an act which, in a natural and continuous chain of events, produces the death and without which the death would not have occurred. There may be more than one cause of death. If the acts of two or more persons contribute to cause death, each such act is a cause of death.

See UJI 14–251 NMRA 2002.

{26} Defendant does not dispute that the act of shooting from the second floor balcony into a group of people was an act greatly dangerous to the lives of others. Defendant also does not dispute that he knew this act was greatly dangerous to the lives of others. Rather, relying on *State v. Hernandez*, 117 N.M. 497, 873 P.2d 243 (1994), Defendant argues that the State failed to prove that his actions caused Mendez's death, therefore failing to meet its burden as to the causation requirement.

{27} Defendant's reliance on *Hernandez* is misplaced. In that case, we found that the defendant's depraved-mind acts of shooting toward two people at two different times were distinguishable and separate from the shot which actually killed the victim. *See id.* at 499, 873 P.2d at 245. The Court stated that "[t]he attempt to disarm [d]efendant, the elapse of time between the initial random shooting and the shot fired during the struggle, the apparent change in [d]efendant's intent when he stopped the random shooting and returned to his house, all lead us to conclude there was no evidence that [d]efendant's initial depraved-mind action caused the victim's death." *Id.* (emphasis omitted). None of those factors is present in this case. There is no question that Mendez's death was caused by a depraved-mind act, the hail of bullets from the balcony. The only question for the jury was who was responsible for the bullets that struck and killed him.

{28} At trial, the evidence showed that Defendant and Allison were standing on the second floor balcony and opened fire at a group of rival gang members below. According to Ortiz, Defendant shot at Mendez first and then let Allison shoot Canas and Ortega. Detective Shawn testified that Ortiz identified Defendant from a photo lineup as one of the shooters, but refused to have his response recorded on tape. Ortega testified that Allison shot at Mendez first and then Defendant took the gun from Allison and shot at the other two. He also identified Defendant as one of the shooters from a photo lineup performed by Detective Shawn

and again positively identified Defendant as one of the shooters at trial. It is true that the evidence tends to align itself with two different factual conclusions—that either Defendant or Allison shot and killed Mendez. We agree with the Court in *State v. Ortiz-Burciaga*, 1999-NMCA-146, ¶ 22, 128 N.M. 382, 993 P.2d 96, however, that under a substantial evidence review, "[i]t is the 'exclusive province of the jury' to resolve factual inconsistencies in testimony." We will not reweigh the evidence or substitute our judgment for that of the jury. *See Sutphin*, 107 N.M. at 131, 753 P.2d at 1319. We conclude that a rational jury could find, from this testimony, that beyond a reasonable doubt Defendant's act of shooting into the crowd caused Mendez's death.

B.

{29} Defendant may also have been convicted of first-degree depraved-mind murder as an accessory to the crime. In order to convict Defendant on this theory, the State had to prove that, even though Defendant did not commit the acts constituting the crime himself:

1. The defendant intended that the crime be committed;
2. The crime was committed; [and]
3. The defendant helped, encouraged or caused the crime to be committed.

UJI 14-2822 NMRA 2002. Defendant argues there is insufficient evidence to establish elements one and three beyond a reasonable doubt—that Defendant intended for Allison to shoot and kill Mendez and that Defendant helped or encouraged him to do it. Defendant maintains that the only testimony regarding the sequence of events surrounding the shooting was from Ortega who testified that Allison shot at Mendez multiple times before Defendant took the gun and shot towards Canas and Ortega. Defendant argues that "Javier, presumably, had long since turned and run, and in all likelihood had already been hit by the fatal bullet" when Defendant began shooting. He also asserts that no evidence showed that Defendant knew anything about Allison's intentions or that he encouraged Allison to shoot Mendez. Defendant argues that mere presence during the commission of the crime is not enough, but rather some outward manifestation of approval is necessary to show that Defendant shared Allison's purpose or intent.

{30} In *State v. Baca*, 1997-NMSC-059, ¶ 15, 124 N.M. 333, 950 P.2d 776, we concluded that in order to find the defendant guilty as an accessory to first-degree depraved-mind murder the State was required to show, "either through direct or circumstantial evidence, that [the principal] committed 'an act greatly dangerous to the lives of others indicating a depraved mind without regard for human life'... and also that [the accomplice] 'helped, encouraged or caused' [the principal's] act, intending that the crime occur." *Id.* (citations omitted). Based on the evidence summarized below, we conclude the State met its evidentiary burden. There is sufficient evidence to support findings that (1) Allison committed an act greatly dangerous to the lives of others, (2) knowing that the act created a risk of death or great bodily harm, which indicated a depraved-mind, without regard for the lives of others, (3) that Defendant helped him commit that act, and (4) that Defendant shared Allison's purpose or design.

{31} Ortega testified at trial that he and fellow Juaritos Maravilla gang members were asked what they were doing in the Barelas barrio by people standing on a second-floor apartment balcony. He stated that Mendez answered, "We could be anywhere we want, Juaritos," and immediately thereafter shots were fired down at them from the balcony. As discussed above, there was conflicting testimony about who shot first, Allison or Defendant. However, both Ortega and Ortiz indicated that one of the two men shot first at Mendez and then the other immediately shot at Ortega and Canas. Furthermore, both identified Defendant as one of the shooters from a photo lineup shown to them by Detective Shawn the night of the shooting. Regardless of who shot first, the evidence clearly supports an inference that Defendant helped, encouraged, caused, and intended that the shooting be committed. Defendant's action of taking the gun from Allison to continue the shooting is clear evi-

dence of accessory liability. The fact finder "can reject the defendant's version of an incident." *State v. Vigil*, 87 N.M. 345, 350, 533 P.2d 578, 583 (1975). We are not persuaded that Defendant was merely present during the shooting. We find that there was sufficient evidence for a rational jury to find beyond a reasonable doubt that Defendant helped, encouraged, caused, and intended the shooting which resulted in Mendez's death.

{32} Defendant is liable for the crime of first-degree depraved-mind murder whether or not he fired the fatal shot. It appears that in this case the jury rejected Defendant's version of the incident, and we will not substitute our judgment for that of the jury. We hold that sufficient evidence exists to affirm Defendant's conviction of first-degree depraved-mind murder on either a principal or accessory liability theory.

V.

{33} Defendant was charged and convicted of conspiracy to commit a first-degree depraved-mind murder. The State concedes that this conviction must be vacated because this Court has explicitly held that this is not a cognizable crime in New Mexico. We agree. *See Baca*, 1997-NMSC-059, ¶ 51, 124 N.M. 333, 950 P.2d 776 (holding that a conviction for conspiracy to commit first-degree depraved-mind murder could not stand under current case law because conspiracy requires both intent to agree and intent to commit the offense which is the object of the conspiracy and depraved-mind murder is an unintentional killing resulting from highly reckless behavior); *cf. State v. Varela*, 1999-NMSC-045, ¶ 42, 128 N.M. 454, 993 P.2d 1280 (refusing to extend *Baca's* holding to prohibit the conviction of conspiracy to commit shooting at a dwelling which requires willful, rather than reckless, behavior). Accordingly, we vacate Defendant's conviction and accompanying nine-year concurrent prison sentence for this crime.

VI.

{34} Defendant next argues that his convictions for all counts relating to shooting at a dwelling or occupied building must be reversed because there was no evidence that Defendant shot at a dwelling or occupied building. He asserts that there was no evidence from any witness that any of the shots were directed at any building or that any bullets hit a building. The State asserts without discussion, and without citing to any evidence in the record, that Defendant "willfully discharged the gun at an occupied apartment building." Viewing the evidence in the light most favorable to the State, resolving all conflicts and indulging all permissible inferences to uphold a verdict of conviction, we find that there was no evidence to support the jury's conclusion that Defendant shot at a dwelling or occupied building. *See Garcia*, 114 N.M. at 274, 837 P.2d at 867.

{35} "Shooting at a dwelling or occupied building consists of willfully discharging a firearm *at* a dwelling or occupied building." Section 30-3-8(A) (emphasis added). In order to find the Defendant guilty, the State had to prove beyond a reasonable doubt that Defendant willfully shot a firearm at a dwelling or an occupied building. *See* UJI 14-340 NMRA 2002. The evidence at trial revealed that shots were fired from an apartment balcony downward into a courtyard area. Necessarily, there were other apartment buildings in the vicinity. Nevertheless, the State put forth no evidence from which the jury could infer that any of the shots from any shooter were directed *at* or hit any building, nor did it cite to any in its briefing to this Court. Ortega testified that the shots were first directed at Mendez, and then at himself and Canas. He gave no testimony that shots were fired in any direction other than towards the four men standing at ground level. Della Gonzales also testified that she heard the noise of the bullets from a nearby apartment but that she did not hear the noise of bullets striking a surface or building. Detective J.D. Herrera stated that his findings were consistent with other physical evidence that tended to demonstrate that the shots were fired only downward. There was nothing in his statement that indicated that any of the shots had been fired at any building.

{36} It is the absence of evidence on this point that convinces us that Defendant did

not willfully discharge the gun at a dwelling or occupied building or agree with another person to commit such a crime. We therefore reverse Defendant's convictions for conspiracy to commit shooting at a dwelling or occupied building (great bodily harm), conspiracy to commit shooting at a dwelling or occupied building (resulting in injury), shooting at a dwelling or occupied building (no injury), and conspiracy to commit shooting at a dwelling or occupied building (no injury).

VII.

{37} Defendant claims that he received ineffective assistance of counsel at every stage of the trial proceedings. He asserts that defense counsel's performance, viewed cumulatively, fell below that of a reasonably competent attorney and prejudiced his defense. We review each of Defendant's allegations of ineffective assistance of counsel individually in addition to considering their cumulative effect.

{38} Defendant has the burden of showing ineffective assistance of counsel. *See Baca*, 1997–NMSC–059, ¶ 24, 124 N.M. 333, 950 P.2d 776. "Assistance of counsel is presumed effective unless the defendant demonstrates both that counsel was not reasonably competent and that counsel's incompetence caused the defendant prejudice." *State v. Gonzales*, 113 N.M. 221, 229–30, 824 P.2d 1023, 1031–32 (1992). "[T]o establish ineffective assistance of counsel, the defendant must point to specific lapses . . . by trial counsel." *State v. Brazeal*, 109 N.M. 752, 757, 790 P.2d 1033, 1038 (Ct.App.1990). "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691, 104 S.Ct. 2052. Accordingly, "defendant must still affirmatively prove prejudice. In other words, '[t]he 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.' " *Brazeal*, 109 N.M. at 757–58, 790 P.2d at 1038–39 (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052) (internal citation omitted).

{39} Defendant claims that the following flaws in defense counsel's performance resulted in ineffective assistance: counsel was unprepared to start trial, he failed to review jury questionnaires prior to jury selection, he failed to complete his interview with Ortega, he failed to interview, secure the presence of, or secure a continuance until such time as Canas could be located, he failed to object to prejudicial hearsay statements, he elicited highly prejudicial evidence against his own client, and he failed to challenge an indictment for a nonexistent crime. Even assuming competent counsel would not have performed in such a manner, we do not find the necessary prejudice.

{40} Defendant first argues that even the State in this case acknowledged from the outset that his counsel was ineffective, stating: "What you have here is ineffectiveness of counsel crusading as someone who wants to disqualify me from participation in this case. He is not prepared to proceed today, Your Honor." This comment was apparently made by the prosecutor in response to defense counsel's request for a one-day continuance. This comment must be considered in the context in which it was made; it occurred during a heated exchange between the defense attorney and the prosecutor, in which defense counsel informed the court that the prosecutor had committed an assault and battery on him by removing his eyeglasses from his face during a witness interview. Defense counsel requested the continuance because he claimed that he was so upset by the incident that he felt he could not proceed that day. While we remind counsel of their obligations of civility and professionalism under the Rules of Professional Conduct, *see e.g.*, Rule 16–804 NMRA 2002, we are not persuaded that this incident, or the trial judge's denial of the request for a continuance, resulted in prejudice to the Defendant. Furthermore, just because the prosecutor thought defense counsel to be ineffective does not make it so.

{41} Defendant next argues that his trial counsel failed to review jury questionnaires prior to jury selection. While counsel admitted at the November 9, 1998 hearing that he had not picked up those questionnaires, he specifically referred to them during voir dire, indicating that he had reviewed them. Counsel may not have had as much time to review the jury questionnaires as he would have liked, but the record indicates that he in fact conducted a thoughtful voir dire in which he engaged in an active discussion with the panel. Defendant has identified no prejudice resulting from any lack of preparedness, nor do we find any.

{42} Defendant also claims that his attorney failed to complete his interview with Ortega. Defense counsel told the court that he was not aware that Ortega and Canas had been arrested on material witness warrants until some time after the two had been arrested, but that he and the prosecutor did conduct an interview with Ortega which eventually broke down due to animosity between the lawyers. It is evident from the record that the trial judge recognized that the defense attorney had not completed his interviews at that point and made some arrangement for him to complete them prior to opening statements. Although it appears that defense counsel did not interview Ortega prior to opening statements, the court noted that it would allow counsel to finish interviewing him before he took the stand. It seems clear from the record that defense counsel did interview Ortega, as indicated by the trial judge's statement: "In reference to the interview, that I'm not so much concerned about because that was conducted out of the presence of the jury and the interview, at least with Mr. Ortega, happened." We find nothing in the record to indicate that defense counsel did not avail himself of this opportunity.

{43} Defendant also claims his trial attorney failed to question Ortega about his alleged statement to his friend Juan Landaras on the night of the shooting, that a third person, Little Guero, not Defendant, was the shooter and that counsel failed to challenge Ortega's conflicting identifications of the shooters. However, during cross-examination, defense counsel questioned Detective Shawn about Ortega's alleged statement to Landaras, specifically attacking his failure to follow-up on this information known by one of his detectives, Detective Martinez. Counsel's failure to ask Ortega about this alleged inconsistent identification could have been a rational trial strategy. If counsel had questioned Ortega about this statement on the stand and he had denied making it, Defendant's theory of the case could have been weakened. However, by bringing this evidence in through Detective Shawn, Defendant was able to argue that the police did an inadequate investigation, potentially leaving the jury with reasonable doubt as to the identification of the shooters. As noted in *State v. Swavola*, 114 N.M. 472, 475, 840 P.2d 1238, 1241 (Ct.App.1992), "a prima facie case [of ineffective assistance] is not made when a plausible, rational strategy or tactic can explain the conduct of defense counsel." We find that defense counsel's failure to question Ortega about his alleged statements to Landaras and his failure to challenge his conflicting identifications can be explained as a rational trial strategy and therefore conclude that defense counsel was acting with reasonable competence, and, in any event, did not prejudice Defendant's case.

{44} We next consider Defendant's argument that defense counsel was ineffective in failing to interview, secure the presence of, or secure a continuance until such time as Canas could be located. Defendant supports his argument with his counsel's own statement, "If I would have been able to interview Jesus, put him under oath, we could have had a statement here ... So I've been thwarted in that." As noted above, Canas and Ortega were arrested and brought in on material witness warrants shortly before trial. However, the court then released the two men, unsure of its authority to keep holding them in detention. Defense counsel was apparently not timely informed that they had been brought in and, therefore, did not have an opportunity to interview them at that time. At the start of trial a week later, Canas did not appear in court, and it was later learned that he had apparently fled to Colorado. During his argument to the court,

defense counsel discussed what Canas had told Detective Shawn and argued that Canas' statement that the shooter was "bald" was exculpatory because his client had short hair. Defense counsel also argued that the "issue about baldness and shortness and so forth could have been used to the defendant's advantage as to who was actually doing the shooting." However, in addition to arguing that portions of Canas' statement were exculpatory, defense counsel acknowledged that portions of his statement were inculpatory. Defense counsel also did not dispute the accuracy of the following statement argued to the court by the State:

> I would also say in the interviews Mr. DeVoe [co-defendant Charlie Allison's counsel] conducted with Mr. Huero [sic] and Mr. Canas, Mr. DeVoe showed the two photo arrays of Allison and Trujillo to Iguado [Ortega] and Canas and they reaffirmed their identification of both defendants at Mr. DeVoe's request.

Moreover, Defendant did not demonstrate that had his counsel moved for a continuance until Canas could be located, the motion would have been granted. *See e.g., Gonzales,* 113 N.M. at 230, 824 P.2d at 1032 (finding that in order to prevail on his ineffective assistance of counsel claim, defendant had to first demonstrate that had his counsel moved for severance, the motion would have been granted). Thus, even though he failed to interview, secure the presence of, or secure a continuance until Canas could be located, it appears undisputed that at least portions of Canas' testimony would have been highly inculpatory, and we are not persuaded that his testimony would have been sufficiently exculpatory to result in an acquittal.

{45} Defendant also argues that defense counsel failed to object to prejudicial hearsay statements and elicited highly prejudicial evidence against his own client. He claims that the testimony came out during defense counsel's examination of Detective Shawn, during which defense counsel asked Shawn an open-ended question about one of his interviews. The Detective responded that "Silly tried to sell him a gun, a .25 caliber." Defense counsel moved on with other questions and then moved for a mistrial, or in the alternative, for a curative instruction, after the jury was dismissed for the day, arguing that the statement was overly prejudicial. The trial judge denied both motions and made the following finding:

> First of all, I don't think very many jurors heard it. Second of all, I think it would be to your disadvantage for me to reiterate what it was because then they will really focus on the fact that he allegedly was buying a handgun. So I'm going to leave it alone. And I've instructed the State that that did not open the door and I don't want that pursued, but that's as far as I'm going to go. I think you are stuck with the strategy there.

We find no evidence to suggest that defense counsel purposely elicited the Detective's answer, or could have known it was coming. Moreover, counsel did not draw the jury's attention to it, and it was not repeated by counsel or the prosecutor. Although the statement may have had some prejudicial effect, Defendant has not demonstrated that had this statement not come in, the result of the proceeding would have been different.

{46} Finally, Defendant argues that defense counsel's failure to challenge the indictment for conspiracy to commit depraved-mind murder, a non-existent crime, constituted per se ineffectiveness. We disagree. Defendant was charged with conspiracy to commit depraved-mind murder on July 22, 1997. On November 13, 1997, this Court filed its opinion in *Baca,* 1997–NMSC–059, ¶ 51, 124 N.M. 333, 950 P.2d 776, holding that conspiracy to commit depraved-mind murder is not a cognizable crime in New Mexico. Defendant's case did not go to trial until November 9, 1998, leaving counsel nearly a year to challenge the indictment for this crime. Certainly counsel's failure to challenge this indictment prejudiced Defendant as to his conviction for this crime. However, this conviction has been vacated, and Defendant has not demonstrated that had he timely challenged this indictment he would have been acquitted of his other convictions. Thus, even assuming a reasonably competent attorney would have timely objected, Defendant has not demonstrated that " 'but for counsel's unprofessional errors, the result of the

proceeding would have been different.' " *Brazeal*, 109 N.M. at 757–58, 790 P.2d at 1038–39 (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052).

{47} We consider the entire proceeding as a whole and judge any claim of ineffectiveness on " 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " *State v. Richardson*, 114 N.M. 725, 727, 845 P.2d 819, 821 (Ct.App.1992) (quoting *Strickland*, 466 U.S. at 686, 104 S.Ct. 2052). We conclude that the alleged failings of counsel in this case do not result in ineffective assistance of counsel regardless of whether they are considered individually or cumulatively.

VIII.

{48} We next address Defendant's argument that the prosecutor engaged in prosecutorial misconduct that deprived him of a fair trial. Defendant asserts that the prosecutor's failure to disclose material evidence to the defense, improper use of leading questions, improper introduction of hearsay evidence, use of inflammatory and irrelevant evidence, and improper argument, distorted the evidence on the crucial issue of identification. We review each of Defendant's allegations of prosecutorial misconduct individually in addition to considering their cumulative effect. We conclude, however, that the alleged instances of prosecutorial misconduct in this case do not rise to the level of reversible or fundamental error regardless of whether they are considered individually or cumulatively.

A.

{49} When an issue of prosecutorial misconduct is properly preserved by a timely objection at trial, we review the trial court's ruling on this issue under the deferential abuse of discretion standard because the "trial court is in the best position to evaluate the significance of any alleged prosecutorial errors." *State v. Duffy*, 1998–NMSC–014, ¶ 46, 126 N.M. 132, 967 P.2d 807. "The trial court's determination of these questions will not be disturbed unless its ruling is arbitrary, capricious, or beyond reason." *Id.* Our resolution of this issue "rests on whether the prosecutor's improprieties had such a persuasive and prejudicial effect on the jury's verdict that the defendant was deprived of a fair trial." *Id.*

{50} Defendant first argues that the prosecutor engaged in misconduct by failing to disclose material evidence to the defense. Defendant properly preserved this issue by a timely objection at trial. Defense counsel, in a motion to dismiss for prosecutorial misconduct, alleged two instances in which the State failed to provide material evidence to the defense. Defendant first alleged that the State failed to provide accurate "rap sheets" on Ortega and Mendez, stating that neither record showed that the two men had a criminal history even though testimony presented at trial indicated that both had previously been in Springer Boys Home or the "D home." Defendant also claimed that the State failed to provide a July booking photo taken of Defendant shortly after his arrest. The State has an affirmative duty to disclose "any material evidence favorable to the defendant which the state is required to produce under the due process clause of the United States Constitution." Rule 5–501(A)(6) NMRA 2002. The United States Supreme Court has held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). However, "[e]vidence is material under *Brady* 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *State v. Baca*, 115 N.M. 536, 541, 854 P.2d 363, 368 (Ct.App. 1993) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). In our analysis,

> we must avoid concentrating on the suppressed evidence in isolation. Rather, we must place it in the context of the entire record. Evidence that may first appear to be quite compelling when considered alone

> can lose its potency when weighed and measured with all the other evidence, both inculpatory and exculpatory. Implicit in the standard of materiality is the notion that the significance of any particular bit of evidence can only be determined by comparison to the rest.

Trujillo v. Sullivan, 815 F.2d 597, 613 (10th Cir.1987).

{51} The trial judge denied Defendant's motion to dismiss on the basis that it came down to a "swearing match" between the two attorneys and she found no prejudice to the Defendant. We do not find the trial court's decision to be arbitrary, capricious, or beyond reason. The court indicated that as to the identity of the shooter, Defendant was not prejudiced because Canas could have testified that the shooter was bald, "but at the same time he may have elicited information that that bald person's name was Silly [Defendant's alias]. It could have gone ... either way, and again, the prejudice to the defendant, I just don't see it." We agree that viewed in the context of the entire record, there is nothing to indicate that had the July booking photograph been disclosed, the result of the proceeding would have been different. We are also not persuaded that had the defense attorney received the requested rap sheets that contained Ortega's and Mendez's juvenile history, any difference in the outcome would have resulted. While the prosecutor cannot hide information behind other arms of the State, *see Kyles v. Whitley,* 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), Defendant had knowledge of these two men's juvenile records and has not demonstrated any prejudice which resulted from the State's failure to provide that information. Accordingly, we find that the trial court did not abuse its discretion when it denied Defendant's motion to dismiss for prosecutorial misconduct based on these two discovery violations.

B.

{52} When an issue has not been properly preserved by a timely objection at trial, we have discretion to review the claim on appeal for fundamental error. Rule 12-216(B)(2) NMRA 2002 ("This [preservation] rule shall not preclude the appellate court from considering ... in its discretion, questions involving: ... fundamental error or fundamental rights of a party."); *see State v. Allen,* 2000-NMSC-002, ¶ 95, 128 N.M. 482, 994 P.2d 728. "Prosecutorial misconduct rises to the level of fundamental error when it is so egregious and had such a persuasive and prejudicial effect on the jury's verdict that the defendant was deprived of a fair trial. An isolated, minor impropriety ordinarily is not sufficient to warrant reversal, because a fair trial is not necessarily a perfect one." *Allen,* 2000-NMSC-002, ¶ 95, 128 N.M. 482, 994 P.2d 728 (internal quotation marks and citations omitted). Because Defendant did not properly preserve the following issues for appellate review, we review them for fundamental error.

{53} Defendant argues that the prosecutor improperly led Ortega on the crucial issue of identification, undermining the truth-finding process and violating principles of fundamental fairness. Defendant alleges that the leading questions asked by the prosecutor dominated the questioning of Ortega and were not merely an attempt to lay a foundation or cojole a hostile or timid witness. Defendant specifically cites to two excerpts in the record that he claims were crucial to Defendant's conviction in which the prosecutor improperly elicited testimony on the issue of identification. For example, the prosecutor asked:

> Q. Do you know how many shots Charlie fired?
>
> A. Like two.
>
> Q. And then Silly over here took the gun?
>
> A. Yeah.
>
> Q. And he fired the rest?
>
> A. At us, at Javier and Jesus.

Similarly, the prosecutor later asked:

> Q. As you look at Silly here in the courtroom today, is his skin—the skin on his face the same or different than it was back then?
>
> A. The same.
>
> Q. And do you see like pimples or acne scars on his face?
>
> A. Yes.

However, the following excerpt preceded both of those identified by Defendant and clearly demonstrates that Ortega identified the Defendant as the second shooter without improper testimony from the prosecutor:

Q. And after Javier said, "I can go anywhere I want, Juaritos, ... what happened?

A. They started shooting.

Q.... [H]ow many people shot the gun?

A. Two of them.

Q. Do you see one of those people in the courtroom today?

A. Yes.

Q. Where is he?

A. Right there.

...

Q. And what do you know him as?

A. Silly.

...

Q.... [H]ow did this shooting start?

A. When he just—when like—they just started shooting when he said, "Juaritos." When he said, "I could be anywhere I want, Juaritos," they just started shooting.

Q. Who shot the gun first?

A. Charlie.

...

Q. Now, you said Charlie started shooting first. Did he fire all the shots?

A. I don't think so.

Q. What happened? What did he do?

A. He was shooting, and these guys over here took the gun away from his hands and started shooting at me and Jesus.

Q. Now, who was Charlie shooting at, if you know?

A. Javier.

Q. And then who took the gun away from Charlie?

A. Silly.

Q. And then where did he shoot?

A. At me and Aaron.

As the Defendant himself concedes, "[w]hen allowed to speak freely, Juan clearly testified that Charlie shot Javier and then Silly shot at him and Jesus." Rule 11-611(C) NMRA 2002 states: "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony." In *State v. Orona*, 92 N.M. 450, 454, 589 P.2d 1041, 1045 (1979), the Court concluded that, under Rule 11-611(C), "[d]eveloping testimony by the use of leading questions must be distinguished from substituting the words of the prosecutor for the testimony of the witness." The Court found that the trial court "abused its discretion in such a manner as to violate principles of fundamental fairness" after it permitted every word describing the alleged offense to come from the prosecuting attorney rather than from the witness. *Id.* There, after the witness stated that she could not recall exactly what happened, the prosecutor, over instruction from the court, lead the witness with the only evidence adduced at trial which would support the charge of criminal sexual penetration in the first-degree. At that point the trial court allowed the witness to be led, and the "direct examination continued with the prosecutor graphically describing sexual acts of defendant by way of leading questions, to each of which the witness gave a simple answer of 'yes.' " *Id.* Unlike the testimony in *Orona*, the prosecutor in this case did not substitute his words for those of Ortega. As quoted above, Ortega told the story in his own words. Thus, even assuming the prosecutor improperly led the witness in the excerpts identified by Defendant, we find no prejudice to Defendant on the issue of identification. Accordingly, we conclude that the prosecutor's leading questions did not constitute fundamental error.

{54} Defendant next argues that the prosecutor improperly elicited damaging hearsay testimony on the issue of identification. He claims that it was improper for the prosecutor to question Detective Shawn regarding his identification of the shooters.

{55} Canas was arrested on a material witness warrant but was not interviewed by the defense and apparently fled the jurisdiction prior to trial. During the prosecution's direct examination of Detective Shawn, the prosecutor elicited testimony that indicated he had interviewed three eyewitnesses to the shooting: Ortega, Ortiz, and Canas. He then testified that all three identified both

Allison and Defendant as the shooters and that they had all told him that only one gun was used. Defense counsel did not timely object to this line of questioning. Defendant did object when the prosecutor asked the Detective about the witnesses' descriptions of Defendant's acne and during the prosecutor's attempt to have the Detective testify as to Canas' identification of Defendant from the photo array. In both instances the objections were sustained, but no limiting instruction was requested.

{56} We agree that Detective Shawn's statements regarding Canas' identification of Defendant was improper hearsay testimony. However, we conclude that these references to Canas' statement did not deprive Defendant of a fair trial. The jury had testimony from two other eyewitnesses, Ortiz and Ortega, that support its findings of guilt. Ortega unequivocally testified that Defendant and Allison were the shooters, and the jury was given the opportunity to consider Ortiz's prior statement to that effect. Thus, we conclude that Detective Shawn's references to Canas' testimony were not sufficiently prejudicial to require a finding of fundamental error.

[redacted] {57} Defendant also asserts that the prosecutor repeatedly asked Ortiz inflammatory and irrelevant questions about his experiences as a gang member and his fear of retaliation, serving to arouse the jurors' prejudices and make Defendant look guilty by association. The State responds to this argument by claiming that "the prosecutor went to great pains to neutralize any bad feelings the jurors may have had about gangs and repeatedly cautioned the jury to judge the case only on its facts." At trial, the judge ruled that the State could introduce evidence relating to gang names and affiliation, but limited the scope and the purpose of the testimony so that it would only be admissible "insofar as it's probative of motive, state of mind, intent, and those sorts of things." On direct examination, Ortiz testified that he grew up in Barelas and was basically born and raised in the gang. He stated that he was beaten up by other gang members when he was ranked out because he was no longer hanging out with them. As discussed above, the State also introduced evidence that Detective Shawn interviewed Ortiz the night of the shooting, although Ortiz was reluctant to testify about the details of the shooting or his prior statement at trial. The State also presented evidence that there was a verbal exchange between Allison, Defendant and Mendez and that some gang identification prompted the shooting. The prosecutor sought to show that Ortiz was aligned with the Barelas, not the Juaritos Maravilla gang. We find that such evidence was inextricably part of the State's case.

[redacted] {58} Ortiz's former, or current, membership in the Barelas gang was important for two reasons. First, Ortiz's fear of retaliation went to his credibility, by showing that he had valid reasons—including the safety and well-being of himself and his family—for being less than candid about his cousin's and Defendant's involvement in the shooting at trial. Second, Ortiz's "ranking out" of the Barelas gang offered a plausible explanation for the start of the quarrel; his former comrades objected to Ortiz showing back up at the scene of his disgrace. Moreover, in his opening statement, the defense attorney was completely forthright about Defendant's gang affiliation, stating that "there is no question that Chris Trujillo is a gang member." Defense counsel went on to say that "nobody in this room is going to think that Mr. Allison or Mr. Trujillo is a Boy Scout ... We certainly can't avoid the issue that this involves gangs, something about drugs, certainly some violence." Defense counsel also spoke of a spectrum of gang involvement, trying to demonstrate to the jury that while Defendant was not a Boy Scout, he was also not a gang member "for profit, for criminal acts, for death, destruction, drug dealing, [or] intimidation." Although we recognize the danger of "guilt by association" when evidence of gang membership is introduced, such evidence is admissible to show other important elements of the crime, such as motive or intent. *See State v. Nieto*, 2000-NMSC-031, ¶ 25, 129 N.M. 688, 12 P.3d 442 (finding expert testimony on defendant's gang affiliation and specific rituals and procedures of that gang was admissible to show defendant's alleged motive). We

conclude that Defendant's gang membership was undisputed by the defense and that the State used evidence of gangs to the extent that it was relevant to its case. We therefore find no error.

{59} Defendant next claims that the prosecutor improperly injected his own opinion during closing arguments on the definition of "at" for "shooting at a dwelling or occupied building" charges. We do not address this argument since we have reversed Defendant's convictions as to all charges relating to shooting at a dwelling or occupied building.

{60} Defendant's final claim is that the prosecutor "aggravated the damage in closing by repeatedly referring to Jesus' 'story' and identification" as though it were valid evidence properly before the jury for consideration. In closing the prosecutor made two references to Canas' statement:

> Let me take you to the balcony. This is where it happened, and that sounds like a consistent story and that comes from Canas and Iguado and Ortiz, you don't discount that and throw that out and try and derive the story if you're Detective Shawn . . .

The second reference came in the middle of his argument about the consistent statements of Ortega and Ortiz:

> You'd expect two completely different stories if we believe this theory that everyone in gangs lies. But what Detective Shawn found was consistent. Also the statements of Canas was that a skinny, thin Hispanic guy with acne was up on the balcony and a big-boned, heavyset guy with a ponytail significantly bigger than the thin Hispanic guy was up on the balcony and those are the two guys who committed the killing.

"We agree with Defendant that it [was] improper for the prosecution to refer the jury to matters outside the record." *Allen*, 2000-NMSC-002, ¶ 104, 128 N.M. 482, 994 P.2d 728. Viewing the prosecutor's statements in the context of the individual facts and circumstances of this case, however, we do not find that they had such a persuasive and prejudicial effect on the jury's verdict that Defendant was deprived of a fair trial. "Parties alleging fundamental error must demonstrate the existence of circumstances that 'shock the conscience' or implicate a fundamental unfairness within the system that would undermine judicial integrity if left unchecked." *State v. Cunningham*, 2000-NMSC-009, ¶ 21, 128 N.M. 711, 998 P.2d 176. The jury had before it evidence from two other eyewitnesses that identified Defendant as one of the shooters. Because we find substantial evidence in the record to support Defendant's convictions, and because Defendant failed to demonstrate circumstances that "shock the conscience" or show a fundamental unfairness, we find no fundamental error.

IX.

{61} Defendant next asserts that the multiple conspiracy charges and convictions violate the Double Jeopardy Clause where there was no evidence of any agreement, let alone separate agreements to support separate charges. Because of our disposition of Defendant's convictions for conspiracy to commit depraved-mind murder and conspiracy to commit shooting at a dwelling or occupied building, the only remaining conspiracy conviction is conspiracy to commit aggravated battery. Thus, we do not address Defendant's double jeopardy argument. We find sufficient evidence to support Defendant's one conviction for conspiracy to commit aggravated battery and affirm this conviction.

{62} Conspiracy is a specific intent crime. *See Baca*, 1997-NMSC-059, ¶ 51, 124 N.M. 333, 950 P.2d 776. "In order to be convicted of conspiracy, the defendant must have the requisite intent to agree and the intent to commit the offense that is the object of the conspiracy." *Varela*, 1999-NMSC-045, ¶ 42, 128 N.M. 454, 993 P.2d 1280; *see also Baca*, 1997-NMSC-059, ¶ 51, 124 N.M. 333, 950 P.2d 776. The agreement need not be verbal, but may be shown to exist by acts which demonstrate that the alleged co-conspirator knew of and participated in the scheme. *See State v. Deaton*, 74 N.M. 87, 90, 390 P.2d 966, 968 (1964). The agreement may be established by circumstantial evidence. *Id.* at 89, 390 P.2d at 967. Both Ortega and Ortiz indicated that one of the two men shot first at Mendez, and then

the gun was handed off to the other who immediately shot at Ortega and Canas. At trial, Ortega positively identified Defendant as the second shooter, stating that he took the gun away from Allison and began shooting at Ortega and Canas. According to Ortiz's statement, after Defendant resisted Allison's request for the gun, Defendant told the four down below, "You guys think I'm joking," and began shooting. Furthermore, both Ortiz and Ortega indicated that the shooting was the result of a verbal conflict between competing gang members. Ortega testified that he heard someone on the balcony ask them what they were doing in their barrio—meaning the Barelas barrio—and that he was talking to Canas, Ortega and Mendez, all Juaritos. As noted above, Mendez then responded, "we can go anywhere we want, Juaritos." We find that the passing of the gun between Allison and Defendant and the evidence of a verbal conflict between the competing gang members immediately preceding the shooting is sufficient evidence for a rational jury to find beyond a reasonable doubt that either by words or acts there was an agreement to shoot at the men located below the balcony with a deadly weapon.

X.

{63} Defendant argues that cumulative error requires a reversal in this case. "In New Mexico the doctrine of cumulative error is strictly applied." *Stills*, 1998-NMSC-009, ¶ 51, 125 N.M. 66, 957 P.2d 51 (quoting *State v. Martin*, 101 N.M. 595, 601, 686 P.2d 937, 943 (1984)). It cannot be invoked when " 'the record as a whole demonstrates that the defendant received a fair trial.' " *Id.* Because we have vacated all convictions for which we found error, and there is otherwise no error to accumulate, we conclude that the defendant received a fair trial and that the doctrine is not applicable in this case.

XI.

{64} Lastly, Defendant claims that his thirty year sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article II, Section 13 of the New Mexico Constitution. However, as Defendant did not raise this issue below, it was not properly preserved for appellate review. "[A] non-jurisdictional claim not raised in the lower court is not properly reviewable on appeal." *State v. Burdex*, 100 N.M. 197, 201, 668 P.2d 313, 317 (Ct.App.1983) (finding defendant's constitutional claim of cruel and unusual punishment was not asserted at the trial court and was therefore not properly preserved for appeal because such a claim is non-jurisdictional).[4] We therefore review Defendant's claim for fundamental error.

{65} Defendant asserts that his sentence was disproportionate to his involvement in the crime as evidenced by the fact that the jury did not convict him of willful and deliberate murder, or of aggravated battery against Mendez, but rather of first-degree depraved-mind murder, which meant the jury clearly believed that Allison, not Defendant, shot the fatal shots. Defendant urges us to find that because of these facts, and because he was a child at the time of the crime, his sentence is so disproportionate as to "shock the general conscience" or "violate principles of fundamental unfairness." We acknowledge that "[a] sentence may constitute cruel and unusual punishment if its length is disproportionate to the crime punished," *Burdex*, 100 N.M. at 202, 668 P.2d at 318, and that it is within "the province of the judiciary to review whether a sentence constitutes cruel and unusual punishment in violation of a constitutional provision." *State v. Rueda*, 1999-NMCA-033, ¶ 10, 126 N.M. 738, 975 P.2d 351. We conclude that Defendant's thirty year sentence with the possibility of

4. Defendant asserts that an unconstitutional sentence is an illegal sentence that may be challenged for the first time on appeal, relying on *State v. Sinyard*, 100 N.M. 694, 695, 675 P.2d 426, 427 (Ct.App.1983) and *State v. Smith*, 102 N.M. 350, 351-353, 695 P.2d 834, 835-837. Defendant's reliance on these cases is misplaced. In those cases the defendants were not challenging their sentences as violations of the constitutional prohibition against cruel and unusual punishment, but rather were claiming that their sentences were illegal as not authorized under the applicable statute.

good time credit does not constitute fundamental error.

{66} Section 31–18–15.3(D) provides: "When an alleged serious youthful offender is found guilty of first degree murder, the court shall sentence the offender pursuant to the provisions of the Criminal Sentencing Act. . . . The court may sentence the offender to less than, but not exceeding, the mandatory term for an adult." Adults convicted of first-degree murder "shall be punished by life imprisonment or death." Section 31–18–14(A). However, under the statute, juvenile offenders convicted of first-degree murder "may be sentenced to life imprisonment but shall not be punished by death." *Id.* It is rare that a term of incarceration, "which has been authorized by the Legislature, will be found to be excessively long or inherently cruel." *State v. Augustus,* 97 N.M. 100, 101, 637 P.2d 50, 51 (Ct.App.1981) (finding that the trial court's sentence did not constitute cruel and unusual punishment because it did not exhibit a deliberate indifference to defendant's medical needs, even though prior to sentencing defendant underwent open heart surgery and his surgeon expressed his belief that defendant should never be incarcerated due to his medical problems). As summarized above, there was sufficient evidence to convict Defendant of first-degree depraved-mind murder as either a principal or accessory and conspiracy to commit aggravated battery. Accordingly, we conclude that a thirty year sentence with the opportunity for good time was authorized by statute and not constitutionally disproportionate to the crimes involved.

XII.

{67} For the reasons stated above, we vacate Defendant's conviction for conspiracy to commit depraved-mind murder and reverse Defendant's convictions for conspiracy to commit shooting at a dwelling or occupied building (great bodily harm), conspiracy to commit shooting at a dwelling or occupied building (resulting in injury), shooting at a dwelling or occupied building (no injury), and conspiracy to commit shooting at a dwelling or occupied building (no injury). We affirm Defendant's convictions for first-degree depraved-mind murder and conspiracy to commit aggravated battery.

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

WE CONCUR: PATRICIO M. SERNA, Chief Justice, and PETRA JIMENEZ MAES, Justice.

GENE E. FRANCHINI, Justice (concurring in part, dissenting in part).

PAMELA B. MINZNER, Justice (concurring in part, dissenting in part).

MINZNER, Justice (concurring in part, dissenting in part).

{69} I would remand this case for a new trial. The majority holding otherwise, I respectfully dissent.

{70} I agree that Defendant properly invoked this Court's mandatory appellate jurisdiction, that he failed to preserve a Confrontation Clause claim, that he was improperly convicted of conspiracy to commit depraved mind murder, and that he was improperly convicted of multiple counts of conspiracy to commit shooting at a dwelling or occupied building. Thus, I concur in parts II, III(A), V, and VI.

{71} Defendant's claims of prosecutorial misconduct and cruel and unusual punishment arising from his sentence could arise on remand, so I agree these questions ought to be reached; additionally, I agree with the majority's disposition on the merits. I also agree that there was sufficient evidence to support the conviction of conspiracy to commit aggravated battery. Because we consider improperly admitted evidence when evaluating the sufficiency of the evidence on appeal, *State v. Post,* 109 N.M. 177, 181, 783 P.2d 487, 491 (Ct.App.1989), I agree that there is sufficient evidence supporting the conviction of depraved mind murder as a principal or as an accessory. I therefore also concur in parts IV, VIII, IX and XI.

{72} I would, however, remand for a new trial because I believe for the following reasons that the admission of the tape and transcript of Joseph Ortiz's interview with the police was reversible error. I therefore re-

spectfully dissent from part III(B). The majority admits Ortiz's out of court statements under Rule 11–803(X) NMRA 2002. I disagree for three reasons.

{73} First, I am not persuaded that the requirements for admission under Rule 11–803(X) were satisfied. Further, despite a brief reference to that rule, the trial court may not have admitted the statement on that basis. Finally, I do not think that the use of Rule 11–803(X) in this context comports with its drafters' intentions. Because none of the other rules upon which the State relied appear to be applicable, I would reverse the convictions of depraved mind murder, aggravated assault, and conspiracy to commit aggravated battery, and remand for a new trial on these counts. In view of my disposition of part III(B), I would not reach the ineffective assistance of counsel and cumulative error claims found in parts VII and X.

{74} Rule 11–803(X) provides:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, [is not included in the hearsay rule] if the court determines that:
>
> (1) the statement is offered as evidence of a material fact;
>
> (2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
>
> (3) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

This rule expressly requires that the proffered statement have "equivalent circumstantial guarantees of trustworthiness." I believe that Ortiz had a motive to lie and therefore his statement lacked circumstantial guarantees and was inherently untrustworthy. I conclude that Rule 11–803(X) does not provide a basis for admitting the statement.

{75} It is true that Ortiz's statement did implicate his own cousin, and one could reason that Ortiz would not implicate a family member with a statement unless he believed it to be true. Ortiz, however, *did* have a motive to shift the blame for the fatal shot from his cousin to Defendant, assuming—as I think we can—that Ortiz was aware that eyewitnesses put both his cousin and Defendant on the balcony, and assuming familial loyalty to his cousin. Although accessory liability might make Defendant legally culpable whether or not he fired the fatal shots, I think it is fair to say that most people would view a shooter who missed his target less culpable than one who slays his target. The fact that Ortiz most likely would view his cousin as being less culpable had he not fired the fatal shots significantly diminishes any circumstantial guarantee of trustworthiness based on the notion that people do not implicate family members unless believing it to be true. *Cf. State v. Torres*, 1998–NMSC–052, ¶ 18, 126 N.M. 477, 971 P.2d 1267 (agreeing that, in the analogous context of statements against penal interest, the subjective beliefs of the declarant about legal culpability are relevant to determining the admissibility of the hearsay).

{76} The majority also reasons that because Ortiz put himself and his family in danger by giving a description of the shooters to the police, it is less likely that he lied. Any danger inherent in a *true* identification of a gang member, however, would also seem to argue *against* the candor of such a statement, especially to the police. Faced with the possibility of gang retaliation, Ortiz might have felt pressure to give an incomplete or inaccurate description of the events.

{77} In fact, the State introduced evidence of Ortiz's and Defendant's gang membership to explain why Ortiz may have lied at trial and to provide a motive for the quarrel. I agree that Ortiz's fear of retaliation shows that he has valid reasons for "being less than candid about his cousin's and Defendant's involvement in the shooting at trial." Majority Opinion, ¶ 58. His fear could have had

the same effect on his statement to the police. In this vein, Ortiz's "ranking out" of the Barelas gang certainly provided a plausible explanation for the start of the quarrel. It also provides a plausible explanation for a less than candid statement to the police about that quarrel.

{78} Both familial loyalty and fear of retaliation could lead to an inference that Ortiz would not have made the statement to the police unless he believed it to be true. On the other hand, both facts also argue that the statement he gave was less than candid. Evidence that supports two contradictory inferences is properly said to have proved neither. *State v. Garcia,* 114 N.M. 269, 275, 837 P.2d 862, 868 (1992). Familial loyalty and fear of retaliation would seem to argue more forcefully *against* a truthful statement; at the very least they do not provide circumstantial guarantees of trustworthiness. Because Rule 11-803(X) requires an affirmative showing of such guarantees, I do not believe that it provides a basis for admitting this statement.

{79} I also note that the detective who took Ortiz's statement felt that Ortiz was lying to him. On cross-examination, Detective Shawn testified that at the time of the interview he felt that Ortiz knew who the shooters were but was concealing their identity. He also testified that he was unaware at the time of the interview that Ortiz and Allison were cousins. Detective Shawn's frustration that Ortiz was hiding the identity of the shooters is understandable. Either out of fear of gang retaliation or out of familial loyalty to Allison, Ortiz had every motive to be less than candid with the police. The same motivation that influenced Ortiz to neglect to name the two men on the balcony would, I think, encourage him to shift the blame for the fatal shot from his cousin to Defendant. In this case the person in the best position to gauge the candor of the out of court statement was Detective Shawn, who alone observed Ortiz's demeanor at the time of the interview. When the person in the best position to judge a witness's candor feels that the witness was being less than truthful, I am uncomfortable holding that the witness's statement bears circumstantial guarantees of trustworthiness.

{80} We have said—and as a general matter I agree—that we should defer to the discretion of the trial judge on evidentiary matters. *State v. Ross,* 1996-NMSC-031, 122 N.M. 15, 20, 919 P.2d 1080, 1085. Such deference, however, has less force in this case, where it is less than clear from the record that the trial court relied upon Rule 11-803(X) in its ruling. In fourteen pages of transcript discussion, the trial court only once mentions Rule 11-803(X) and it certainly cannot be said to be the thrust of the State's argument. The State initially proffered the out of court statements under Rule 11-803(E) NMRA 2002. After a lengthy discussion of that rule, the State noted, "There are some other exceptions that I could argue or basis on the rules of evidence that I could argue for the admission of this, but that [, Rule 11-803(E),] I think is [the principal basis]." After Defendant's response to the State's argument, the State proffered several other grounds for the admission of the statement: Rule 11-801(D)(1)(c) NMRA 2002, Rule 11-803(X), Rule 11-804(A)(3) NMRA 2002, and Rule 11-613(B) NMRA 2002. During its discussion of Rule 11-803(X), the State recognized that it had not satisfied all of the requirements of the rule: "I realize that notice should be given sufficiently in advance of trial to allow counsel to prepare, but I think the Court is well aware of the circumstances under which Mr. Ortiz has appeared here. And I think that notice requirement is a somewhat flexible requirement." The trial court never expressly decided whether the notice requirement is flexible enough to allow use of the rule absent notice.

{81} In response to these arguments, the trial court initially indicated that the statement was admissible as a combination of Rule 11-801(D)(1)(c) and 11-803(E). In making its final ruling, the trial court mentions, for the first time, Rule 11-803(X):

> I think [that there are] grounds for me to go ahead and allow it at least to be played for the jury, just not admitted into evidence as an exhibit, but for all the other reasons that were cited by [the State],

803X and some of the other 804–A3. I do believe it's appropriate to allow that.

The court then noted that the State could have impeached Ortiz with every line of the out-of-court statement, and that it was more efficient to just play the tape to the jury. While it is unclear from the transcript what the exact grounds for the trial court's ruling were, it is clear that Rule 11–803(X) did not play a significant role in the deliberations. The trial court never made an express ruling that the three textual requirements of Rule 11–803(X) had been met, nor did it rule that the State's failure to comply with the notice requirement was excusable. Under those circumstances, I am not persuaded that the reasons for the principle of deference apply.

{82} The Court of Appeals has said of the essentially identical predecessor to Rule 11–803(X) that it "cannot be read to mean that hearsay which almost, but not quite, fits another specific exception, may be admitted under the 'other exceptions' subsection...." *State v. Barela*, 97 N.M. 723, 726, 643 P.2d 287, 290 (Ct.App.1982). In this case the State appears to me to rely on this rule in a way the Court of Appeals rejected as contrary to its purpose. As its first sentence makes clear, Rule 11–803(X) should be used in a novel situation not considered by the drafters and not "specifically covered by any of the foregoing exceptions...." It should not be used when the statement is of a type expressly considered by other exceptions, but which does not satisfy the rules those exceptions establish.

{83} In this case, the State initially offered the testimony under Rule 11–803(E) (recorded recollection), and that was the focus of most of its discussion. The State also offered the hearsay under a number of other rules: Rule 11–613(B) (extrinsic proof of prior inconsistent statements), Rule 11–801(D)(1)(c) (statements of identification), Rule 11–804(A)(3) (one of the definitions of unavailable) and Rule 11–803(X). None appears to support the use of Ortiz's interview with the police.

{84} We have already noted in the related case *State v. Allison*, 2000–NMSC–027, ¶ 30, 129 N.M. 566, 11 P.3d 141, that Rule 11–803(E) is not a proper ground for the admission of this statement. In that case, we ultimately allowed the admission of Ortiz's out-of-court statement under Rule 11–803(X), not on the merits, but because the defendant in that case did not argue against the use of that rule. *Id.*, ¶ 31. Rule 11–804(A)(3) is simply the definition of unavailable that would apply to Ortiz and is not a ground for the admission of the statement. Rule 11–613(B) would allow, in this case, for the impeachment of Ortiz with extrinsic proof of those out-of-court statements, but would not allow them to come in for substantive purposes.

{85} Finally, Rule 11–801(D)(1)(c) (statements of identification) would not allow the statements to come in because Ortiz's interview did not identify either of the two shooters but instead described the shooting. Majority Opinion, ¶ 4. *State v. Lopez*, 1997–NMCA–075, 123 N.M. 599, 943 P.2d 1052 recognizes that courts ought to give a narrow interpretation of the word identification, stating: "Identification in its usual sense hinges upon a witness' recognition of a suspect and ability to match the person then to the person now and give assurances that this is the same individual." *Lopez*, 1997–NMCA–075, ¶ 11, 123 N.M. 599, 943 P.2d 1052. In this case Ortiz described seeing a "big guy" and a "little guy." He also described what each was wearing and told how the big guy asked for the gun, but the little guy did not want to give it to him. The little guy then yelled at the four below, "You guys think I'm joking," before shooting. Although this description might help the police find the alleged perpetrators, I do not believe we ought to characterize it as a statement of identification under Rule 11–801(D)(1)(c), because in it Ortiz did not match any current suspect to the people he witnessed at the crime scene.

{86} In this case, the State was faced with an out-of-court statement that was almost, but not quite, a recorded recollection under 11–803(E), and was almost, but not quite, a statement of identification under Rule 11–801(D)(1)(c). The statement was thus "specifically covered by [some] of the foregoing exceptions...." Rule 11–803(X). It did not, however, satisfy the requirements of any of those exceptions. In this situation the use of

Rule 11–803(X) seems contrary to its purpose, and allows the State to avoid the requirements of the hearsay rule and its normal exceptions.

{87} I would reverse the trial court's determination that Ortiz's hearsay statement was admissible and reverse Defendant's convictions. I do not think that Rule 11–803(X) allows the admission of his statement because the elements of that rule are not met, because the trial court did not seem to rely on that rule in its decision, and because the use of Rule 11–803(X) in this context seems contrary to its purpose. Because I find none of the other rules relied upon by the State and the trial court persuasive, I would remand for a new trial and not allow the substantive use of the evidence. I respectfully dissent from part III(B). I concur in parts II, III(A), IV, V, VI, VIII, IX and XI. Because of my disposition of Defendant's evidentiary objection, I would not reach parts VII or X.

I CONCUR: GENE E. FRANCHINI, Justice.

2002-NMCA-029

42 P.3d 844

STATE of New Mexico, Plaintiff–Appellant,

v.

James LASWORTH, Defendant–Appellee.

No. 21,513.

Court of Appeals of New Mexico.

Dec. 7, 2001.

Certiorari Denied, No. 27,333, March 5, 2002.

Patricia A. Madrid, Attorney General, Margaret McLean, Assistant Attorney General, Santa Fe, NM, for Appellant.

Todd Hotchkiss, Roderick T. Frechette, II, Frechette & Associates, P.C., Albuquerque, NM, for Appellee.

OPINION

ALARID, Judge.

INTRODUCTION

{1} In *State v. Torres,* 1999–NMSC–010, ¶ 30, 127 N.M. 20, 976 P.2d 20, the Supreme Court held that the results of a horizontal gaze nystagmus (HGN) field sobriety test constitute scientific evidence within the meaning of Rule 11–702 NMRA 2001 when offered by the State against a defendant in a prosecution for driving while intoxicated; and, that HGN test results may not be admitted unless the State, as the proponent of HGN evidence, has demonstrated that such evidence meets the evidentiary reliability standard adopted by the Supreme Court in *State v. Alberico,* 116 N.M. 156, 861 P.2d 192 (1993). In the present case, the district court, applying *Torres,* ruled that the results of Defendant's HGN test were inadmissible at trial. We affirm.

Overview of HGN and Standardized Field Sobriety Tests

{2} HGN has come to be a principal component of standardized field sobriety tests

(FSTs) as the result of a series of studies conducted under the auspices of the National Highway Traffic Safety Administration (NHTSA). In the mid 1970s, Drs. Marcelline Burns and Herbert Moskowitz, doing business as the Southern California Research Institute, were awarded a contract by the NHTSA to conduct laboratory studies of various FSTs then in use around the country, with the goal of identifying the most effective battery of FSTs. The results of the research were published in 1977. M. Burns and H. Moskowitz, *Psychological Tests for DWI Arrest, Final Report,* No. DOT–HS–802–424 (1977) (hereafter the 1977 Report). The 1977 Report recommended a battery of three FSTs: one-leg-stand, walk-and-turn, and HGN. According to Dr. Burns and Dr. Moskowitz, the combined scores from the proposed three-test FST battery correctly discriminated between subjects having blood alcohol concentrations (BACs) below 0.10 percent and those having BACs at or above 0.10 percent eighty-three percent of the time.

{3} NHTSA sponsored a further study to standardize administration and scoring of the FSTs. The results of this second study were published in 1981. V. Tharp, M. Burns, and H. Moskowitz, *Development and Field Test of Psychophysical Tests for DWI Arrest,* No. DOT–HS–805–864 (1981). The researchers reported that in the laboratory, police officers trained in the administration of the three-test battery were able to discriminate between subjects whose BAC was below 0.10 percent and those whose BAC was at or above this level eighty-one percent of the time.

{4} NHTSA funded a third study. The purpose of this study was to evaluate the effectiveness of the three-test battery in the field. Researchers concluded that a properly-administered HGN test would correctly identify a suspect as having a BAC at or above 0.10 percent seventy-seven percent of the time, and that when the HGN and walk-and-turn results were combined using a decision matrix, the two tests would correctly identify a suspect as having a BAC at or greater than 0.10 percent eighty percent of the time. T. Anderson, R. Schweitz, and M. Snyder, *Field Evaluation of a Behavioral Test Battery for DWI,* No. DOT–HS–806–475 (1983).

{5} There have been further studies validating the NHTSA standardized FST battery, including studies in Colorado, M. Burns and E. Anderson, *A Colorado Validation Study of the Standardized Field Sobriety Test (SFST) Battery,* Final Report, submitted to Colorado Department of Transportation (1995) (hereafter 1995 Colorado Report); Florida, M. Burns and T. Dioquino, *A Florida Validation Study of the Standardized Field Sobriety Test (S.F.S.T.) Battery,* (1998); and California, J. Stuster and M. Burns, *Validation of the Standardized Field Sobriety Test Battery at BACs Below 0.10 Percent,* Final Report, submitted to U.S. Dept. of Transportation, NHTSA (1998) (hereafter 1998 Final Report). In the 1998 Final Report, researchers concluded that the NHTSA's three-test FST battery enabled officers in the field to accurately estimate whether a motorist's BAC was at or above 0.08 percent ninety-one percent of the time.

{6} The 1995 Colorado Report describes the HGN FST as follows:

> The basic requirements for examination of the eyes for HGN are only that the officer must be able to see the subject's eyes and the subject must be able to see the stimulus object. No special apparatus or conditions are necessary. The officer instructs the subject to hold his/her head still and to follow the movement of a stimulus (e.g., a pen, penlight, or finger) with the eyes. The officer observes each of the subject's eyes for three signs:
>
> (1) the ability of the eye to smoothly track or pursue the stimulus as it moves left and right in the subject's visual field.
>
> *A lack of smooth pursuit movement is consistent with the presence of a D–I–P* [depressants-inhalants-phencyclidine] *drug.*
>
> (2) the presence and the amplitude of a jerking movement, which may occur when the eyes have deviated as far as possible to the extreme side of the visual field.
>
> *A distinct jerking is consistent with the presence of a D–I–P drug.*

(3) the angle of the eye's gaze when the first nystagmus jerking occurs; i.e., the angle of onset.

Jerking which occurs prior to a 45 degree angle of gaze and persists when the stimulus is held in one position indicates the presence of a D I P drug.

1995 Colorado Report, *supra*, at 20.

Procedural History

{7} Defendant was arrested on September 10, 1998. The arresting officer had observed Defendant traveling in the wrong direction on the on ramp leading from State Road 599 to northbound I–25. After stopping Defendant's car, the arresting officer noted that Defendant "displayed signs of impairment." The arresting officer administered a "Standardized Field Sobriety Test." Based on the results of this test, the officer arrested Defendant. Defendant submitted to a breath alcohol test, which indicated a BAC of 0.09 percent. Defendant was convicted in Santa Fe County Magistrate Court of driving while under the influence in violation of NMSA 1978, § 66–8–102.

{8} Defendant appealed to the First Judicial District Court. The district court conducted a trial de novo on February 4, and March 3, 2000. The case was tried to the court without a jury. At the beginning of the trial, the prosecutor explained to the district court that the State intended to present an expert who would validate the HGN FST under the standards of *Alberico* and *Torres*. However, due to scheduling problems, the expert could not appear until later in the trial. The district court proposed that the State go ahead and present its lay HGN evidence, with the understanding that the court would disregard this testimony if the State's expert was unable to establish a foundation for its admission. During the first day of trial, the district court heard testimony from the arresting officer, who recounted his training and experience in administering the NHTSA's standardized FSTs. The arresting officer provided a detailed description of the FSTs he administered to Defendant. The officer testified that on the HGN FST, Defendant demonstrated a "lack of smooth pursuit" in both eyes, "distinct nystagmus at maximum deviation" in both eyes, and an "angle of onset of nystagmus" of approximately forty degrees. The officer testified that he observed six cues, the maximum possible under the standardized HGN FST. The officer stated that, based on his training and experience, the presence of all six HGN cues indicated Defendant was "under the influence" of alcohol or another central nervous system depressant, an inhalant, or PCP at the time of the test. After the first day of testimony, the trial was continued.

{9} On March 3, 2000, the trial resumed. The State tendered Marcelline Burns, Ph.D., as its expert on HGN testing. Dr. Burns' twenty-one page curriculum vitae was marked and admitted. Dr. Burns holds a bachelor's degree, a master's degree, and a doctoral degree in psychology. Dr. Burns recounted her role in the development and validation of the NHTSA's standardized FST battery. Dr. Burns testified that she has qualified as an expert witness on the HGN FST in at least twenty-six states.

{10} Defense counsel objected to the State's proffer of Dr. Burns as an expert. In response to voir dire by defense counsel, Dr. Burns conceded that she is not a medical doctor, and, that as a psychologist, she is primarily interested in behavorial measurements. The district court explained that it understood *Torres* to require that HGN evidence must be both scientifically *valid* and scientifically *reliable*. The district court believed that Dr. Burns was qualified to speak to the second, "reliability," prong. However, in the district court's view, Dr. Burns was not qualified by herself to establish the first, "validity," prong. In the district court's view, the State should have called an expert in a discipline such as biology or medicine, rather than a behavioral psychologist, to explain how the amount of alcohol a person consumes correlates with HGN. The district court expressed its concern that without such testimony, it could not rule out the possibility that the correlation between BAC and HGN claimed by Dr. Burns was a "coincidence." Because the State could satisfy only the second prong of the *Torres* test, the district court ruled that the arresting officer's testi-

mony regarding the results of the HGN FST were inadmissible.

{11} At the State's request, the district court continued the trial to enable the State to appeal the ruling excluding evidence of the results of the HGN FST. We have jurisdiction pursuant to NMSA 1978, § 39-3-3(B)(2) (1972).

DISCUSSION

{12} Before scientific evidence may be admitted, the proponent must satisfy the trial court that the technique used to derive the evidence has scientific validity—there must be "proof of the technique's ability to show what it purports to show." *Alberico*, 116 N.M. at 167, 861 P.2d at 203. We begin by deciding what it is that the HGN FST "purports to show."

{13} Dr. Burns, the State's expert, is a leading—perhaps the foremost—proponent of the HGN FST. Dr. Burns was involved in the original NHTSA-funded research, as well as many of the subsequent studies of the NHTSA's standardized FST battery. Although the original goal of the NHTSA research was "[t]o develop more sensitive tests that would provide more reliable evidence of impairment," 1977 Report, Technical Summary, that approach was abandoned during the development of the NHTSA standardized FST battery. Dr. Burns testified that the HGN FST was validated by comparing arrest/release decisions based upon the results of the NHTSA's standardized FSTs against the subjects' BACs as subsequently measured by breath alcohol or blood alcohol tests.[1]

{14} In the 1998 Final Report, Dr. Burns explained how the limitations imposed by this methodology have been misunderstood:

> The only appropriate criterion measure to assess the accuracy of SFSTs is BAC. Measures of impairment are irrelevant because performance of the SFSTs must be correlated with BAC level, rather than driving performance. BAC provides an objective and reliable measure that states have recognized as presumptive and/or per se evidence of impairment, depending on the statute.
>
> . . . .
>
> Many individuals, including some judges, believe that the purpose of a field sobriety test is to measure driving impairment. For this reason, they tend to expect tests to possess "face validity," that is, tests that appear to be related to actual driving tasks. Tests of physical and cognitive abilities, such as balance, reaction time, and information processing, have face validity, to varying degrees, based on the involvement of these abilities in driving tasks; that is, the tests seem to be relevant "on the face of it." Horizontal gaze nystagmus lacks face validity because it does not appear to be linked to the requirements of driving a motor vehicle. The reasoning is correct, but it is based on the incorrect assumption that field sobriety tests are designed to measure driving impairment.
>
> Driving a motor vehicle is a very complex activity that involves a wide variety of tasks and operator capabilities. It is unlikely that complex human performance, such as that required to safely drive an automobile, can be measured at roadside. The constraints imposed by roadside testing conditions were recognized by the developers of NHTSA's SFST battery. As a consequence, they pursued the development of tests that would provide *statistically valid and reliable indications of a driver's BAC, rather than indications of driving impairment. The link between BAC and driving impairment is a separate issue, involving entirely different research methods.*

1. We realize that during its redirect examination of Dr. Burns, the State inserted the phrase "horizontal gaze nystagmus as a measure of impairment" into a series of questions, and, that in responding to these questions, Dr. Burns did not take issue with the State's characterization of HGN "as a measure of impairment." In our view, any inference that may be drawn from Dr. Burns' failure to correct the State's characterization of HGN as a "measure of impairment" does not overcome her testimony on direct examination and her unequivocal published statements that the HGN FST has been validated as a means of discriminating between BACs below a given level and BACs at or above that level, and not as a direct measure of impairment.

1998 Final Report, *supra*, at 10, 27–28 (emphasis added).[2]

{15} "[S]cientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). As Dr. Burns has observed, "the objective of the test is to discriminate between drivers above and below the statutory BAC limit, *not to measure driving impairment.*" 1998 Final Report, *supra*, at 28 (emphasis added). Based on Dr. Burns' testimony and our own review of the 1995 Colorado Report, as well as her published statements, we conclude that the HGN FST has not been scientifically validated as a direct measure of impairment. We conclude that the sole purpose for which the HGN FST arguably has been scientifically validated is to discriminate between drivers above and below the statutory BAC limit, which in New Mexico is 0.08 percent.[3]

{16} The State argues that Dr. Burns was qualified to establish the validity of the HGN FST and lay a foundation for the arresting officer's testimony that Defendant was "under the influence" at the time the FST was administered. In making this argument, the State erroneously assumes that the HGN FST measures impairment. However, as noted above, "the objective of the test is to discriminate between drivers above and below the statutory BAC limit, *not to measure driving impairment,*" and "[t]he link between BAC and driving impairment is a separate issue, involving entirely different research methods." Thus, in order to lay a foundation for the admission of the arresting officer's statement that Defendant was under the influence of alcohol or another central nervous system depressant, the State was required to establish two predicates: first, that the HGN FST is a scientifically valid means of discriminating between BACs below 0.08 percent and those at or above 0.08 percent; and, second, that a BAC at or above 0.08 percent correlates with diminishment of Defendant's mental or physical driving skills. Dr. Burns appears to have been called to testify as to the first predicate.

{17} The State argues that the district court abused its discretion by ruling that Dr. Burns was not able to explain how alcohol caused the eye movements observed by the arresting officer. At trial, Dr. Burns testified that "[a]lcohol is a central nervous system depressant and as it depresses the brain, which is the part that we are concerned about here, it affects the reticular formation, the brainstem, and that disrupts or causes a dysfunction in the muscle and neural control of the eyes." Dr. Burns conceded that she herself had not conducted studies or experiments to determine how and why alcohol causes HGN and that her understanding of the mechanisms that produce HGN was based upon her review of the published results of studies by other researchers. However, Dr. Burns also testified that her knowledge of the physiological causes of HGN was sufficient to allow her to design and carry out studies correlating the HGN FST with BAC.

{18} Some minimal level of knowledge of the underlying substantive area of science is necessary even to design a statistical study. *See* 1 David L. Faigman, *et al.*, *Modern Scientific Evidence: The Law and Science of Expert Testimony* § 3–1.2 (1997) (hereafter *Modern Scientific Evidence*) (noting "choice of which data to examine" may require subject matter expertise in addition to knowledge of applied statistics). Dr. Burns testified that her knowledge of the physiological basis of HGN was sufficient for her to design and carry out studies of the HGN FST. There was no evidence refuting Dr. Burns' testimony on this point. Dr. Burns' understanding of the causes of HGN therefore appears to have been sufficient for her to design and conduct studies to verify whether the HGN FST can be used to discriminate between BAC below and above a given level.

2. The 1998 Final Study is available online at the National Highway Traffic Safety Administration's website: *http://www.nhtsa.dot.gov/people/injury/alcohol/limit.08/ !SFSTREP.pdf.*

3. The standardized FSTs initially were validated as means of discriminating between BACs at or above 0.10 and those below this level. In the 1998 Final Report, Dr. Burns concluded that the standardized FST battery was a valid and "extremely accurate" means of discriminating between BACs above and below the 0.08 percent level and she suggested that the FST battery can be used to accurately discriminate BACs above or below 0.04 percent. 1998 Final Report, *supra*, at 26.

{19} Evidence that Dr. Burns was qualified in the abstract to design and conduct studies of HGN does not mean that she in fact designed and conducted scientifically sound studies. *See Modern Scientific Evidence,* supra, § 1–3.3.3 (observing that "even the highest quality [scientific] journals sometimes publish work that is later found to be wrong"). The district court appears to have been concerned that without a more detailed understanding of the causes of HGN, the court could not be sure the results obtained by Dr. Burns and other HGN researchers were not a "coincidence."

{20} We share the district court's concern. In the 1995 Colorado study, 234 motorists who were stopped subsequently submitted to a breath- or blood-test, thereby enabling the researchers to compare the subject's measured BAC with the arrest-release decision dictated by the FSTs.1995 Colorado Report at 13. At the time of the Colorado study, a BAC of 0.05 percent or greater provided grounds for arrest under Colorado law. *Id.* at *v*. The mean BAC of the 234 motorists was 0.152 percent, or *over three times* the statutory limit under Colorado law. *Id.* at 16. Of the 234 motorists, 184 had BACs at or above the statutory limit of 0.05 percent, *id.* at 14, table 4; and, of these 184 motorists, 133 had BACs at or above 0.10, or *over twice* the statutory limit, *id.* at 17. The driving behaviors that led the officers participating in the study to stop a motorist in the first place clearly were selecting out of the general driving population a highly intoxicated group of test subjects. If the officers had simply arrested every one of the 234 motorists, without even administering the FSTs, seventy-nine percent (184 of 234) of their arrest-release decisions would have been correct. In the actual study, the researchers concluded that arrest-release decisions based on the FSTs were correct eighty-six percent of the time. *Id.* at 14. Thus, administration of the FSTs did not dramatically improve the overall percentage of correct decisions. Further, among motorists whose BACs fell in the range between 0.03 to 0.07 percent (0.05 percent ± 0.02 percent), arrest-release decisions based on the FSTs were correct only 57 percent (21 of 37) of the time. 1995 Colorado Report, Appendix IV. We share the district court's concern that some coincidental factor, such as the driving behaviors that led an officer to stop a motorist in the first place, were largely responsible for the claimed ability of the FSTs to discriminate between motorists above and below the statutory BAC. *See Modern Scientific Evidence, supra,* § 3–5.2.3 (discussing "confounding variable"—factor omitted from the researcher's analysis, which in fact drives correlation noted by the researcher).

{21} Further, Dr. Burns stated in the 1995 Colorado Report that "[i]t is possible that lack of smooth pursuit and distinct nystagmus at maximum deviation occur at low BACs with some subjects but not with others, or on some occasions but not others.... Research has not yet clearly defined HGN signs for low BACs." 1995 Colorado Report at 21. Dr. Burns noted that there is evidence that "smooth pursuit movement breaks down at BACs as low as 0.04%" and that "controlled laboratory research at low BACs is needed to examine the three HGN signs." *Id.* at 20. These statements suggest that the HGN FST may be prone to false positives under New Mexico law. *See* NMSA 1978, § 66–8–110(B)(1) (1978, as amended through 1993) (establishing presumption that motorist whose BAC is 0.05 percent or less is not under the influence of intoxicating liquor). We think that it would have been reasonable for the district court to want to know more about the effects of relatively low alcohol levels on the physiological mechanisms that produce HGN.

{22} Lastly, we note that although the HGN FST was originally validated as a means of discriminating between BACs below 0.10 percent and those at or above 0.10 percent, in the 1995 Colorado Report the FST battery was used to discriminate between BACs below 0.05 percent and those at or above 0.05 percent. Further, in the 1995 Colorado Validation Study, Dr. Burns suggested that the standardized FSTs also are effective when the criterion for arrest is 0.08 percent. 1995 Colorado Report at 15. The district court could reasonably have wanted to hear a more detailed scientific explanation of how the physiological cues that make up the HGN FST vary with a subject's BAC in such a remarkable manner that the HGN FST can provide statistically valid and reliable evidence at varying criterion BACs.

{23} *Torres* required the district court to conduct a searching, de novo inquiry into the validity of the HGN FST, not to merely rubber stamp the decisions of courts in other jurisdictions that have admitted such evidence. It is the district court, not the expert, however qualified, who makes the ultimate determination of the validity of scientific evidence. The district court was not required to accede to the State's take-it-or-leave-it proffer of Dr. Burns, and it did not abuse its discretion in requiring the State to produce an expert who could explain in greater detail than Dr. Burns the physiological and pharmacological basis of the six cues that make up the HGN FST.

{24} In its reply brief, the State argues that the district court misapplied *Torres* by reading *Torres* to require testimony from a medical doctor, and that it was on this narrow basis that the district court rejected Dr. Burns. Although some of the district court's remarks could be understood as a request for testimony from a medical doctor, in other places the district court expressed its concern more broadly, using the terms "biological or physical or medical evidence," "some basis biologically or medically," "the biological, medical explanation." Our review of the entire transcript of Defendant's trial satisfies us that the district court remained open to any witness who was capable of providing biological, physical, *or* medical evidence about the relationship of HGN to a subject's BAC.

{25} We note an alternate statutory rationale for upholding the exclusion of HGN evidence. This alternate ground follows from our recognition that the HGN FST has been validated, if at all, solely as a means of discriminating between BACs at or above a given level, and BACs below that level.

{26} NMSA 1978, § 66–8–107(A) (1978, as amended through 1993) provides that "[a]ny person who operates a motor vehicle within this state shall be deemed to have given consent . . . to *chemical* tests of his breath or blood or both, *approved by the scientific laboratory division of the department of health.*" (Emphasis added). NMSA 1978, § 66–8–110(A) (1978, as amended through 1993), provides that "[t]he results of *a test performed pursuant to the Implied Consent Act* [66–8–105 to 66–8–112 NMSA 1978] may be introduced into evidence in any civil action or criminal action arising out of the acts alleged to have been committed by the person tested for driving a motor vehicle while under the influence of intoxicating liquor or drugs." (Emphasis added). Lastly, Section 66–8–110(E) provides that "[t]he determination of alcohol concentration *shall* be based on the grams of alcohol *in one hundred milliliters of blood* or the grams of alcohol *in two hundred ten liters of breath.*" (Emphasis added).

{27} The statutes cited in the preceding paragraph were enacted by Chapter 35 of 1978 N.M. Laws, which created the Motor Vehicle Code. In 1978 when the Motor Vehicle Code was enacted, Dr. Burns and her colleagues had only recently published the first laboratory study advocating the adoption of HGN as a FST. In view of the experimental status of the HGN FST in 1978, it is not surprising that the Legislature did not include HGN as a method of proving a suspect's BAC. Although the HGN FST has come to be widely known and widely used subsequent to the enactment of the Motor Vehicle Code in 1978, the Legislature has not amended the Motor Vehicle Code to authorize a conviction[4] based upon the results of non-chemical BAC tests such as the HGN FST.

CONCLUSION

{28} The decision of the trial court excluding the results of Defendant's horizontal gaze nystagmus field sobriety test is affirmed.

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

WE CONCUR: JONATHAN B. SUTIN, Judge, and IRA ROBINSON, Judge.

4. Nothing in our discussion of the Motor Vehicle Code should be understood as foreclosing the use of the results of an HGN FST to establish probable cause for arresting a motorist or to establish "reasonable grounds" for administering a chemical BAC test. *See* § 66–8–107 (1978, as amended through 1993).

2002-NMCA-036

42 P.3d 851

STATE of New Mexico, Plaintiff–Appellee,

v.

Rufino MARTINEZ, Defendant–Appellant.

No. 22,059.

Court of Appeals of New Mexico.

Feb. 13, 2002.

Certiorari Denied, No. 27,378, March 18, 2002.

Patricia A. Madrid, Attorney General, James O. Bell, Assistant Attorney General, Santa Fe, NM, for Appellee.

Phyllis H. Subin, Chief Public Defender Kathleen T. Baldridge, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

PICKARD, Judge.

{1} Defendant was convicted of battery on a peace officer after he kicked and spit on a prison guard while engaged in a struggle with that guard. Defendant challenges his conviction on three grounds. First, Defendant contends that the trial court's limitation on the time allowed for voir dire violated his right to due process because he claims his counsel did not have sufficient time to inquire into the potential biases of venire members who had relatives in law enforcement. Second, Defendant contends that he made a prima facie showing that the State used its peremptory challenges in a racially discriminatory manner because the State used all three of its challenges to remove Hispanics from the jury, and as a result the trial court should have required the State to provide a racially neutral explanation for its challenges in accordance with *Batson v. Kentucky,* 476 U.S. 79, 96–98, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Finally, Defendant claims that there was insufficient evidence to convict him of battery on a peace officer because the act of spitting on the officer did not constitute a meaningful challenge to the officer's authority, and because the officer suffered only scratches and slight bruising when Defendant kicked him.

{2} We hold that Defendant made a prima facie showing that the State was using its peremptory challenges in a discriminatory

manner, and we therefore remand this case to the trial court to determine if the State had a racially neutral reason for exercising its third peremptory challenge against a Hispanic prospective juror. If the State is able to provide a racially neutral reason, then the conviction shall be affirmed, because we hold that (1) the trial court did not abuse its discretion in limiting the time allowed for voir dire because defense counsel had sufficient time to inquire into potential biases and (2) there was sufficient evidence for the jury to conclude that Defendant's act of spitting on a prison guard constituted a "meaningful challenge" to that officer's authority, or in the alternative to conclude that Defendant inflicted actual harm when he kicked the officer in the leg. If the State cannot provide a racially neutral reason for the use of its peremptory challenge, then the conviction must be overturned and a new trial ordered.

FACTS

{3} Defendant was involved in a scuffle with guards at the Wackenhut Corrections Corporation prison facility in Hobbs, New Mexico. The altercation occurred while one guard (hereinafter "the officer") was taking Defendant to his cell. At the time, Defendant was handcuffed and his legs shackled, with a "black box" securing chains between the cuffs and the leg shackles to further limit Defendant's movements. The officer either grabbed or placed his hand on Defendant's arm as he was leading Defendant into the cell. Defendant jerked away. When the officer touched Defendant's arm a second time, Defendant jerked away again. The officer then pushed Defendant to the ground. At that point, Defendant spit toward the officer's face; some of the spit landed in the officer's mouth. Three other officers came to assist and restrained Defendant by placing him face down on the ground. While the officers were on top of him, Defendant continued to struggle, kicking his legs up and down. As he did so, he kicked the officer in the leg. The officer testified that he had some scratches and discoloration on his leg. He applied an ice pack to his leg after the incident, then continued working his shift. As a result of this incident, Defendant was charged with one count of battery on a peace officer, contrary to NMSA 1978, § 30–22–24(A) (1971).

PROCEEDINGS

{4} On the day of trial, the trial court reminded counsel of the court's standing policy limiting voir dire to fifteen minutes for each side. During the trial court's initial voir dire, several members of the venire indicated that they had friends or family in law enforcement, some with a connection to the Hobbs facility in particular. The prosecutor, in her fifteen-minute voir dire, asked some questions about these connections. Defense counsel then began questioning the panel. She asked some questions relating to these connections, but spent most of her time on other topics. After fifteen minutes, defense counsel asked for an extension of time to inquire about the panel members' connections to law enforcement. The trial court allowed defense counsel an extra five minutes. When the additional five minutes were up, defense counsel again sought an extension. The court denied the request this time. In chambers, defense counsel objected to the trial court's limitation on voir dire, expressing concern that she did not have enough time to ask seven of the venire members about their acknowledged connections to law enforcement. The trial court overruled the objection. The court then struck for cause seven other venire members who had been questioned about their connections to law enforcement.

{5} Of the seven prospective jurors that defense counsel indicated she wanted to question further, only one was selected to serve as a juror. Of the thirteen jurors, only three had any connection to law enforcement. The first knew a police officer in Texas. The second knew one active and one retired police officer. A third had a brother-in-law who previously worked for Hobbs as a detention officer. Each of these three jurors assured the trial court that they could remain impartial.

{6} In accordance with the Rules of Criminal Procedure, the trial court allowed Defendant five peremptory challenges and the State three. *See* Rule 5–606(D) NMRA 2002. After the State used its first two peremptory challenges to strike prospective jurors with

Hispanic surnames, Defendant objected and asked that the State provide a racially neutral explanation for its challenges under *Batson*, which prohibits the use of peremptory challenges to exclude people from jury service on the basis of race. The trial court asked the prosecutor to explain why she struck both potential jurors. As to the first challenge, the prosecutor indicated that she "didn't get a real good feeling" about that panel member because she had made little eye contact. As to the second challenge, the prosecutor indicated that the panel member never spoke up to answer a question and never made eye contact with the prosecutor. Although acknowledging that the panel member could have had difficulty because she required an interpreter, the prosecutor noted that two other panel members who required an interpreter were more responsive to questioning. The trial court found those explanations to be racially neutral and excused both the prospective jurors.

{7} Later, the defense again asked for a racially neutral explanation when the State used its third and final peremptory challenge to strike another prospective juror with a Hispanic surname. This time, the trial court found that Defendant had not made out a prima facie showing that the State was discriminating against Hispanics in the use of its peremptory challenges. The court, in making its ruling, noted that fifteen of the thirty-three prospective jurors on the panel were Hispanic. Of the thirteen jury members selected (twelve jurors and one alternate), seven were Hispanic.

{8} After jury selection, the case proceeded to trial, and the jury found Defendant guilty of battery on a peace officer.

DISCUSSION

The State's Use of Peremptory Challenges

{9} Defendant claims that the State's use of peremptory challenges against Hispanics violated his equal protection rights. It is well established that the State may not, during the jury selection process, use its peremptory challenges to exclude otherwise unbiased and well-qualified individuals solely on the basis of their race. *Batson*, 476 U.S. at 85–88, 106 S.Ct. 1712; *State v. Jones*, 1997–NMSC–016, ¶ 3, 123 N.M. 73, 934 P.2d 267. Such exclusions violate the equal protection rights of both the defendant and the prospective jurors. *Batson*, 476 U.S. at 85–88, 106 S.Ct. 1712.

{10} In *Batson*, the United States Supreme Court outlined a three-step procedure for trial courts to determine whether a prosecutor has discriminated on the basis of race in using peremptory challenges. *Batson*, 476 U.S. at 94–95, 106 S.Ct. 1712; *Jones*, 1997–NMSC–016, ¶ 3, 123 N.M. 73, 934 P.2d 267. A defendant must first make a prima face showing that the State used its peremptory challenges in a racially discriminatory way. *Jones*, 1997–NMSC–016, ¶ 3, 123 N.M. 73, 934 P.2d 267. If the defendant makes a prima facie showing, then the State must provide a racially neutral explanation for its challenges. *Id.* If the trial court finds that the State's explanation is racially neutral, then the burden again falls on Defendant to show that the reason given is in fact pretext for a racially discriminatory motive. *Id.*

{11} The question in this case is whether Defendant established a prima facie case of discrimination under *Batson*. To make a prima facie showing of discrimination against a racial group, a defendant must show that (1) the State exercised its peremptory challenges to remove members of that group from the jury panel and (2) these facts and other related circumstances raise an inference that the State used its challenges to exclude members of the panel solely on account of their race. *State v. Jim*, 107 N.M. 779, 781, 765 P.2d 195, 197 (Ct.App.1988); *see also Powers v. Ohio*, 499 U.S. 400, 414–16, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (eliminating additional requirement that a defendant must be of the same racial group as the excused venire members to raise a *Batson* challenge). The trial court ruled that the circumstances in this case did not raise an inference that the State was using its challenges in a discriminatory manner. In so finding, the trial court pointed out that fifteen of thirty-three venire members were Hispanic, and seven Hispanics were selected to serve on the jury. As a result, the trial court concluded that there was no pattern of

discrimination. In support of the trial court's decision, the State argues that Defendant needed to show that Hispanics had either been eliminated from the jury altogether or were substantially underrepresented on the jury, or that this was a case that was particularly sensitive to racial bias. The State is correct that any of those circumstances will support an inference of racial discrimination. *See Jim,* 107 N.M. at 781, 765 P.2d at 197. The State is also correct that none of those circumstances are present in this case. The percentage of Hispanics on the selected jury was actually higher than the percentage of Hispanics represented in the venire panel. In addition, Defendant does not argue that this case is particularly susceptible to racial discrimination.

{12} However, those three particular circumstances, drawn from *Batson,* 476 U.S. at 95, 106 S.Ct. 1712, are not the only circumstances that give rise to an inference of discrimination. In fact, New Mexico case law provides support for Defendant's position that he did indeed make a prima facie showing of discrimination in this case. *See State v. Guzman,* 119 N.M. 190, 193–94, 889 P.2d 225, 228–29 (Ct.App.1994); *State v. Gonzales,* 111 N.M. 590, 595–97, 808 P.2d 40, 45–47 (Ct.App.1991), *modified on other grounds by State v. Dominguez,* 115 N.M. 445, 452, 853 P.2d 147, 154 (Ct.App.1993). Unfortunately, neither the State nor Defendant brought these cases to the attention of the trial court. Nonetheless, we must determine whether these cases compel us to reverse the trial court's decision.

{13} In *Gonzales,* the State used eight out of ten challenges against Hispanics. 111 N.M. at 593, 808 P.2d at 43. The resulting jury was made up of four Hispanics, one Native American, and seven Anglos. *Id.* In that case, we held that the defendant had made a prima facie showing of discrimination based on the State's pattern of eliminating Hispanics from the jury, even though Hispanics were neither absent nor underrepresented on the jury. *See id.* at 597, 808 P.2d at 47. We held that "a showing that the state used eighty percent of its peremptory challenges to eliminate members of his racial group from the jury was a prima facie showing of intentional discrimination," *id.* at 596–97, 808 P.2d at 46–47, and reversed the trial court's contrary decision. *Id.* at 597, 808 P.2d at 47. In *Guzman,* the State used all five of its peremptory challenges against Hispanics. *Guzman,* 119 N.M. at 191, 889 P.2d at 226. The trial court found that the defendant had not made a prima facie showing of discrimination because several Hispanics had been selected to serve on the jury. *Id.* at 193, 889 P.2d at 228. We reversed. *Id.* at 195, 889 P.2d at 230.

{14} In both *Guzman* and *Gonzales,* we stressed that the presence of members of a particular group, standing alone, does not defeat a defendant's attempt to establish a prima facie case of discrimination. *See Guzman,* 119 N.M. at 193–94, 889 P.2d at 228–29; *Gonzales,* 111 N.M. at 597, 808 P.2d at 47. We explained that a too-heavy emphasis on the representative character of the jury confuses the concepts of equal protection, on the one hand, and the guarantee of an impartial jury, on the other, and that the use of a single peremptory challenge for racially motivated reasons violates equal protection, even when the jury still retains its representative character. *See Guzman,* 119 N.M. at 193, 889 P.2d at 228. In reversing the trial court in *Guzman,* we explained that "the district court may have operated under a misapprehension that the prohibition against using peremptory challenges to discriminate against prospective jurors on racial or ethnic grounds is based exclusively on a defendant's right to have a representative cross-section of the community on the jury." *Id.* In correcting this notion, we stressed that the United States Supreme Court in *Batson* was concerned with protecting the rights of the individual prospective jurors, as well as the rights of the defendants. *See Guzman,* 119 N.M. at 193–94, 889 P.2d at 228–29. Similarly, we explained in *Gonzales* that "[a] single prospective juror may be stricken for a racially motivated reason and the jury nonetheless retain its 'representative character.' This, nevertheless, offends equal protection." *Gonzales,* 111 N.M. at 595, 808 P.2d at 45.

{15} In contrast, we were not convinced the defendant established a prima facie case of discrimination in *Dominguez,* 115 N.M.

445, 853 P.2d 147. In *Dominguez,* the State had seventeen peremptory challenges available. It used only six of those challenges, but used all six to strike Hispanics from the jury. *Id.* at 450, 853 P.2d at 152. However, the State also accepted several Hispanic jurors for service, even though it had more challenges available. *Id.* at 450–51, 853 P.2d at 152–53. Because the State did not use the additional challenges it had available, we upheld the trial court's decision that the defendant had not made a prima facie showing of discrimination. *See id.* at 451–52, 853 P.2d at 153–54.

{16} In this case, the trial court seemed to rely exclusively on the representative character of the jury in finding that Defendant failed to make a prima facie showing of discrimination. The above-cited cases, therefore, would seem to dictate reversal. We see no relevant factual distinction that sets this case apart from *Gonzales* or *Guzman.* This case is somewhat different than *Gonzales* in that the State's use of peremptory challenges in this case had a less substantial impact on the racial makeup of the jury. However, there was no evidence in *Guzman* that the State's use of peremptory challenges substantially altered the racial makeup of the jury, and we still found that the defendant had established a prima facie case. The only difference between this case and *Guzman* is the number of challenges available to the State, which is prescribed by rule. In both cases, however, the State used all of its peremptory challenges, and therefore it could not have eliminated any more Hispanic jurors. If the State used those three challenges with the intent to minimize the presence of Hispanics on the jury, then the State's action would constitute an equal protection violation, even though the jury retained its representative character. Thus, Defendant's attempt to establish a prima facie case should not fail simply because the State only had three peremptory challenges available.

{17} Nonetheless, we are not convinced that this error automatically warrants reversal. The *Batson* analysis has evolved somewhat since the Supreme Court issued its decision in 1986. As this case law has developed, our courts have recognized the need to give deference to the decisions of trial courts. *See State v. Jones,* 1996–NMCA–020, ¶¶ 7–9, 121 N.M. 383, 911 P.2d 891, *aff'd,* 1997–NMSC–016, 123 N.M. 73, 934 P.2d 267. The above-cited cases, however, treated the question of whether a prima facie case had been established as a question of law, subject to de novo review on appeal. In *Gonzales,* we relied on a case from Maryland, *Stanley v. State,* 313 Md. 50, 542 A.2d 1267 (1988). *See Gonzales,* 111 N.M. at 595, 808 P.2d at 45. In that case, the Maryland appellate court felt it necessary to exercise its "independent constitutional judgment" in determining whether the defendant had established a prima facie case, in part because the deciding trial court was unfamiliar with *Batson. Stanley,* 542 A.2d at 1277. Because of this difference in analysis, we think this case requires us to decide whether to reaffirm the principle that, as a matter of law, the use of a disproportionate number of strikes against a particular group establishes a prima facie case of discrimination, or whether, in the alternative, that determination is left to the sound discretion of the trial court.

Standard of Review

{18} The *Batson* Court emphasized the important role trial courts must play in reviewing claims that a litigant is using peremptory challenges in a discriminatory manner. The Court explained that the trial court must undertake a "sensitive," factual inquiry in order to determine if the party raising the claim has proven discriminatory intent. *See Batson,* 476 U.S. at 93, 95, 106 S.Ct. 1712. The Court also indicated that it is up to the trial court to determine whether the party raising the claim has established a prima facie case of discrimination. The Court explained that "[w]e have confidence that trial judges, experienced in supervising *voir dire,* will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." *Id.* at 97, 106 S.Ct. 1712.

{19} Recognizing the factual nature of the *Batson* inquiry, our Supreme Court has indicated that a trial court's decision in a *Batson*

claim should generally be reviewed under an abuse of discretion standard. *Jones,* 1997-NMSC-016, ¶¶ 10-11, 123 N.M. 73, 934 P.2d 267. We do not read *Jones,* however, as requiring absolute deference to the decisions of trial courts. The question before the *Jones* Court was whether a prosecutor's reason for striking an African American juror was legally sufficient. *Id.* ¶¶ 3, 11. It was undisputed in that case that the defendant had established a prima facie case of discrimination. The Court held that a deferential review was appropriate as to the trial court's factual findings. *Id.* ¶ 11. Yet the Court also reiterated that it was the role of the appellate court to determine if the prosecutor's reason was constitutionally adequate. *See id.*

{20} Deference to the trial court is especially important in evaluating the reasons a prosecutor gives for making a challenge, as well as the reasons a defendant puts forth for claiming those reasons are pretextual. *See Heno v. Sprint/United Mgmt. Co.,* 208 F.3d 847, 854 (10th Cir.2000) (holding that the trial court's ultimate finding as to whether there was a violation is reviewed for clear error only). At that stage of the *Batson* analysis, the trial court must evaluate the sincerity of both parties and rely on its own observations of the challenged jurors. The trial court must also draw on its experience in supervising voir dire. It is appropriate for an appellate court to defer to the trial court in these findings. In some circumstances, a trial court will be called on to make similar factual findings in order to determine whether or not a defendant has established a prima facie case of discrimination. On the other hand, in many cases, like this one, the defendant's claim will be based purely on the number of challenges used against a particular group. *See* Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges,* 71 NOTRE DAME L.REV. 447, 470-78 (1996) (discussing heavy reliance on numerical analysis in determining whether a party has established a prima facie case of discrimination) (hereinafter Melilli).

{21} In this case, the parties do not dispute the relevant facts, such as how many prospective jurors were Hispanic and how many strikes the prosecution used to remove Hispanics from the jury pool. The trial court made no other factual findings. Like the Court in *Jones,* we think it is appropriate for us on appeal to determine whether Defendant has met the legal threshold to establish a prima facie case of discrimination. Thus, we think our review of *Batson* claims at this stage is similar to our review for sufficiency of evidence, where we give deference to the fact-finder's resolution of factual conflicts and inferences derived therefrom, but also make a legal determination as to whether the evidence viewed in this manner could support a particular conviction. *See State v. Orgain,* 115 N.M. 123, 126, 847 P.2d 1377, 1380 (Ct.App. 1993) (explaining that a sufficiency of evidence review involves a two-step process).

What Level of Proof is Required to Establish a Prima Facie Case?

{22} As noted above, *Batson* set out a three-step analysis for claims that a party's use of peremptory strikes violates equal protection. The *Batson* Court modeled this approach after the analysis of claims of racial discrimination in employment brought under Title VII of the Civil Rights Act. *See Batson,* 476 U.S. at 94 n. 18, 106 S.Ct. 1712. In Title VII cases, the plaintiff must set out preliminary facts establishing a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), *modified on other grounds by Hazen Paper Co. v. Biggins,* 507 U.S. 604, 612, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993). Prior to *Batson,* the United States Supreme Court indicated that the burden on plaintiffs at that stage is "not onerous." *Tex. Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). A plaintiff need only provide enough evidence to permit the trier of fact to infer the facts at issue. *Id.* at 254 n. 7, 101 S.Ct. 1089. The burden then shifts to the defendant-employer to produce evidence. *Id.* at 253, 101 S.Ct. 1089. The purpose of these initial steps is to frame the factual issues and progressively sharpen the inquiry. *Id.* at 255, 101 S.Ct. 1089.

{23} Some state courts, relying on the *Batson* Court's analogy to Title VII cases, have adopted a lenient approach in analyzing the first step of the *Batson* inquiry. *See, e.g., Wardlow v. State,* 6 S.W.3d 786, 787 (Tex.Ct.App.1999) (holding that only minimal evidence is needed to support a rational inference of discriminatory intent); *Linscomb v. State,* 829 S.W.2d 164, 167 (Tex.Crim.App. 1992) (en banc) ("A prima facie case is what raises the issue, not what eventually disposes of it."). Recently, the United States Supreme Court reaffirmed that plaintiffs in Title VII suits do not face a particularly high threshold in *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). Describing the requirements for a prima facie case as "minimal," the Court explained that additional evidence is needed before a court can find that an employer discriminated on the basis of race. *Id.* at 506, 515, 113 S.Ct. 2742.

{24} In other types of cases where courts have found sufficient evidence to support a prima facie case, that evidence, standing alone, does not prove that the party making the challenge was actually engaging in discrimination. Courts are in near universal agreement, for example, that a party's decision to strike all the members of a particular race establishes a prima facie case of discrimination. Jay M. Zitter, Annotation, *Use of Peremptory Challenges to Exclude Ethnic and Racial Groups, Other than Black Americans, from Criminal Jury–Post–Batson State Cases,* 20 A.L.R.5th 398 at §§ 7, 9 (1994). Courts are also willing, however, to accept a racially neutral explanation for these strikes. *See Jones,* 1997–NMSC–016, ¶ 3, 123 N.M. 73, 934 P.2d 267. The question before a trial court, when deciding whether a party has established a prima facie case of discrimination, is whether there is sufficient evidence to support an inference of discriminatory intent, not whether that party has already proved its case. *See Gonzales,* 111 N.M. at 596, 808 P.2d at 46 ("The important inquiry is whether defendant can point to some facts or circumstances from which a trial court could reasonably infer that the prosecution has intentionally used its peremptory challenges to eliminate jurors on the basis of race, rather than for racially neutral reasons related to the juror's ability to fairly and impartially hear the case.").

Is the Use of a Disproportionate Number of Strikes Against One Racial Group a Prima Facie Case of Discrimination?

{25} Having determined the appropriate level of deference to give to the decision of the trial court, and having determined that a defendant bringing a *Batson* claim is not held to a particularly onerous level of proof at the prima facie stage, we see no reason to retreat from our decided case law holding that a disproportionate use of peremptory strikes against one racial group gives rise to an inference of discriminatory intent. In fact, in reviewing other jurisdictions, we found that many also hold that, as a matter of law, a disproportionate number of strikes against a particular group creates a prima facie case of discrimination. *See, e.g., State v. Clark,* 324 N.J.Super. 558, 737 A.2d 172, 178 (App.Div.1999) ("It is clear that a prosecutor may be found to have exercised individual peremptory challenges in a discriminatory manner even though the jury ultimately selected includes a substantial percentage of the minority group against whom such challenges were directed."); *Linscomb,* 829 S.W.2d at 167 ("an unexpectedly high rate of challenges against a particular group is, as an empirical matter, some evidence of an intent to exclude persons on account of membership in that group"). This is particularly true when the prosecution did not have additional strikes available. *Cf. United States v. Johnson,* 4 F.3d 904, 913–14 (10th Cir.1993) ("The presence of members of the subject race on the final jury is a relevant factor in negating an alleged *Batson* violation *when the government has the opportunity to strike the juror.*") (emphasis added). In Alabama, the state courts initially took the position adopted by the State here, and thus required proof of an impact on the racial makeup of the jury as well as proof that the prosecution used a disproportionate number of strikes against a particular racial group. *See Harrell v. State,* 571 So.2d 1270, 1271 (Ala.1990), *overruled by Ex Parte Thomas,* 659 So.2d 3, 8 (Ala.1994). That state later decided that a defendant can establish a pri-

ma facie case solely on the fact that a prosecutor used a disproportionate number of peremptory challenges to strike members of a particular racial group. *See Thomas,* 659 So.2d at 4–8.

{26} Indeed, the Supreme Court in *Batson* indicated that "a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination." *Batson,* 476 U.S. at 97, 106 S.Ct. 1712. The trial court in this case indicated that he saw no pattern in the prosecution's strikes, even though all three strikes were against members of the same racial group. Despite the trial court's statement, the court was clearly focusing on the impact of the State's strikes, not the pattern of strikes against a particular group.

{27} Of course, some states have concluded that a defendant must show, at the prima facie stage, that the prosecutor's use of peremptory challenges has a discriminatory impact on the racial makeup of the jury. *See, e.g., Willis v. State,* 201 Ga.App. 727, 411 S.E.2d 714, 715 (1991) ("Since the record here indicates that after the jury selection had ended, the percentage of blacks on the jury had increased from the number of blacks on the panel, [the defendant] failed to make a prima facie showing of discrimination."); *Johnson v. State,* 761 P.2d 484, 490 (Okla.Crim.App.1988) (rejecting a *Batson* claim because "[w]hether or not the prosecutor was trying to discriminate ..., the plan ... failed"). These differing results among jurisdictions reflects the difficulties in relying on numbers to establish an inference of discriminatory intent. *See* Melilli, *supra,* at 470. Professor Melilli, in his analysis of state court application of *Batson,* argued that the best method to analyze peremptory strikes is to compare the percentage of challenges used against a particular racial group to the percentage of that group in the venire, because "neutrally exercised peremptory challenges ought, on average, to affect targeted-group members in proportion to their membership on the venire as a whole." Melilli, *supra,* at 472, 478. Texas has adopted this approach, and in its cases looks at whether the number of strikes used against a particular group are "larger than one would expect if race had nothing to do with it." *Linscomb,* 829 S.W.2d at 166; *see also United States v. Esparsen,* 930 F.2d 1461, 1467 (10th Cir.1991) ("the prosecution's use of 71% (5/7) of its challenges against Hispanics would acquire some statistical meaning if we knew the percentage of Hispanics in the venire").

{28} An analysis of percentages becomes somewhat skewed when only three challenges are available, as will be the case in prosecutions against a single defendant. *See* Rule 5–606(D). Nonetheless, the prosecution in this case used 100% of its strikes against Hispanics, even though Hispanics made up 45% of the venire. It would be expected that one or two of the prosecution's challenges will go against Hispanic venire members. But where the prosecution used all three of its strikes against one racial group, it should be conscious of the perception that it is using these challenges in a discriminatory manner, and it should be willing to put forward a reason for those challenges in order to eliminate that perception. The prosecution in this case had only three peremptory challenges available to use with a venire of thirty-three prospective jurors (twenty-six after seven jurors were excused for cause). The prosecutor surely put some thought into which jurors it should eliminate in order to get the most advantageous jury.

{29} Of course, the fact that the prosecution used all of its peremptory challenges against one racial group only creates an inference of discrimination. The same is true in other situations where we accept statistical evidence as sufficient to create a prima facie case of discrimination. For example, we find a prima facie case is made where the prosecution uses a peremptory challenge to remove the sole member of a particular racial group from the jury. *See Jones,* 1996–NMCA–020, ¶ 10, 121 N.M. 383, 911 P.2d 891. That, however, does not conclusively prove that the prosecutory motivation for striking that juror was discriminatory. *See Jones,* 1997–NMSC–016, ¶¶ 4–5, 123 N.M. 73, 934 P.2d 267. The defendant still bears the burden of proving discriminatory intent. *Id.* ¶ 3.

{30} In this case, the prosecution's use of all three of its peremptory challenges against Hispanics created an inference of discrimination sufficient to support a prima facie case. The trial court, therefore, should have required the State to provide an explanation for the use of its third and final challenge. Accordingly, we remand this case to the trial court to hold a hearing on this issue. At the hearing, the State shall be required to provide an explanation for that challenge. If the State is able to provide a reason, the trial court shall continue with the *Batson* analysis and determine if the State's reason was racially neutral. If the State is able to do so, then the conviction shall be affirmed because, as we discuss below, we do not find merit in Defendant's additional claims of error. If, due to the time lapse, the State is unable to provide a reason, or if the trial court finds that the reason given is not racially neutral, then the conviction shall be set aside and a new trial ordered.

The Trial Court's Limitation on the Time Allowed for Voir Dire

{31} Defendant contends he was denied a right to a trial before a fair and impartial jury because the trial court did not allow defense counsel additional time to question potential jurors about their connections to law enforcement. A defendant has a Sixth Amendment right to a trial by a neutral and impartial jury. *State v. Sosa*, 1997–NMSC–032, ¶ 14, 123 N.M. 564, 943 P.2d 1017. Voir dire assists in the selection of such a jury. *Id.* Trial courts, however, are given broad discretion in overseeing the voir dire process. *Id.* A criminal conviction will be reversed only where the trial court has clearly abused its discretion in limiting voir dire. *See State v. Clark*, 1999–NMSC–035, ¶ 20, 128 N.M. 119, 990 P.2d 793.

{32} The trial court in this case has a standing policy of limiting the time allowed voir dire to fifteen minutes for each side. If the parties seek additional time, they must convince the court that additional questioning is necessary. Defense counsel argued that additional questioning was necessary because she did not have enough time to question all the venire members who indicated they had connections to law enforcement. Those jurors, however, were specifically questioned by the trial court about their connections to law enforcement. In addition, defense counsel was aware of the time constraint when she began voir dire. Defense counsel questioned a number of other panel members about their law enforcement connections. Had counsel spent less time with each individual juror, and spent less time raising other issues, she would have had sufficient time to question all of the panel members who had mentioned a connection to law enforcement. Twenty minutes was sufficient time to question all the venire members who acknowledged ties to law enforcement.

{33} The trial court's policy is designed to move cases along and prevent counsel from using voir dire to instruct the jury or ask repetitious questions. In addition, the court could reasonably find that enough information had been developed during the voir dire process. The court, in fact, from the outset was sensitive to the potential bias that panel members with connections to law enforcement might have in hearing a case where a defendant is accused of battering a prison guard. The court's first questions, after determining whether any panel members were personally acquainted with any of the parties, counsel, or witnesses, related to the panel members' ties to law enforcement. The trial court did not abuse its discretion in determining that this was sufficient time to explore that topic.

{34} In addition, Defendant has not shown that the court abused its discretion in determining that the jurors selected could be fair and impartial. Of the thirteen jury members selected, only three had any connection to law enforcement. Each of these three jurors assured the trial court that they could remain impartial. The court was within its discretion to accept those assurances.

{35} Although Defendant focuses his challenge on the trial court's general policy of limiting the time allowed for voir dire, we think this is no different than other cases in which a trial court has exercised its discretion in determining how much questioning is necessary on a particular topic. For example, we upheld a trial court's decision to limit

questioning on juror's attitudes toward alcohol use in a case in which the defendant claimed he was too drunk to form criminal intent. *See State v. Fransua*, 85 N.M. 173, 174–75, 510 P.2d 106, 107–08 (Ct.App.1973). Similarly, our Supreme Court upheld a trial court's decision to limit questions on juror's experiences with gangs in a case in which the defendant was charged with gang activity. *See Sosa*, 1997–NMSC–032, ¶¶ 14–15, 123 N.M. 564, 943 P.2d 1017. The trial court, who is listening first hand to counsel's questions and the panel members' responses, is in the best position to determine whether voir dire has sufficiently exposed any biases that may preclude jurors from acting fairly and impartially. We hold that the trial court did not abuse its discretion in limiting defense counsel's voir dire questions on connections to law enforcement.

Sufficiency of the Evidence

{36} Defendant argues that there was insufficient evidence to convict him of battery on a peace officer. In analyzing the sufficiency of evidence, the inquiry is whether substantial evidence exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction. *State v. Sosa*, 2000–NMSC–036, ¶ 6, 129 N.M. 767, 14 P.3d 32. This is not a case where Defendant disputes what occurred. In fact, Defendant presented no evidence to dispute the officer's version of events. Instead, Defendant argues that his conduct did not rise to the level necessary to convict him of the charge of battery on a peace officer.

{37} Battery on a peace officer is "the unlawful, intentional touching or application of force to the person of a peace officer while he is in the lawful discharge of his duties, when done in a rude, insolent or angry manner." Section 30–22–24(A). Our Supreme Court, in construing this statute, determined that not every act of battery will be sufficient for a conviction on this charge. *See State v. Padilla*, 1997–NMSC–022, ¶¶ 5–6, 123 N.M. 216, 937 P.2d 492. Instead, the Court held that the battery must result in actual injury to the officer, represent a threat to the officer's safety, or present a "meaningful challenge" to the officer's authority. *Id.* ¶ 7.

{38} The State seems to argue that Defendant could be convicted based solely on the finding that he spit on the officer. However, we recently held that the act of spitting will not automatically provide a basis for conviction for this offense. *See State v. Jones*, 2000–NMCA–047, ¶¶ 12, 15, 129 N.M. 165, 3 P.3d 142. We noted that spitting is, by its nature, abusive, but held that it is up to the jury to decide whether the act of spitting also constituted a meaningful challenge to authority. *Id.* ¶ 12. We specifically declined to define what types of behavior will be sufficient to constitute a meaningful challenge to authority and what will not. *Id.* ¶ 14. Instead, we stressed that whether or not a defendant's conduct constituted a meaningful challenge would depend on the context in which the battery occurred. *Id.*

{39} Defendant argues that because he was shackled and was being physically restrained when he spit at the officer, nothing he did constituted a meaningful challenge to the officer's authority. Defendant explains that the officer was never in danger. The question of whether Defendant's actions constituted a threat to the officer's safety, however, is separate from the question of whether his actions constituted a meaningful challenge. Under *Padilla*, conduct is punishable if it constitutes either a threat to safety or a meaningful challenge to authority, or if it results in actual injury. *Padilla*, 1997–NMSC–022, ¶ 7, 123 N.M. 216, 937 P.2d 492. In *Jones*, we indicated that spitting could constitute either a threat to safety or a meaningful challenge to authority, depending on the circumstances. *Jones*, 2000–NMCA–047, ¶ 12, 129 N.M. 165, 3 P.3d 142. Defendant is probably correct that he was not in a position to cause substantial harm to the officer. Indeed, the jury was not asked to consider whether Defendant's actions posed an actual threat to the officer's safety. Nonetheless, Defendant's actions could still constitute a meaningful challenge to the officer's authority, and we hold there was sufficient evidence to support the jury's finding that Defendant's conduct constituted a meaningful challenge to the officer's authority.

{40} The incident began with Defendant's attempt to reject the officer's authority by pulling away from him, twice, while the officer was trying to lead Defendant to his cell. When the officer restrained Defendant, Defendant continued to resist the officer's authority. It was at that point Defendant spit in the officer's face. Even after three other officers came to assist the officer in restraining Defendant, Defendant continued to struggle. Even though he was wearing shackles, he managed to kick the officer, resulting in scratching and bruising. All of Defendant's actions constituted a challenge to the officer's authority. Given this evidence regarding the context in which the battery arose, it was appropriate for the trial court to submit to the jury the question of whether Defendant's conduct presented a meaningful challenge to the officer's authority, and there was sufficient evidence for the jury to decide that it did. Therefore, there was sufficient evidence to convict Defendant of battery on a peace officer.

{41} As noted above, the jury also could have found Defendant guilty if the officer suffered a physical injury when Defendant kicked him. *See Padilla*, 1997–NMSC–022, ¶ 7, 123 N.M. 216, 937 P.2d 492. Defendant argues that, because the officer's injuries were relatively minor, there was insufficient evidence to support a finding that the officer suffered actual harm. Once again, this was a question for the jury. Although the officer's injuries were admittedly minor, they were in fact injuries, and therefore there was sufficient evidence for the jury to find that the officer suffered actual harm.

CONCLUSION

{42} We hold that Defendant has established a prima facie case of discrimination under *Batson*, and we therefore remand this case to the trial court to determine whether the State can provide a racially neutral explanation for its third peremptory challenge. If the State can provide a racially neutral explanation, then the conviction will be affirmed, because we hold that (1) the trial court did not abuse its discretion in limiting the time allowed for voir dire and (2) there was sufficient evidence to convict Defendant of battery on a peace officer. If the State cannot provide a racially neutral explanation, then the conviction must be set aside and a new trial ordered.

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

WE CONCUR: JAMES J. WECHSLER and CELIA FOY CASTILLO, Judges.

2002-NMSC-007

42 P.3d 1207

STATE of New Mexico, Plaintiff–Respondent,

v.

Frederico GAITAN, Defendant–Petitioner.

No. 26,743.

Supreme Court of New Mexico.

Feb. 22, 2002.

Phyllis H. Subin, Chief Public Defender, Will O'Connell, Assistant Appellate Defender, Santa Fe, NM, for Petitioner.

Patricia A. Madrid, Attorney General, Max Shepherd, Assistant Attorney General, Santa Fe, NM, for Respondent.

OPINION

BACA, Justice.

{1} Defendant, Frederico Gaitan, was convicted of second degree murder as an accessory under NMSA 1978, § 30–2–1(B) (1994) and NMSA 1978, § 30–1–13 (1972), aggravated assault with a deadly weapon under NMSA 1978, § 30–3–2(A) (1963), tampering with evidence as an accessory under NMSA 1978, § 30–22–5 (1963) and Section 30–1–13, and aggravated battery with a deadly weapon under NMSA 1978, § 30–3–5(C) (1969). Defendant appeals his convictions and raises two issues on appeal: (1) whether the trial court erred in failing to instruct the jury on voluntary and involuntary manslaughter; and (2) whether the trial court erroneously admitted evidence of a prior bad act. The Court of Appeals affirmed Defendant's convictions, and we granted his petition for writ of certiorari to the Court of Appeals. *State v. Gaitan,* 2001–NMCA–004, ¶ 28, 130 N.M. 103, 18 P.3d 1056. We affirm.

I.

{2} On October 13, 1997, Defendant, Richard Padilla, and Viento Herrera initiated an altercation with Stephen and Wesley Zotigh that resulted in Stephen's death. On that night, Defendant, Padilla, and Herrera had been drinking at a party and were driving to another party when they approached the victim and his cousin, who were walking home from a convenience store. During the ensuing altercation, the victim was stabbed four times. He later died as a result of two of the wounds.

{3} According to Wesley Zotigh's testimony, the three men pulled up beside him and his cousin and offered them a ride. After they refused the offer, someone in the car asked them if they were Indian, what their names were, and if they had any money. Zotigh stated that he got the feeling something bad was going to happen after the three men began to giggle inside the car, and he urged the victim to leave. As the two walked away, Zotigh heard the engine rev and felt a "little shove" from the victim, pushing him out of the way. When Zotigh turned around he saw the car hit the victim, throwing him onto the hood of the car. The victim then got off the hood, took off his shirt, and approached Defendant, who had gotten out of his car. Zotigh testified that as Defendant and the victim pushed and shoved each other, Defendant turned toward the car and said, "Let's get out the gat," as he gestured to his friends with both hands. Padilla and Herrera then got out of the car, and all three men began fighting with the victim. Zotigh stated that he then heard one of the men say, "Let's go. Let's go," and the three ran back to the car laughing and drove away. At that point Zotigh realized the victim had been seriously injured.

{4} Padilla testified that he heard the Defendant say "Get the gat" at a party the three men attended earlier in the evening. He stated that Defendant used the words to intimidate people at the party when they refused to allow Defendant to leave with some of the beer. Padilla reiterated that the Zotighs did not want a ride from the three men and had in fact refused their offer. He testified that he was the first person to get back into the car after the altercation and that Defendant was the last one back in. He also stated that after they got back in the car the three men laughed about what had taken place.

{5} Teresa Padilla, Richard Padilla's mother, testified that Herrera told her that after the Zotighs started walking away from the car, Defendant was "acting crazy" and kept asking, "Should I run the fuckers over?" Herrera apparently responded "Go for it," and the Defendant hit the victim with his car.

{6} Vincent Archuleta, another friend of Defendant, testified that on the night of the stabbing Defendant came to Archuleta's trailer and asked if he could stay at his house. Defendant told him that "they had got [sic] in a fight and somebody was stabbed, that they had stabbed somebody." Archuleta's girlfriend, Isabel Cortez, was present at Archuleta's trailer that night, and testified that she too heard Defendant say "We stabbed somebody."

{7} The State also presented testimony from Kevin Silva, who was incarcerated in the Taos County Detention Center when Defendant was brought in on these charges. He stated that he had known Defendant since childhood and that they had both been in the Barrios Small Town gang together. Silva testified that when he asked Defendant why he was in jail, Defendant told him "We pulled a cap back on an Indian," and "We had killed an Indian." Defendant further explained that they had stabbed the victim.

{8} Defendant gave a different version of the events of that night. According to his testimony, he pulled up beside the two men in his car, and Herrera, a passenger, asked them if they wanted a ride. Defendant stated he could not recall why he had pulled over, although he admitted that the Zotighs "weren't asking for a ride," but that they had "pulled over and offered them a ride." After the Zotighs refused Herrera's offer and continued walking, Defendant decided he "wanted to mess around with them a little bit," and he slowly drove up behind them, "revved" his engine, and stopped "real close" to the victim. Defendant stated that when he stopped his car, the victim "must of [sic] thought I was going to hit him or something because I was so close to him. He turned around and maybe his instinct was to jump, so he jumped on my car and he got off and took off his shirt." Defendant testified that after the victim jumped off the hood of the car he came towards Defendant in an aggressive manner. Defendant thought the victim was going to attack him, so he got out of his car to apologize and explain that he was just "playing around." However, as soon as Defendant exited his vehicle the victim began pushing Defendant toward the road. Fearing the victim was going to "pound" him, Defendant told the victim, "I have a gat, leave me alone. I have a gat." Soon thereafter, Defendant saw Herrera and Padilla get out of the car and begin fighting with the victim. Contrary to Padilla's testimony, Defendant stated that he was the first to get back in the car, and that after Padilla and Herrera got back in he drove away.

{9} Defendant testified that, as he was driving away, he saw blood on the victim's face and chest, but thought the victim had a bloody nose. Herrera then commented that he had blood on his hands, and Padilla announced that he had stabbed the victim. Defendant also testified that he did not know Padilla had a knife and did not know that the victim had been stabbed until after they drove away.

II.

{10} The State charged Defendant with first degree murder as an accessory. The indictment named as principals either Herrera or Padilla, or both. At trial, the jury was instructed on second degree murder as a lesser included offense of first degree murder. The trial court refused Defendant's tendered instructions on the lesser included offenses of voluntary and involuntary manslaughter. Defendant argues that the trial court's failure to tender his requested instructions to the jury constituted reversible error because there was a reasonable view of the evidence which could sustain a finding that voluntary manslaughter, or in the alternative, involuntary manslaughter, was the highest degree of homicide committed by Defendant. We review this issue de novo. *See State v. Salazar*, 1997–NMSC–044, ¶ 49, 123 N.M. 778, 945 P.2d 996 ("The propriety of jury instructions given or denied is a mixed question of law and fact. Mixed questions of law and fact are reviewed de novo.").

A.

[2-4] {11} A defendant is entitled to an instruction on a lesser included offense when there is " 'some view of the evidence pursuant to which the lesser offense is the highest degree of crime committed, and that view [is] reasonable.' " *State v. Brown,* 1998-NMSC-037, ¶ 12, 126 N.M. 338, 969 P.2d 313 (quoting *State v. Curley,* 1997-NMCA-038, ¶ 5, 123 N.M. 295, 939 P.2d 1103). "Voluntary manslaughter consists of manslaughter committed upon a sudden quarrel or in the heat of passion." NMSA 1978, § 30-2-3(A) (1994). The difference between second degree murder and voluntary manslaughter is that voluntary manslaughter requires sufficient provocation. *Compare* UJI 14-220 NMRA 2002 *with* UJI 14-210 NMRA 2002. Thus, Defendant was entitled to an instruction on voluntary manslaughter only if there was some evidence in the record to support his assertion that sufficient provocation existed.

{12} Because Defendant was charged as an accessory, and the principal and accessory may each be convicted for different degrees of an offense depending on their state of mind, we agree with the Court of Appeals' determination that we must consider whether Defendant, rather than Padilla or Herrera, was sufficiently provoked by the victim. *Gaitan,* 130 N.M. 103, 18 P.3d 1056, 2001-NMCA-004, ¶¶ 14-15; *see State v. Holden,* 85 N.M. 397, 400, 512 P.2d 970, 973 (Ct.App. 1973) ("The fact that [the accessory] was convicted of a different crime than [the principal] is a permissible result under our accessory statute."). Applying this approach, the Court of Appeals determined that Defendant was not entitled to a voluntary manslaughter instruction because "[e]ven under Defendant's version of the incident, there is evidence that Defendant brought on Steven's attack." *Gaitan,* 130 N.M. 103, 18 P.3d 1056, 2001-NMCA-004, ¶ 17. In reaching this conclusion the Court relied on the following language from *State v. Manus,* 93 N.M. 95, 100, 597 P.2d 280, 285 (1979), *overruled in part by Sells v. State,* 98 N.M. 786, 788, 653 P.2d 162, 164: "If the defendant intentionally caused the victim to do acts which the defendant could claim provoked him [or her], [the defendant] cannot kill the victim and claim that he [or she] was provoked. In such case, the circumstances show that [the defendant] acted with malice aforethought, and the offense is murder." (Quoted authority omitted.) We agree with the Court of Appeals.

{13} Defendant argues that the Court of Appeals interpreted this language too broadly, and that the proper reading of *Manus* is that "where the assailed person *intentionally* provokes an attack so that he can use that attack as an excuse for killing, he is guilty of murder." We are not persuaded by Defendant's reading of this case. Rather we conclude that the proper interpretation of this language is that the law does not permit one who intentionally instigates an assault on another to then rely on the victim's reasonable response to that assault as evidence of provocation sufficient to mitigate the subsequent killing of the victim from murder to manslaughter. *See State v. Munoz,* 113 N.M. 489, 491-92, 827 P.2d 1303, 1305-06 (Ct.App.1992) ("We recognize that a defendant cannot pose a threat to the victim and then rely on the victim's response as a legal provocation."); *State v. Durante,* 104 N.M. 639, 643, 725 P.2d 839, 843 (Ct.App. 1986) ("Defendant cannot create the provocation which would reduce murder to manslaughter."); *State v. Padilla,* 104 N.M. 446, 448, 722 P.2d 697, 699 (Ct.App.1986) ("As a general rule, however, there also must be evidence of acts of provocation by the victim that do not result from intentional acts of defendant."); *State v. Marquez,* 96 N.M. 746, 749, 634 P.2d 1298, 1301 (Ct.App.1981) ("If there was any provocation, it was not brought about by [the victim] throwing a vase, but by defendant's illegal entry into [her] home."). "Even in the case where the defendant kills in response to a violent blow, . . . [the defendant] may not have [the] homicide reduced to voluntary manslaughter if [the defendant] by his [or her] own prior conduct (as by vigorously starting the fracas) was responsible for that violent blow." 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law,* § 7.10(b)(1) (1986). In the present case, not only did Defendant intentionally and vigorously start the fracas with an aggravated battery, there

was not even a violent blow by the victim in response. Thus, as the Court of Appeals determined, even assuming Defendant retreated to his car in fear, Defendant's own version of the events presents evidence that Defendant intended to bring on the victim's attack. Defendant testified that he, Padilla, and Herrera approached the Zotighs in Defendant's car and Herrera asked them if they wanted a ride. Defendant explicitly stated that he could not remember why they had chosen to approach the Zotighs that night, and there was no evidence that either of the Zotighs provoked Defendant prior to this incident. After the Zotighs refused their offer, Defendant decided he "wanted to mess around with them a little bit" so he slowly drove up behind them, "revved" his engine, and stopped "real close" to the victim. Defendant also stated that, as a result of his actions, the victim "must of [sic] thought I was going to hit him or something because I was so close to him" and that the victim became very angry. "If one person attacks another who defends himself with no more force than he is privileged by law to use for his own protection, there is no problem of provocation. The assailant is acting without mitigation of any sort and the defender is fully justified or excused." Rollin M. Perkins & Ronald N. Boyce, *Criminal Law,* 89 (3d ed.1982) (footnotes omitted). Because Defendant intentionally instigated the assault on the victim, he cannot now rely on the victim's reasonable response to that assault as evidence of provocation sufficient to mitigate the subsequent killing of the victim from murder to voluntary manslaughter.

{14} Furthermore, there is no reasonable view of the evidence supporting sufficient provocation as the mental state underlying Defendant's role in the killing. " 'Sufficient provocation' can be any action, conduct or circumstances which arouse anger, rage, fear, sudden resentment, terror or other extreme emotions. The provocation must be such as would affect the ability to reason and to cause a temporary loss of self control in an ordinary person of average disposition." UJI 14–222 NMRA 2002. Under Defendant's version of the facts, he had no intent for the victim to be killed. However, Defendant did intentionally threaten the victim and goad him to respond. He testified that he was "trying to just mess around with [the victim], . . . put him in some anger and stuff[, and] . . . get[ ] him mad or piss[ ] this young man off." Defendant stated that he knew his actions warranted an apology to the victim, and he testified that the victim's anger was understandable, stating, "he was angry about what happened. And I was guilty about what happened also." Defendant stated, "I don't blame him for being angry, either, because I would have been angry myself." Defendant testified that he "never did attack [the victim]. And [the victim] actually never really attacked me. If he would have attacked me, he would have probably left me with my face pretty swoll [sic] up and stuff. And he just basically just shoved me, pushed me, that was it." Defendant said that "[t]he only time I felt threatened was when I thought he was going to beat me up." From this testimony, it is clear that Defendant did not fear anything more than a beating by the victim, that the victim was going to "pound" him and that he may have a swollen face as a result. *See Salazar,* 123 N.M. 778, 945 P.2d 996, 1997–NMSC–044, ¶ 53 (rejecting the defendant's argument that the victim's actions of "veer[ing] her car at him and reaching under the seat as if to retrieve a gun" aroused fear or terror in the defendant because "[o]ther testimony by the [d]efendant precludes the possibility that he acted out of provocation and therefore eliminates any reason to instruct on voluntary manslaughter"). We, therefore, conclude that the anticipated and, in fact, desired response from the victim did not arouse sufficient fear, terror, or other extreme emotion "as would affect [Defendant's] ability to reason and to cause a temporary loss of self control in an ordinary person of average disposition." UJI 14–222. Accordingly, the trial court did not err in refusing to instruct the jury on voluntary manslaughter.

B.

{15} Defendant also claims he was entitled to an involuntary manslaughter instruction because the evidence supported a reasonable view that involuntary manslaughter was the highest degree of homicide to

which Defendant was an accessory. Defendant concedes that the theory argued on appeal is not the theory expressed in the rejected instruction. However, he argues that the instruction alerted the trial court to the possibility that the facts could be construed to support such an instruction and that the instruction was warranted. We do not agree.

{16} The Court of Appeals deemed this issue unpreserved, noting that "Defendant acknowledges that he failed to preserve the alleged error for appeal because he failed to request an involuntary manslaughter instruction at trial." *Gaitan,* 130 N.M. 103, 18 P.3d 1056, 2001–NMCA–004, ¶ 18. While it is clear from the record that Defendant requested an instruction on involuntary manslaughter, we are not persuaded that this instruction properly preserved the issue for appeal. Rule 5–608(D) NMRA 2002, governing the preservation of error in jury instructions, states:

> [F]or the preservation of error in the charge, objection to any instruction given must be sufficient to alert the mind of the court to the claimed vice therein, or, in case of failure to instruct on any issue, a *correct* written instruction must be tendered before the jury is instructed.

(Emphasis added.) The purpose of this language is "to allow the court an opportunity to decide a question whose dimensions are not open to conjecture or after-the-fact interpretation." *Gallegos v. State,* 113 N.M. 339, 341, 825 P.2d 1249, 1251 (1992); *see also State v. Hill,* 2001–NMCA–094, ¶ 7, 131 N.M. 195, 34 P.3d 139 (concluding that although the instruction was flawed, defendant's requested instruction on self-defense was preserved because there was evidence in the record that the attorneys and the judge discussed the issue extensively, and that the trial court understood the type of instruction defendant wanted and should have modified it to correctly state the law).

{17} Defendant's requested instruction asked the jury to find involuntary manslaughter if it determined that either Herrera or Padilla, or both, "stabbed Steven Zotigh with a knife." We do not believe that the act described in the instruction can be characterized as anything other than a felonious act, which is outside the statutory definition of involuntary manslaughter. *See* NMSA 1978, § 30–2–3(B) (1994); *Salazar,* 123 N.M. 778, 945 P.2d 996, 1997–NMSC–044, ¶ 57 (finding that the act of " 'Shooting at Manzanares' " described in the requested involuntary manslaughter instruction could not be characterized as anything other than a felonious act and therefore did not fit within the definition of involuntary manslaughter). Thus, based on the requested instruction, there was no way for the trial court to construe the facts to support such an instruction. Furthermore, there is nothing in the record to indicate that Defendant offered any other theory at trial which would have sufficiently alerted the trial court that it needed to modify the instruction to correctly state the law. As this Court stated in *Salazar,* "[i]t is not error for a trial court to refuse instructions which are inaccurate." 123 N.M. 778, 945 P.2d 996, 1997–NMSC–044, ¶ 57. We believe the trial court correctly refused the inaccurate instruction tendered by Defendant. Moreover, even if Defendant had properly preserved this issue for appellate review, we find no reasonable view of the evidence that supports involuntary manslaughter as the highest degree of crime to which Defendant was an accessory.

{18} Defendant was only entitled to an instruction on involuntary manslaughter if there was some reasonable view " 'of the evidence pursuant to which the lesser offense is the highest degree of crime committed.' " *Brown,* 126 N.M. 338, 969 P.2d 313, 1998–NMSC–037, ¶ 12 (quoting *Curley,* 123 N.M. 295, 939 P.2d 1103, 1997–NMCA–038, ¶ 5). "Involuntary manslaughter consists of manslaughter committed in the commission of an unlawful act not amounting to [a] felony, or in the commission of a lawful act which might produce death in an unlawful manner or without due caution and circumspection." Section 30–2–3(B). As discussed above, "[t]o determine the kind of homicide of which the accomplice is guilty, it is necessary to look to his [or her] state of mind; it may have been different from the state of mind of the princi-

pal and they thus may be guilty of different offenses." 2 LaFave & Scott, *supra*, § 6.7(c), at 144. We thus consider whether there was some reasonable view of the evidence presented at trial which would have warranted giving the instruction.

{19} In *Holden*, our Court of Appeals considered the issue of accessory liability as it relates to involuntary manslaughter. In that case, the evidence introduced at trial was that the defendant was looking for the victim and had made a statement to the effect that he was going to get someone to beat the victim up. *Holden*, 85 N.M. at 399, 512 P.2d at 972. Shortly after learning of the victim's whereabouts, defendant returned to that location with another man who then shot and killed the victim. *Id.* The Court determined that "[t]he fact that [the defendant] did not bargain for the result [was] not material. The material fact [was] that he did 'procure' another to perform an 'unlawful act.'" *Id.* at 400, 512 P.2d at 973. Thus, the Court concluded that there was "substantial evidence that [the defendant], with the intent to commit an unlawful act, procured [the principal] to inflict a beating on decedent," and death occurred. *Id.* This amounted to the lesser included offense of accessory to involuntary manslaughter. *Id.*

{20} This case is distinguishable from *Holden*. According to Defendant's testimony, he had no intent that Padilla or Herrera act at all during the altercation with the Zotighs. He testified that he thought the victim was going to attack him, so he got out of his car to apologize, and as soon as he exited the vehicle the victim began pushing him toward the road. Defendant told the victim, "I have a gat, leave me alone. I have a gat," fearing the victim was going to "pound" him. Defendant explained that he used the statement to intimidate the victim, not as a call for help from his friends. Defendant also testified that there was never any agreement between the three men to fight the victim, nor did he think that they would "jump in" for him. Thus, Defendant's own testimony does not present a reasonable view of the evidence which would support involuntary manslaughter as the highest degree of homicide to which Defendant was an accessory, because according to Defendant's theory of the case he did not intend, help, encourage or cause the acts which resulted in the victim's death. *See* UJI 14-2822 NMRA 2002.

{21} Furthermore, under no version of the facts presented at trial is Defendant entitled to the instruction. First, on appeal Defendant argues that a reasonable view of the evidence would have supported the instruction on the theory that Defendant by his negligent actions—provoking the altercation—precipitated the unintentional killing. This argument misinterprets accessory liability as it applies to involuntary manslaughter because it focuses on Defendant's actions as an accessory, rather than on his intent with respect to the actions of the principals. *See* 2 LaFave & Scott, *supra*, § 6.7(c), at 144. However, even if Defendant's conduct of provoking the altercation precipitated the acts which eventually resulted in the victim's death, we do not agree that Defendant's actions were negligent. Defendant acknowledged that as a result of intentionally approaching the victim with his vehicle, the victim "must of [sic] thought I was going to hit him or something because I was so close to him." Even if we assume Defendant did not strike the victim with his vehicle, according to Defendant's own testimony, the victim presumably believed he was going to hit him. Thus, at the very least, Defendant's actions were criminal and amounted to an aggravated assault with a deadly weapon (a motor vehicle), a fourth degree felony. *See* § 30-3-2(A) ("Aggravated assault consists of ... unlawfully assaulting or striking at another with a deadly weapon...."); *State v. Mata*, 86 N.M. 548, 550, 525 P.2d 908, 910 (Ct.App. 1974). More importantly, nothing about that act demonstrates the appropriate intent: that Defendant intended for Padilla or Herrera, or both, to commit "an unlawful act not amounting to [a] felony," which resulted in the victim's death. Section 30-2-3(B).

{22} Second, even if Defendant only said "I have a gat," intending to intimidate the victim, that statement also constitutes the felony of aggravated assault and again fails to show the intent required for the instruction. *See* § 30-2-3(B); *Mata*, 86 N.M. at 550, 525 P.2d at 910.

{23} Finally, with respect to the stabbing of the victim by the principals, the jury was presented with two alternative statements by Defendant relevant to his intent as an accessory. Under the first alternative, according to his own testimony, Defendant said, "I have a gat," intending to intimidate and not as a call for help. If believed by the jury, this statement would have resulted in an acquittal on the accessory to murder charge, because Defendant would not have shared the principals' purpose or design. Under the second alternative, Defendant said, "Let's get the gat," intending that his friends get a weapon and help him seriously injure or kill the victim. If believed by the jury, this statement demonstrates liability as an accessory to first or second degree murder because Defendant intended that a felonious act be committed. *See* § 30–2–1.

{24} Defendant has advanced no argument, and we find no reasonable view of the evidence, pursuant to which involuntary manslaughter is the highest degree of crime to which Defendant was an accessory. We will not "fragment the testimony ... to such a degree as to distort it" in order to construct a view of the evidence which would support the giving of the instruction. *Manus,* 93 N.M. at 100, 597 P.2d at 285. Accordingly, the trial court did not err in refusing to instruct the jury on involuntary manslaughter.

III.

{25} Defendant also asserts that the trial court improperly admitted testimony that Defendant said "Get the gat," at a party several hours before the stabbing incident. He argues that the statement was irrelevant, unfairly prejudicial, and constituted inadmissible propensity evidence. The trial court admitted the statement, concluding that it was relevant to the issues in the case, was not unfairly prejudicial, and could be construed as an admission by a party opponent. We will only reverse the trial court's ruling regarding the admissibility of evidence if the court abused its discretion. *See State v. Garcia,* 99 N.M. 771, 776, 664 P.2d 969, 974 (1983); *State v. Hamilton,* 2000–NMCA–063, ¶ 14, 129 N.M. 321, 6 P.3d 1043, *cert. denied,* 129 N.M. 207, 4 P.3d 35 (2000) *and cert. denied,* 129 N.M. 249, 4 P.3d 1240 (2000).

{26} Under Rule 11–404(B) NMRA 2002, "[e]vidence of other crimes, wrongs, or acts" is not admissible to show that the defendant had a propensity to commit the charged crimes. However, this evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Rule 11–404(B). "In order to admit evidence under [this Rule], the court must find that the evidence is relevant to a disputed issue other than the defendant's character, and it must determine that the prejudicial effect of the evidence does not outweigh its probative value...." *State v. Beachum,* 96 N.M. 566, 567–68, 632 P.2d 1204, 1205–06 (Ct.App.1981); *see also Hamilton,* 129 N.M. 321, 6 P.3d 1043, 2000–NMCA–063, ¶ 14.

{27} Defendant argues that the State's proffered reasons for using Defendant's statement were "nothing more than propensity recast in other words." He asserts that the State sought to admit the statement to show that Defendant was a "bullying gang member" and had a "propensity to commit violent acts with guns." The State responds that the statement was probative of the disputed issue of whether Defendant was an accessory to several crimes including murder and assault with intent to commit a violent felony. We note that to convict the Defendant of these crimes as an accessory the State was required to prove that Defendant intended that the crimes be committed and that he helped, encouraged, or caused the crimes to be committed. *See* UJI 14–2822. The State asserts that the evidence of the earlier statement made at the party is useful as a comparison to his similar statement made during the altercation with the Zotighs, in that, "it tended to show that when in trouble the [D]efendant used a phrase that alerted his friends to the fact that he wanted them to help him as necessary." We agree with the Court of Appeals that the statement was admissible under Rule 11–404(B) "because the trial court could have concluded that the statement was highly probative of

Defendant's intent to enlist or encourage the help of his companions and therefore relevant to the disputed issue of Defendant's liability as an accessory." *Gaitan*, 130 N.M. 103, 18 P.3d 1056, 2001–NMCA–004, ¶ 24 (relying on *State v. Carrasco*, 1997–NMSC–047, ¶ 7, 124 N.M. 64, 946 P.2d 1075, which stated that the criminal intent of the accessory "can be inferred from behavior which encourages the act").

{28} Furthermore, Defendant argues that the trial court misapplied the law by failing to perform the proper balancing test under Rule 11–403 NMRA 2002 and consequently erred in concluding that its prejudicial impact did not substantially outweigh its probative value. We disagree. Rule 11–403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

In this case, the trial court specifically indicated its concern that the statement was prejudicial, explaining that "this is really a question of ... weighing and balancing." Thus, as the Court of Appeals determined, based on the record, it appears that the trial court conducted the proper Rule 11–403 analysis. *See Gaitan*, 130 N.M. 103, 18 P.3d 1056, 2001–NMCA–004, ¶ 26.

{29} We further agree with the Court of Appeals that the prejudice of the statement did not outweigh its probative value to show Defendant's intent. At the time the statement was admitted, "the State had already introduced testimony concerning Defendant's gang affiliation, 'bullying' nature, and propensity for violence." *Gaitan*, 130 N.M. 103, 18 P.3d 1056, 2001–NMCA–004, ¶ 27 (relying on *State v. Woodward*, 121 N.M. 1, 6, 908 P.2d 231, 236 (1995), which stated that "[t]he purpose of [Rule] 11–403 is not to guard against the danger of any prejudice whatever, but only against the danger of *unfair* prejudice. A statement is not unfairly prejudicial simply because it inculpates the defendant."). Testimony had been elicited that Defendant was "acting crazy" and kept asking, "Should I run the fuckers over," which was corroborated by Defendant's own admissions of his desires to "mess around with them a little bit." Two witnesses testified that Defendant hit the victim with his car, and Zotigh testified that during the altercation Defendant said, "Let's get out the gat." Furthermore, both Archuleta and his girlfriend, Cortez, stated that on the night of the stabbing Defendant admitted that they had stabbed somebody, and Silva testified that Defendant told him that they had "killed an Indian." We agree with the Court of Appeals that "[b]alancing this evidence with the probative value of the statement to show Defendant's intent, the trial court did not abuse its discretion in admitting [the] testimony." *Gaitan*, 130 N.M. 103, 18 P.3d 1056, 2001–NMCA–004, ¶ 27.

IV.

{30} For the foregoing reasons we affirm Defendant's convictions for second degree murder as an accessory, aggravated assault with a deadly weapon, tampering with evidence as an accessory, and aggravated battery with a deadly weapon.

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

WE CONCUR: PATRICIO M. SERNA, Chief Justice and PETRA JIMENEZ MAES, Justice.

GENE E. FRANCHINI and PAMELA B. MINZNER, Justices (concurring in part, dissenting in part).

MINZNER, Justice (concurring in part and dissenting in part).

{32} I respectfully dissent. I believe Defendant was entitled to an instruction on voluntary manslaughter. I agree that the trial court did not abuse its discretion in admitting the "get the gat" statement. I also agree that Defendant's proposed instruction on accessory to involuntary manslaughter was flawed and that he thus failed to preserve an appellate issue with respect to an instruction on that theory. Because on remand Defendant might draft a better instruction and put on new or different evidence, I would not reach the issue of his

entitlement to an instruction on involuntary manslaughter. I therefore concur in part II(B) to the extent that it holds that issue was not preserved, and I concur in part III. For the following reasons, I dissent from part II(A), and I would remand for a new trial.

{33} Defendant sought an instruction on voluntary manslaughter. Defendant was not the killer, but the State charged him as an accessory. Manslaughter consists of "the unlawful killing of a human being without malice," NMSA 1978, § 30-2-3 (1994), and voluntary manslaughter is "manslaughter committed upon a sudden quarrel or in the heat of passion." NMSA 1978, § 30-2-3(A) (1994). Defendant is liable for voluntary manslaughter as an accessory if he "procures, counsels, aids or abets in its commission." NMSA 1978, § 30-1-13 (1972). In order to be entitled to an instruction of a lesser included offense to the offense charged, there must be some reasonable view of the evidence whereby the lesser offense is the highest degree of the offense committed. *State v. Brown,* 1998-NMSC-037, ¶ 12, 126 N.M. 338, 969 P.2d 313. Thus, to be entitled to the instruction, there must be some reasonable view of the evidence whereby Defendant was sufficiently provoked by the victim, and while so provoked Defendant aided, abetted or encouraged Padilla and Herrera to kill the victim.

{34} The State has argued that Defendant was not entitled to the voluntary manslaughter instruction as an accessory for two reasons. First, Defendant was not sufficiently provoked by the victim's size and anger. Second, Defendant was the initial aggressor and as such cannot rely on the victim's response as adequate provocation.

{35} The first question is properly one for the jury. As the majority notes, Defendant testified that he revved his engine to scare the victim, and when the victim responded by taking off his shirt and jumping on the hood of the car, he got out to apologize. Although he was not initially afraid of the victim—despite the significant difference in their sizes—Defendant testified that he did feel threatened when he thought the victim was going to "pound" him. Majority Opinion, ¶ 8. I believe there is thus a view of the evidence in which Defendant was provoked. The jury should have been given the opportunity to decide whether to credit Defendant's testimony and to determine whether the provocation was sufficient under the law. The trial court ought not have decided, as a matter of law, that Defendant was not provoked. *State v. Munoz,* 113 N.M. 489, 490, 827 P.2d 1303, 1304 (Ct.App.1992) ("Whether a particular set of circumstances is sufficient provocation is generally a question for the jury to decide.").

{36} The State's second argument appears to me to expand a rule past its original boundaries and to create a per se rule where a fact-based one is appropriate. In *State v. Manus,* 93 N.M. 95, 100, 597 P.2d 280, 285 (1979) we said: "If the defendant intentionally caused the victim to do acts which the defendant could claim provoked him, he cannot kill the victim and claim that he was provoked. In such case, the circumstances show that he acted with malice aforethought, and the offense is murder." Based on that language the majority concludes that, as a matter of law, Defendant is not entitled to an voluntary manslaughter instruction because he initially assaulted the victim.

{37} The first sentence of this quote can be read in more than one way, depending on the interpretation given to the word "intentionally." As the State argues, intentionally could be read to describe the act that causes the victim to respond. Thus, a negligent act that elicits a response from the victim is distinguished from an intentional act. On the other hand, as Defendant argues, intentionally could be read to describe the motive in doing the act that elicits the victim's response. In that way, a defendant who provokes a victim *in order to* rely on the victim's response as provocation is distinguished from one who intends to agitate the victim, but is surprised by that victim's reaction and genuinely provoked by it. The former, by virtue of the premeditated decision to kill, is guilty of murder, and the latter, who lacks such premeditation and is actually provoked by the victim, is guilty of manslaughter.

{38} I think the latter interpretation is more natural, and is confirmed by the second

sentence of the quoted language: "In such case, the circumstances show that he acted with malice aforethought, and the offense is murder." By this language the author of *Manus* indicated that the reason for the rule that a initial aggressor cannot claim provocation is because the circumstances of that initial aggression evince an intent to murder prior to the provocation. Additionally, the author of *Manus* quoted this language from *Wharton's Criminal Law.* That source followed the quote used in *Manus* with an example: "Thus, a defendant is guilty of murder when he arms himself and plans to insult the victim and then kill him if the victim strikes him in resentment over the insult." 2 Charles E. Torcia, *Wharton's Criminal Law* § 157, at 352 (15th ed.1994) (footnote omitted). That example seems to me to clarify the rule and to support a conclusion that an initial aggressor loses the benefit of provocation in more limited circumstances than urged by the State.

{39} Such an interpretation is brought out by the facts of *Manus* and subsequent cases that rely on this rule. Although *Manus* was the source of the rule quoted above, the defendant in that case was largely denied the instruction because the acts he claimed provoked him were performed by the police in the lawful exercise of their duty. "The exercise of a legal right, no matter how offensive, is no such provocation as lowers the grade of homicide." *Manus,* 93 N.M. at 100, 597 P.2d at 285 (citation omitted).

{40} In *State v. Marquez,* 96 N.M. 746, 634 P.2d 1298 (Ct.App.1981), for example, the defendant, who had a bad history with the victim, went to her home, broke in, took a knife from the kitchen and waited for her to come home. When she did, he confronted her and got into an argument during which he stabbed a chair in the room repeatedly with the knife. He then chased the victim and managed to stab her once. She responded by throwing a vase at him, which he claimed provoked him. He then killed her. In that case, unlike this one, there is simply no view of the evidence that allows an inference that the defendant killed in response to the victim's provocation.

{41} Similarly, in *State v. Durante,* 104 N.M. 639, 725 P.2d 839 (Ct.App.1986), the defendant broke into the victims' house wearing a ski mask, put his hand over the sleeping female victim's mouth and instructed her to be quiet or he would kill her. The male victim, who was sleeping next to her, woke up, observed what the defendant was doing, and struggled with him. During the struggle, the defendant stabbed the male victim several times. The male victim was responding to a serious threat to his safety from a masked and armed intruder, a threat realized by the intruder's actions.

{42} This interpretation is endorsed by the commentators. In addition to the view expressed in *Wharton's Criminal Law,* another commentator has described the rule of provocation in the context of a mutual quarrel or combat:

> If an unlawful attack is resisted by force obviously in excess of what is needed in self-defense, the case may or may not be within the rule of provocation. There is no mitigation in favor of the original assailant if he intended in the beginning to kill or to inflict great bodily injury; whereas if the original assailant intended only a nondeadly scuffle the counter attack may constitute adequate provocation.

Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 89 (3d ed.1982) (footnotes omitted). Whether the victim's response was in excess of self-defense, whether Defendant intended to kill prior to the encounter, or whether he was surprised by the victim's response are all fact-intensive inquiries that should properly be considered by a jury. A per se rule that, as an initial aggressor, Defendant was not entitled to claim provocation seems to deprive Defendant of his right to have a jury determine whether he was sufficiently provoked in this context.

{43} In this case there is a version of the facts, from Defendant's testimony and some permissible inferences from his conduct, that he did not provoke the victim with the predetermined intent of killing him, and that when he encouraged his companions to come after the victim he was afraid of him. The evidence of provocation was not overwhelming, and a jury could easily determine that Defendant's testimony concerning his intentions was untrustworthy, and that his actions support an inference that he intended to kill from the beginning of the encounter. That

was, however, the jury's decision to make, and the jury was deprived of that opportunity when the trial court denied the proper instruction. I do not consider this error harmless because "[t]here is a legitimate concern that conviction of the greater offense may result because acquittal is an alternative that is unacceptable to the jury." *State v. Meadors,* 121 N.M. 38, 52, 908 P.2d 731, 745 (1995) (Ransom, J., specially concurring).

{44} Defendant's original intent in approaching the victim and the sufficiency of the provocation are both questions for the jury. Having put forth some evidence of provocation as a part of his theory of the case, Defendant was entitled to an instruction. I respectfully dissent from part II(A), and I would remand this case for a new trial. I concur in the holding in part II(B) that Defendant failed to preserve his claim to an instruction on involuntary manslaughter, and I concur in part III.

I CONCUR: GENE E. FRANCHINI, Justice.

2002-NMSC-006

42 P.3d 1219

In the Matter of the Proposed Merger of QWEST COMMUNICATIONS INTERNATIONAL, INC. and U.S. West, Inc.

Attorney General of the State of New Mexico, Appellant,

v.

New Mexico Public Regulation Commission, Appellee,

and

Qwest Corporation, Qwest Communications Corporation, LCI International Telecom Corporation, USLD Communications, Inc., and Phoenix Network, Inc., Intervenors.

No. 26,298.

Supreme Court of New Mexico.

March 6, 2002.

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OPINION

FRANCHINI, Justice.

{1} Appellant Attorney General appeals a Final Order of the New Mexico Public

Regulation Commission ("the Commission") declaring that the Commission lacked jurisdiction to approve or disapprove a merger between U.S. West Communications, Inc. ("US West") and Qwest Communications International, Inc. ("Qwest"). Among other claims on appeal, Appellant argues that the Commission erred in determining that it lacks regulatory authority over the merger. Based on the absence of any statutory provision specifically granting the Commission regulatory authority over telecommunication mergers, we affirm the Commission's order.

I. FACTS AND PROCEDURE

{2} In 1999, U.S. West and various subsidiaries of Qwest filed a Joint Application and Supplemental Statement with the Commission, seeking an Order declaring that the Commission had no jurisdiction over the merger between U.S. West and Qwest or, alternatively, approving the merger. On February 1, 2000, the Commission entered its Final Order, disclaiming jurisdiction over the merger, but reserving the right to require U.S. West and the Qwest subsidiaries to file a report detailing the merger's benefits. Appellant filed a motion for rehearing, which was rejected, and then filed notice of appeal with this Court, pursuant to NMSA 1978, § 63-9A-14.

{3} Appellant argues that the procedures utilized by the Commission in making its determination were inadequate, unfair, arbitrary and capricious, and in violation of due process. Appellant also argues that there was not substantial evidence to support the Final Order. Finally, Appellant asserts that the Commission had jurisdiction over the merger. Appellee and Intervenors counter that the Commission correctly determined that it lacked jurisdiction over this matter, and that Appellant's remaining arguments are therefore moot. When reviewing the Commission's jurisdictional determination, "we conduct a de novo review, giving little deference to the [Commission's determination]." *Southern Union Gas Co. v. New Mexico Pub. Util. Comm'n*, 1997-NMSC-056, ¶ 5, 124 N.M. 176, 947 P.2d 133.

II. WHETHER THE COMMISSION HAD JURISDICTION OVER THE MERGER

{4} The New Mexico Constitution invests the Commission with the duty to regulate, among other public service companies, "transmission and pipeline companies, including telephone, telegraph and information transmission companies...." N.M. Const. art XI, § 2. Under that same provision, the scope of the Commission's regulatory authority is limited to "such manner as the legislature shall provide." *Id.* With regard to telecommunications, the New Mexico Telecommunications Act, NMSA 1978, §§ 63-9A-1 to -20 ("the Act") provides the commission with broad authority to require and grant certificates of public convenience and necessity, NMSA 1978, § 63-9A-6, and to regulate rates, charges, and service conditions, NMSA 1978, §§ 63-9A-8, -9. Neither the Act, nor any other relevant statute, however, provides the Commission with any authority over the mergers of telecommunication companies or their holding companies. Without any such legislative provision, the Commission correctly disclaimed jurisdiction over the merger between U.S. West and Qwest. Because the Commission had no jurisdiction to review the merger, we do not address Appellant's arguments regarding the propriety of the proceeding. *See Southern Union Gas Co.*, 1997-NMSC-056, ¶ 1, 124 N.M. 176, 947 P.2d 133 (stating that the Court's holding that the Commission did not have jurisdiction over a particular controversy "render[ed] resolution of all other appellate issues unnecessary").

{5} The legislature's decision not to include the authority to affect and oversee telecommunication company mergers among the powers of the Commission disposes of this matter. Accordingly, despite extensive briefing on the subject from all parties, we do not reach the issue of whether the Commission has jurisdiction over the holding companies of telecommunication service providers. Furthermore, we agree with Appellant and Appellee that the Public Utilities Act does not apply to telecommunication services.

{6} Our holding today in no way diminishes the broad authority of the Commission to regulate telecommunication rates and services. Pursuant to the aforementioned statutory authority, the Commission reserved its right to "investigate the effects of the merger upon U.S. West and the Qwest subsidiaries, place conditions on U.S. West's [certificate of convenience and necessity], or undertake other appropriate measures necessary to ensure that the merger does not result in adverse consequences to U.S. West's New Mexico customers, and that those customers continue to receive adequate service." Thus, the Commission correctly recognized that while the Act does not empower it to oversee the acquisitions of telecommunication companies, any potential effect of such an acquisition on New Mexico will be subject to the Commission's regulatory authority.

III. CONCLUSION

{7} The Commission's Final Order is affirmed.

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

WE CONCUR: PATRICIO M. SERNA, Chief Justice, JOSEPH F. BACA, Justice, PAMELA B. MINZNER, Justice, and PETRA JIMENEZ MAES, Justice.

2002-NMCA-030

42 P.3d 1221

SANTA FE TECHNOLOGIES, INC., Plaintiff–Appellee,

v.

ARGUS NETWORKS, INC., and David L. Jannetta, et al., Defendants–Appellants.

Nos. 21,381, 21,382, 21,469, 21,470.

Court of Appeals of New Mexico.

Dec. 13, 2001.

Certiorari denied, No. 27,285, Feb. 28, 2002; No. 27, 324, March 6, 2002.

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Tim L. Fields, Michelle A. Martinez, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, NM, Alan K. Cotler, Andrew P. Hoppes, Klett Rooney Lieber & Schorling, Philadelphia, PA, for Appellants Argus Networks, Inc. and David L. Jannetta.

OPINION

WECHSLER, Judge.

{1} We examine in this appeal the scope of personal jurisdiction over out-of-state Defendants in a business tort action, including the issue of conspiracy as a basis for personal jurisdiction. Defendants, Argus Networks, Inc. (Argus), David Jannetta (Jannetta), TL Ventures, LLC (TL), Michael Burns (Burns), and Mark DeNino (DeNino) appeal the district court's refusal to dismiss the complaint of Santa Fe Technologies, Inc. (SFT) for lack of personal jurisdiction, or, alternatively, to compel arbitration. All Defendants applied for interlocutory appeal as to the personal jurisdiction and arbitration rulings and filed notice of direct appeal of the denial of the arbitration motion pursuant to NMSA 1978, § 44-7-19(A) (1971). We granted the interlocutory appeals and consolidated the cases to review both the personal jurisdiction and arbitration issues as to all Defendants. We affirm the district court on all issues, concluding that the district court has personal jurisdiction over all Defendants and that the arbitration clause at issue does not compel arbitration in this case.

The Parties

{2} At its core, this case involves a failed business venture between SFT and Defendants. SFT sued Argus, its CEO, Jannetta, TL, two of its principals, Burns and DeNino, and three principals of Sensor Management Systems (SMS), the New Mexico corporation that replaced SFT in the venture. All of the parties are interrelated.

{3} SFT is a New Mexico corporation, with its principal place of business in New Mexico at the time of occurrence of the actions giving rise to this lawsuit and with additional offices in Virginia and Florida. Dwight Sangrey was SFT's CEO. Argus is a Delaware corporation with its principal place of business in Pennsylvania. Although Argus is now reincorporated under a new name, we will refer to it as Argus. Jannetta, a Pennsylvania resident, was president of Argus. TL is a limited liability company with its principal place of business in Pennsylvania. It manages private equity funds, one of which is a shareholder in Argus. TL argues that it "has never had any operating role or responsibility for the conduct" of Argus' business. However, Burns, a resident of Pennsylvania and employee of TL, is a stockholder, director, and officer of Argus. DeNino, also a resident of Pennsylvania, is managing director of TL as well as a director of Argus. Brian Malewicz is a shareholder in Argus and former schoolmate of Burns. The principals of SMS are Defendants Mark Nash, Jerry Musnitsky, and Harvey Dollar, who are residents of New Mexico, stockholders in SFT, and former employees of SFT. The SMS defendants are not party to this appeal.

Facts and Procedural Background

{4} In 1997, Jannetta first contacted SFT in New Mexico on behalf of Argus by telephone from Pennsylvania to participate in a bid for a traffic monitoring contract with the federal government to be performed in Pennsylvania. Throughout 1998, SFT discussed the structure of the companies' future business relationship with Jannetta, Burns, and DeNino. A merger was proposed, and stock ownership percentages in the new venture were decided among Argus, Jannetta, Burns, DeNino, and TL. The merger would occur if

the federal government granted the contract to the Argus SFT venture. All in-person negotiations for the prospective merger occurred in Pennsylvania. SFT's lawyers drafted the Merger Plan Agreement (Agreement) in Utah, and Argus' lawyers negotiated revisions from Pennsylvania. The parties signed the Agreement in Pennsylvania in November 1998.

{5} The Agreement provided that each party had the right to terminate the Agreement for any reason if the merger was not closed by December 15, 1998. The Agreement also contained provisions requiring arbitration of "any breach, default, dispute, controversy, or claim arising out of or relating to this Agreement" and deeming arbitration the "sole and exclusive remedy ... respecting any dispute, protest, controversy, or claim arising out of or relating to this Agreement."

{6} Between July 1998 and February 1999, Sangrey met with DeNino up to three times monthly in Philadelphia. The federal government issued the Request for Proposals for the traffic monitoring system in December 1998, and Argus and SFT began working on the bid. The Request for Proposals required that bidders employ a pre-qualified prime contractor under whose auspices the subcontractor proposal would be made. SFT and Jannetta chose SIGNAL Corporation as the prime contractor for the Argus bid. SIGNAL was incorporated and had its principal place of business in Virginia. Most of the subcontractors chosen to participate in the SIGNAL team were from Pennsylvania, Maryland, Virginia, and Washington, D.C. Although most of the bid preparation work took place in Virginia, and no one from Argus or TL came to New Mexico during this time, the administrative function of SFT and Argus was performed in Albuquerque, where some employee records of Jannetta, Malewicz, and TL were kept. According to SFT's CEO, Dwight Sangrey, Argus and SFT functioned "de facto as an integrated operating company."

{7} During bid preparations in December, Argus claimed to have learned that SFT was experiencing financial problems and it claimed that such problems made Argus suspect of SFT's ability to perform. Argus eventually concluded that SFT's references from the performance of other government contracts were suspect. Additionally, SFT had not reached its actual revenue goal for 1998. Argus thus extended a loan to SFT to cover its payroll in exchange for a lower equity percentage if the merger went through. At this time as well, Jannetta and another Argus employee were receiving their paychecks from the SFT payroll in New Mexico. Jannetta also had a cell phone with a New Mexico telephone number and was carried on SFT insurance and health plans. Argus reimbursed SFT for these payments and paid a portion of two SFT employees' salaries.

{8} In mid-February, Jannetta and Burns began discussing the replacement of SFT on the bidding team. Jannetta proposed that Argus consider another New Mexico corporation, SMS. On February 13, 1999, Burns relayed to DeNino that Argus and Jannetta were considering potential replacements for SFT. Joe Cal of Northern Transportation Systems, a subsidiary of SMS, contacted Jannetta by telephone on February 19, 1999. Sangrey had introduced Cal to Jannetta on December 30, 1998, when Sangrey had wanted to involve SMS in the installation of traffic sensors as part of the federal contract. From the TL conference room in Pennsylvania, Jannetta and Burns telephoned Nash and Musnitsky of SMS in Albuquerque and discussed collaborating on the federal contract. They set a meeting in San Francisco for the following week. Burns then notified DeNino of the talks with SMS. DeNino approved the discussions but expressed concern over potential legal action from SFT.

{9} Burns and SMS met in San Francisco where Burns identified himself as affiliated with TL and explained TL's ownership interest in Argus. He explained that he was authorized to speak for Argus and make an offer on their behalf. When Burns notified Jannetta and Malewicz that this meeting was unsuccessful, they decided that Malewicz would meet with SMS to facilitate a deal. Malewicz met with Nash, Musnitsky, and another SMS principal in Albuquerque on February 23, 1999. Malewicz maintained

telephone contact with Jannetta and Burns throughout his talks with SMS. The parties agreed that Argus would purchase SMS and that SMS would replace SFT on the bidding team for the federal contract. On February 24, 1999, Argus notified SFT by facsimile transmission that it was terminating the Agreement. Later that same day, Argus and SMS signed a letter of intent in Pennsylvania and New Mexico, respectively. On February 26, 1999, Argus told SFT that it would not be included in the federal contract project.

{10} On March 1, 1999, Argus and SMS signed a stock purchase agreement, exchanging stock and cash, and SMS became a wholly owned subsidiary of Argus. Argus additionally arranged to replace SMS principals as guarantors on some SMS debts to New Mexico banks. Argus and SIGNAL submitted their bid for the traffic contract to the federal government with SMS in place of SFT. The federal government subsequently awarded the contract to Argus with SMS.

{11} SFT filed its complaint in July 1999 alleging that Defendants "combined and conspired to divert and steal ... a corporate opportunity that Santa Fe identified, developed, owned and was ready to perform," and that it was entitled to monetary damages as result of its exclusion from the federal bid. SFT alleged interference with prospective contractual relations, usurpation of business opportunity, fraud, and conspiracy to commit the aforementioned torts, among other claims. Argus and Jannetta filed two motions to dismiss, alleging that (1) the merger agreement required SFT's claims to be arbitrated and (2) the court lacked personal jurisdiction over Defendants. TL, Burns, and DeNino filed similar motions. The district court allowed discovery, briefing, and argument. Ultimately, the district court denied all four motions without specific findings but certified for interlocutory appeal both the issue of arbitration as well as personal jurisdiction to this Court. Defendants appealed. We granted the interlocutory appeal and now affirm.

Personal Jurisdiction

Standard of Review

{12} The issue of whether the district court has personal jurisdiction over the non-resident Defendants in this case is a question of law, which we review de novo. *Cronin v. Sierra Med. Ctr.*, 2000–NMCA–082, ¶ 10, 129 N.M. 521, 10 P.3d 845. When the district court bases its ruling on the pleadings and affidavits, the standard of review resembles that of summary judgment; the appellate court reviews the pleadings and affidavits or sworn testimony in the light most favorable to the party asserting jurisdiction. *Id.* In this case, the district court did not hold an evidentiary hearing. Therefore, the party asserting jurisdiction "need only make a prima facie showing that personal jurisdiction exists." *Id.*

Long–Arm Jurisdiction

{13} Generally, to find personal jurisdiction over non-residents, New Mexico requires the satisfaction of a three-part test:

> (1) the defendant's act must be one of the five enumerated in the long-arm statute; (2) the plaintiff's cause of action must arise from the act; and (3) minimum contacts sufficient to satisfy due process must be established by the defendant's act.

State Farm Mut. Ins. Co. v. Conyers, 109 N.M. 243, 244, 784 P.2d 986, 987 (1989); *see also* NMSA 1978, § 38–1–16 (1971). However, as "[t]he first and third step of this test have been 'repeatedly equated' with the due process standard of 'minimum contacts,' " the necessity of a technical determination of whether the non-resident committed an act enumerated by the long-arm statute has evaporated. *Fed. Deposit Ins. Corp. v. Hiatt*, 117 N.M. 461, 463, 872 P.2d 879, 881 (1994) (quoting *Kathrein v. Parkview Meadows, Inc.*, 102 N.M. 75, 76, 691 P.2d 462, 463 (1984)); *see also Tarango v. Pastrana*, 94 N.M. 727, 728, 616 P.2d 440, 441 (Ct.App. 1980). Rather, we " 'search for the outer limits of what due process permits,' " *Hiatt*, 117 N.M. at 463, 872 P.2d at 881 (quoting *Forsythe v. Overmyer*, 576 F.2d 779, 782 (9th Cir.1978)), because New Mexico's long-arm statute will extend as far as the constitution allows. *United Nuclear Corp. v. Gen. Atomic Co.*, 91 N.M. 41, 42, 570 P.2d 305, 306 (1977). Thus, for the court to find personal

jurisdiction, a plaintiff must allege an occurrence that falls within the long-arm statute, and the court must find the requisite minimum contacts to comport with due process. *Cronin,* 2000–NMCA–082, ¶ 20, 129 N.M. 521, 10 P.3d 845.

Commission of Tortious Act Within New Mexico by Defendants

{14} The first part of the three-step test requires that the "defendant's alleged acts ... fall into a category ... specifically enumerated in the New Mexico long-arm statute." *DeVenzeio v. Rucker, Clarkson & McCashin,* 1996–NMCA–064, ¶ 9, 121 N.M. 807, 918 P.2d 723. New Mexico's long-arm statute provides:

> A. Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts enumerated in this subsection thereby submits himself or his personal representative to the jurisdiction of the courts of this state as to any cause of action arising from:
>
> (1) the transaction of any business within this state;
>
> ....
>
> (3) the commission of a tortious act within this state.

Section 38–1–16(A)(1),(3). SFT alleges that Defendants and their agents, Malewicz and SMS, committed tortious acts within New Mexico, expecting the injury to SFT to occur within New Mexico. The alleged torts arise out of the interference with SFT's business opportunity when Argus purchased SMS through the facilitation of Malewicz and replaced SFT in the federal contract bid. We agree with SFT that its causes of action arise out of an alleged tortious act committed in this state under the long-arm statute supported by sufficient minimum contacts through Defendants' actions and those of their agent Malewicz to satisfy due process as to all Defendants except DeNino. Thus, we need not consider SFT's other asserted bases, transaction of business or the agency of SMS, for personal jurisdiction under the statute. *See Visarraga v. Gates Rubber Co.,* 104 N.M. 143, 146, 717 P.2d 596, 599 (Ct.App. 1986).

{15} For purposes of the long-arm statute, a "tortious act" can occur in New Mexico when the actual harmful act originates outside the state, but the injury itself occurs inside New Mexico. *See Peralta v. Martinez,* 90 N.M. 391, 393, 564 P.2d 194, 196 (Ct.App.1977). This is the "place-of-the-wrong" rule as accepted by our Supreme Court. *Cronin,* 2000 NMCA 082, ¶ 18, 129 N.M. 521, 10 P.3d 845; *see Torres v. State,* 119 N.M. 609, 613, 894 P.2d 386, 390 (1995). The place of the wrong is " 'the location of the last act necessary to complete the injury.' " *Id.* at 613, 894 P.2d at 390 (quoting *Wittkowski v. State, Corr. Dep't,* 103 N.M. 526, 528, 710 P.2d 93, 95 (Ct.App.1985) *overruled on other grounds by Silva v. State,* 106 N.M. 472, 745 P.2d 380 (1987)). A tort is not complete until the plaintiff suffers a cognizable injury. *Peralta,* 90 N.M. at 393, 564 P.2d at 196 ("A wrong without damage or damage without wrong does not amount to a cause of action."). SFT alleges that it suffered economic loss as a result of its exclusion from the federal bid and the substitution of SMS. This alleged economic loss is the "cognizable injury" which completes the tort in New Mexico and satisfies the first two prongs of the three part test for personal jurisdiction: that SFT allege one of the enumerated acts in the long-arm statute and that the cause of action arise from those acts.

Constitutional Due Process

{16} The principles of constitutional due process are well settled. Due process requires that an out-of-state defendant have "minimum contacts" with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (citations omitted). A minimum contacts analysis focuses on "the relationship among the defendant, the forum, and the litigation." *Shaffer v. Heitner,* 433 U.S. 186, 204, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977). There must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws,"

Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), and the case must arise from these activities. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). *See also Conyers*, 109 N.M. at 245, 784 P.2d at 988 (the "purposeful availment" test is the "key focus" of the due process analysis). Stated another way, the non-resident's activities in the forum state should be "such that he [or she] should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

{17} Thus, personal jurisdiction cannot be based on "random, isolated, or fortuitous" contacts, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984), as opposed to "deliberate" activities. *Burger King Corp.*, 471 U.S. at 475–76, 105 S.Ct. 2174. However, the lack of physical contact with the forum will not defeat personal jurisdiction as long as "a commercial actor's efforts are 'purposefully directed' toward residents" of that forum. *Burger King Corp.*, 471 U.S. at 476, 105 S.Ct. 2174 (quoting *Keeton*, 465 U.S. at 774, 104 S.Ct. 1473).

{18} We apply these principles to evaluate whether Defendants' minimum contacts are such that the lawsuit comports with Defendants' due process protections.

Sufficiency of Defendants' Contacts with New Mexico

{19} Argus and TL contend that they lack the necessary minimum contacts with New Mexico to support personal jurisdiction. SFT argued to the district court that an intentional tort, such as that alleged in this case, gives rise to personal jurisdiction based on its purposeful nature alone. SFT relies on *Calder v. Jones*, 465 U.S. 783, 789–90, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984), in which the United States Supreme Court found personal jurisdiction in California over Florida residents for the tortious act of libel in a nationally circulated magazine, concluding that the impact of the libel was intentionally directed toward California, the plaintiff's residential state and place of business, and the defendant could expect suit based on the article's truth. We decline to apply this reasoning under these circumstances. An intentional tort without minimum contacts does not comport with due process. *See DeVenzeio*, 121 N.M. at 811, 918 P.2d at 727 (concluding that economic loss alone not sufficient for personal jurisdiction based on intentional tortious acts of fraudulent misrepresentation when non-resident defendant "did not avail himself of the privilege of conducting activities in New Mexico").

{20} Argus argues that business torts as alleged by SFT find their locus of commission where the contractual rights lie or at the focal point of the business relationship, instead of the location of the SFT's principal place of business or the place of injury, citing *Far West Capital, Inc. v. Towne*, 46 F.3d 1071, 1079–80 (10th Cir.1995) and *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 771–73 (5th Cir.1988). TL contends that SFT's alleged economic injury in New Mexico is not enough to justify personal jurisdiction over a non-resident defendant, relying on *DeVenzeio*, 121 N.M. at 810–11, 918 P.2d at 726–27.

{21} We do not entirely disagree with Defendants' arguments. The constitutional inquiry, however, is not dependent upon the type of tort or the underlying transaction in dispute. The inquiry is whether Defendants have such minimum contacts with New Mexico so that the suit does not offend due process. The location of a business's activities or performance of a contract is but one factor in the minimum contacts analysis. The cases cited by Argus all base their reasoning on the same rationale: minimum contacts are necessary for the court to exert jurisdiction. As the court in *Far West Capital, Inc.* stated,

> [T]he mere allegation that an out-of-state defendant has tortiously interfered with contractual rights or has committed other business torts that have allegedly injured a forum resident does not necessarily establish that the defendant possesses the constitutionally required minimum contacts.... [A] court must undertake a particularized inquiry as to the extent to

> which the defendant has purposefully availed itself of the benefits of the forum's laws.... We therefore examine "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing." In addition, we examine the contacts created by the out-of-state defendant in committing the alleged tort.

Far W. Capital, Inc., 46 F.3d at 1079–80 (quoting *Burger King Corp.*, 471 U.S. at 479, 105 S.Ct. 2174). Finding the language of *Far West Capital, Inc.* instructive, we now turn to the facts alleged in this case.

{22} The relationships among the Pennsylvania Defendants are significant to our discussion. Jannetta is the president of Argus of which Burns is both officer and director, and DeNino is a director of Argus as well. DeNino is the managing director of TL which invests in Argus, and Burns is TL's employee. Malewicz is a friend of Burns, a shareholder in Argus, and a signatory on the Agreement on behalf of Argus. Of these four individuals, only one, Malewicz, physically entered New Mexico during the time period of the alleged occurrence or beforehand during negotiations with SMS. Because the key focus of a personal jurisdiction, minimum contacts analysis is "purposeful availment," we look at Defendants' activities directed toward New Mexico. *See Conyers*, 109 N.M. at 245, 784 P.2d at 988.

{23} Initially, we note that Argus and Jannetta reached out to New Mexico when they contacted SFT in Albuquerque in 1997. This contact led to merger negotiations from June to November of 1998 between the two companies to better pursue the federal bid opportunity. These negotiations occurred in Pennsylvania and were attended by DeNino and Burns, as representatives of TL, and Jannetta, as representative of Argus. During the months following the Agreement, Argus loaned money to SFT, and Jannetta and one other employee were paid through SFT payroll service. Argus, in turn, reimbursed SFT for these costs and paid part of SFT's salaries for its CEO and CFO. Jannetta was carried on SFT employee insurance and health plans and had a New Mexico cell phone and telephone number provided by SFT. The administrative function of the two companies and some employee records of Argus and TL were located in Albuquerque.

{24} Looking to the " 'prior negotiations and contemplated future consequences,' " Defendants' actions demonstrate an intent to do business themselves in New Mexico and with a New Mexico company. *Far W. Capital, Inc.*, 46 F.3d at 1079 (quoting *Burger King Corp.*, 471 U.S. at 479, 105 S.Ct. 2174). They solicited a New Mexico company with which they wanted to do business and then acted as if the two companies were one, intermingling funds, extending loans, and planning for a future merger. These interactions with SFT were not "random" or "fortuitous" contacts, but rather deliberate actions to further a potentially lucrative business relationship. *See Keeton*, 465 U.S. at 774, 104 S.Ct. 1473.

{25} Additionally and significantly, Argus, TL, Jannetta, and Burns had physical contact with New Mexico, based on the actions of Defendants' agent, Malewicz, in the state. We do not agree with Defendants' argument that, because Malewicz did not have authority to bind Argus or TL, he was not an agent for personal jurisdiction purposes. *See, e.g., Romero v. Mervyn's*, 109 N.M. 249, 253–54, 784 P.2d 992, 996–97 (1989).

{26} Our long-arm statute provides that the actions of an agent are imputed to the principal for the purposes of personal jurisdiction. *See* § 38–1–16(A) ("Any person ... who in person or through an agent does any of the acts enumerated ... submits himself ... to the jurisdiction of the courts of this state."). "An agent is one authorized by another to act on his behalf and under his control." *Hansler v. Bass*, 106 N.M. 382, 387, 743 P.2d 1031, 1036 (Ct.App. 1987); *see also Carlsberg Mgmt. Co. v. State, Taxation & Revenue Dep't*, 116 N.M. 247, 251, 861 P.2d 288, 292 (Ct.App.1993) ("[T]he retention of control by [the principal] and the delegation of specified duties indicates an agency relationship."); Restatement (Second) of Agency § 1, at 7 (1958) ("Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the

other so to act."). The existence of agency is a question of fact. *Carlsberg Mgmt. Co.*, 116 N.M. at 251, 861 P.2d at 292. SFT bears the burden of proof to make a prima facie showing of agency for all jurisdictional allegations. *Swindle v. Gen. Motors Acceptance Corp.*, 101 N.M. 126, 129, 679 P.2d 268, 271 (Ct.App. 1984).

{27} Jannetta and Burns, who represented both Argus and TL in connection with SMS, specifically sent Malewicz to New Mexico as an envoy on their behalf to facilitate negotiations with SMS, a New Mexico corporation, about replacing SFT on the federal bid. No one disputes that Malewicz did not have authority to bind Argus contractually. However, this lack of authority does not preclude Malewicz from being an agent for Jannetta or Burns. Some agents have authority only to transmit or receive information on behalf of the principal. *Diversified Dev. & Inv., Inc. v. Heil*, 119 N.M. 290, 297–98, 889 P.2d 1212, 1219–20 (1995) (stating that an agent can have authority to speak for principal but not have authority to bind principal contractually). Deposition testimony showed that Malewicz acted on behalf of Jannetta and Burns and under their direction and control. *See Carlsberg Mgmt. Co.*, 116 N.M. at 251, 861 P.2d at 292; *Tercero v. Roman Catholic Diocese*, 1999–NMCA–052, ¶ 26, 127 N.M. 294, 980 P.2d 77 (finding agency relationship between priest and out-of-state diocese for purposes of long-arm statute when diocese sent priest to New Mexico to supervise another priest and delegated power to the former to remove censure from the latter). *Cf. Campos Enters., Inc. v. Edwin K. Williams & Co.*, 1998–NMCA–131, ¶ 18, 125 N.M. 691, 964 P.2d 855 (finding no agent-principal relationship between franchisee and franchisor when franchisor had no day-to-day control over franchisee's business). Malewicz was a "facilitator" in the negotiations and maintained telephone contact with Jannetta throughout his stay.

{28} Thus, Burns and TL had a physical, in-state contact with New Mexico through Malewicz, Argus, and Jannetta. Later, Argus, Jannetta, Burns, TL, and DeNino decided to pursue a second New Mexico company, SMS. Jannetta and Burns called Albuquerque and contacted SMS. In San Francisco, Burns made representations that he appeared on behalf of Argus and TL, connecting both Argus and TL as joint-venturers. With this connection, the physical contact of Malewicz can be imputed to his principals, Argus, Jannetta, Burns, and TL. We exclude DeNino because SFT did not present or allege facts that DeNino specifically knew of or facilitated Malewicz' trip to New Mexico.

{29} Although there was only a single physical, in-state contact, the extent of the business interaction between Argus, TL, Jannetta, and Burns with SFT in New Mexico and their decision to pursue a second New Mexico company belies any argument that Argus, Jannetta, TL, and Burns could not have " 'reasonably anticipate[d] being haled into [our] court[s]' " for its activities with SFT. *Tercero*, 1999–NMCA–052, ¶ 18, 127 N.M. 294, 980 P.2d 77 (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 297, 100 S.Ct. 559). Nor do we have to stretch to characterize as "purposeful" the dispatch of Malewicz to Albuquerque to negotiate with SMS. As a consequence, the district court properly found personal jurisdiction based on sufficient minimum contacts to satisfy long-arm jurisdiction over Argus, TL, Jannetta, and Burns.

Personal Jurisdiction Based on Conspiracy

{30} We conclude above that DeNino did not have sufficient minimum contacts with New Mexico based on Malewicz's actions because DeNino lacked specific participation in the dispatch of Malewicz to New Mexico. SFT asserts, however, that personal jurisdiction lies over Defendants based on a conspiracy, claiming that Defendants conspired with the in-state New Mexico Defendants of SMS to tortiously replace SFT on the proposal for the federal contract and that economic harm resulted from its exclusion. Due to our conclusions above, we confine our evaluation of SFT's conspiracy argument to DeNino. As we discuss below, personal jurisdiction based on conspiracy rests on principles of agency. As such, it is but a short step from our earlier agency analysis. We agree that SFT

has presented prima facie evidence that DeNino had knowledge of, and participated in, an alleged agreement to intentionally interfere with SFT's contractual relations to pursue the federal contract bid to the detriment of and without the knowledge of SFT, and that DeNino is subject to personal jurisdiction in the New Mexico courts premised on a conspiracy claim.

Satisfaction of Due Process of Personal Jurisdiction Based on Conspiracy

{31} Personal jurisdiction based on conspiracy is premised on the concepts that jurisdictional contacts of one in-state conspirator may be imputed to a non-resident co-conspirator or that "the acts of a nonresident conspirator, which establish sufficient contacts with the forum state [under the] state's long arm statute, are likewise sufficient to establish personal jurisdiction over nonresident coconspirators." *Am. Land Program, Inc. v. Bonaventura Uitgevers Maatschappij,* 710 F.2d 1449, 1454 (10th Cir.1983). The issue of whether conspiracy provides an adequate constitutional foundation for personal jurisdiction has challenged courts throughout the country, with differing results.

{32} Some courts have concluded that knowledge of and voluntary participation in a conspiracy with other individuals who have physical, in-state presence does not offend due process and allows the court to extend personal jurisdiction over a non-resident who may lack specific, individualized contacts with the forum state. *See Istituto Bancario Italiano v. Hunter Eng'g Co.,* 449 A.2d 210, 225 (Del.1982) ("[A] defendant who has so voluntarily participated in a conspiracy with knowledge of its acts in or effects in the forum state can be said to have purposefully availed himself of the privilege of conducting activities in the forum state, thereby fairly invoking the benefits and burdens of its laws."); *Rudo v. Stubbs,* 221 Ga.App. 702, 472 S.E.2d 515, 516–17 (1996) (recognizing that co-conspirators are agents of each other for purposes of personal jurisdiction when acting in furtherance of conspiracy but requiring specific facts of activity purposefully directed toward Georgia residents). Our Supreme Court alluded to conspiracy as a viable basis for personal jurisdiction in *Sanchez v. Church of Scientology,* 115 N.M. 660, 663, 857 P.2d 771, 774 (1993), although the Court declined to find jurisdiction because the plaintiff was unable to make a prima facie showing that a conspiracy existed.

{33} Other states, such as California, Texas, and Washington, have rejected conspiracy as a basis for personal jurisdiction because it relies on the imputation of contacts from one co-conspirator to another, which, arguably offends due process. *See, e.g., Kipperman v. McCone,* 422 F.Supp. 860, 873 n. 14 (N.D.Cal. 1976) (rejecting conspiracy theory for personal jurisdiction as it relies on imputed conduct); *Mansour v. Superior Court,* 38 Cal. App.4th 1750, 46 Cal.Rptr.2d 191, 197 (1995) (explaining that California does not recognize conspiracy as a basis for personal jurisdiction because it does not require individualized contacts with the forum state); *Nat'l Indus. Sand Ass'n v. Gibson,* 897 S.W.2d 769, 773 (Tex.1995) (explaining that the imputation of contacts under a conspiracy theory in absence of any traditional minimum contacts "distract[s] from the ultimate due process inquiry: whether the out-of-state defendant's contact with the forum [is] such that it should reasonably anticipate being haled into a court in the forum state"); *Hewitt v. Hewitt,* 78 Wash.App. 447, 896 P.2d 1312, 1316 (1995) (holding that the imputation of contacts via a conspiracy theory violated due process). These cases, relied on by Defendants, reject jurisdiction based on conspiracy due to the historical evaluation of each non-resident's individualized contact with the forum state. However, it does not appear that these cases consider whether adoption of an appropriately limited conspiracy analysis of jurisdiction might satisfy due process.

{34} We believe that the elements of knowledge and voluntary participation can create "minimum contacts" with the forum state such that personal jurisdiction based on a conspiracy can be constitutionally sound. When appropriately found, personal jurisdiction in an alleged conspiracy is not based on "random" or "fortuitous" contacts. *Keeton,* 465 U.S. at 774, 104 S.Ct. 1473. Nor is it based on the "unilateral activity of another party or a third person."

Burger King Corp., 471 U.S. at 475, 105 S.Ct. 2174 (internal quotation marks and citation omitted). Conspiracy is based on the principles of agency. *See, e.g., Grove Press, Inc. v. Angleton*, 649 F.2d 121, 122–23 (2d Cir.1981) (applying a conspiracy analysis under the agency component of New York's long-arm statute). In a conspiracy, an individual's actions in furtherance of the conspiracy are not unilateral because conspiratorial acts have at their foundation an agreement and the involvement of other co-conspirators. Because an act in furtherance of the conspiracy is on behalf of the conspiracy, the contacts with the forum of the co-conspirator performing the act may become contacts for other co-conspirators. We agree with the Delaware Supreme Court that:

> a defendant who has so voluntarily participated in a conspiracy with knowledge of its acts in or effects in the forum state can be said to have purposefully availed himself of the privilege of conducting activities in the forum state, thereby fairly invoking the benefits and burdens of its laws.

Istituto Bancario Italiano, 449 A.2d at 225. Therefore, the substantial contact with New Mexico through the actions of conspirators in furtherance of a conspiracy can make the exercise of jurisdiction by our courts reasonable and fair.

{35} Moreover, New Mexico has an interest in providing a forum when appropriate. As the Supreme Court stated in *Burger King Corp.*, 471 U.S. at 473–74, 105 S.Ct. 2174 (citations omitted):

> A[s]tate generally has a "manifest interest" in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.... [W]here individuals "purposefully derive benefit" from their interstate activities, it may well be unfair to allow them to escape having to account ... for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.

We recognize that the Due Process Clause as a "territorial shield" is correctly invoked to protect a non-resident who is brought into a forum with which he or she has no contact. However, we believe that, when properly limited, personal jurisdiction based on a conspiracy recognizes both the state's interest in the provision of a forum for its citizens and the constitutional protections of due process.

{36} We explained above that conspiracy rests on principles of agency and, as such, those actions of a co-conspirator in furtherance of the conspiracy which create contact with the forum state can be properly attributed to other co-conspirators when the plaintiff can demonstrate that the non-resident co-conspirators had sufficient knowledge of and participation in the acts that occurred in the forum state and the resultant effect of those acts was foreseeable. We conclude that SMS is an in-state co-conspirator of DeNino such that its contacts in furtherance of the conspiracy in New Mexico are properly attributed to DeNino for purposes of personal jurisdiction.

{37} In this case, SFT did not present any facts that DeNino himself solicited SMS for substitution on the federal bid. However, DeNino was an active participant in the original negotiations with SFT and knew of and later approved the pursuit and substitution of SMS for SFT for the federal contract bid in concert with Burns and Jannetta. DeNino's approval was one of the actions SFT has alleged set in motion the sequence of events in New Mexico which ultimately resulted in the alleged economic harm to SFT.

{38} DeNino's activities were directed toward New Mexico because he knew or should have known that SMS, upon its agreement, would perform in New Mexico the actions in furtherance of the conspiracy of which he had approved. SMS is a New Mexico corporation with New Mexico principals. It was reasonably foreseeable to DeNino that any action by SMS would originate from its headquarters in this state even though the original meeting had taken place in San Francisco. Although SMS was not a direct agent of DeNino, it was an alleged co-conspirator. SMS voluntarily and knowingly participated in the plan of which DeNino was a part, to substitute itself at the last moment for SFT on the federal contract bid and take the steps to bring that plan to fruition in New Mexico.

These actions, allegedly substantial actions in furtherance of the conspiracy, included both the agreement itself to replace SFT and the subsequent conduct to effect the replacement.

{39} We believe that, because DeNino gave his approval to the substitution of SMS for SFT, precipitating the events in New Mexico of which SFT complains, personal jurisdiction of the state's courts over DeNino as a co-conspirator with SMS is sound. *See Istituto Bancario Italiano,* 449 A.2d at 225 (concluding that non-resident co-conspirator is subject to personal jurisdiction when plaintiff can show that non-resident was member of conspiracy that performed a substantial act in furtherance of the conspiracy in the forum and that non-resident had knowledge of the act and its foreseeable effects in the forum). The extension of DeNino's actions in New Mexico are such that he could foresee harm in the state and, thus, could reasonably foresee being haled into a New Mexico court to account for the consequences of his actions and decisions. *See World-Wide Volkswagen Corp.,* 444 U.S. at 297, 100 S.Ct. 559.

Prima Facie Case of Conspiracy

{40} TL, Burns, and DeNino further contend that, even if conspiracy were an accepted basis for personal jurisdiction in New Mexico, SFT did not make out a prima facie case of conspiracy. *See Sanchez,* 115 N.M. at 662–64, 857 P.2d at 773–75. We disagree and conclude that SFT has made a prima facie showing of conspiracy to intentionally interfere with prospective contractual relations.

{41} To assert personal jurisdiction based on a conspiracy, SFT must make a prima facie showing of conspiracy upon a non-resident defendant's denial that a conspiracy exists. *See Campos Enters., Inc.,* 1998–NMCA–131, ¶ 6, 125 N.M. 691, 964 P.2d 855; *Baldridge v. McPike, Inc.,* 466 F.2d 65, 68 (10th Cir.1972). A prima facie showing consists of specific facts that, if proven, would allow a factfinder to find the existence of a conspiracy. *State v. Armijo,* 90 N.M. 12, 15, 558 P.2d 1151, 1154 (Ct.App.1976). Mere allegations are not sufficient, *Am. Land Program, Inc.,* 710 F.2d at 1454, but all factual disputes are resolved in SFT's favor. *See Campos Enters., Inc.,* 1998–NMCA–131, ¶ 6, 125 N.M. 691, 964 P.2d 855. Frequently, there is an insufficient discovery record on a motion to dismiss for lack of personal jurisdiction for a court to reach a conclusion that a plaintiff has shown a prima facie case of conspiracy for personal jurisdiction to lie as to a particular defendant. *See Sanchez,* 115 N.M. at 663, 857 P.2d at 774.

{42} In the complaint, SFT alleged that each defendant to this appeal committed interference with prospective contractual relations and conspiracy to intentionally interfere. SFT specifically alleged that the SMS principals intentionally caused it to be dropped from the bidding team for its own economic benefit and "to get even with [SFT] for perceived grievances arising out of their previous employment and separation from [SFT]." Defendants' motions to dismiss for lack of personal jurisdiction and accompanying affidavits and memoranda do not respond to SFT's conspiracy allegations directly. We conclude that SFT has made a prima facie case of conspiracy with respect to the tort of intentional interference with prospective contractual relations, and we need not address the other individual torts set out in the complaint.

{43} Civil conspiracy is an agreement to accomplish an unlawful purpose or a lawful purpose by unlawful means. *Las Luminarias of the N.M. Council of the Blind v. Isengard,* 92 N.M. 297, 300, 587 P.2d 444, 447 (Ct.App.1978). The tort of intentional interference with prospective contractual relations requires a plaintiff to prove that a defendant "improperly interfered with the plaintiff's contractual relations, either through improper means or improper motive." *Diversey Corp. v. Chem-Source Corp.,* 1998–NMCA–112, ¶ 20, 125 N.M. 748, 965 P.2d 332. The purpose of this tort is to "impose liability for contractual interference when the means of interfering was not tortious or otherwise unlawful in itself." *Id.*

{44} Following discovery, SFT set forth the following facts through deposition evidence. In February 1999, Burns told DeNino that he and Jannetta were looking at SFT

alternatives. Burns forwarded to DeNino a Jannetta e-mail stating that Jannetta had spoken with NTS, a subsidiary of SMS, and that Jannetta suggested that they "could swap [SMS'] credentials with SFT's." A week later, Jannetta and Burns called Albuquerque and spoke with Nash and Musnitsky of SMS and set up a meeting in San Francisco. The principals of SMS were former members of SFT and present stockholders who had voted against the merger of SFT and Argus. The next day Burns discussed the "SMS option" with DeNino, informed him of the San Francisco meeting, and suggested that they substitute SMS for SFT in the bid proposal on March 1, 1999, and that " 'Jannetta would need to know if it will be SMS later this week.' " DeNino approved the San Francisco meeting, cautioning that SFT might sue. Following the failed San Francisco meeting and after a telephone call to Musnitsky in New Mexico, Jannetta and Burns sent Malewicz to Albuquerque to continue negotiations. On February 24, 1999, the letters of intent between Argus and SMS were signed, and SFT was notified of the merger agreement termination. Two days later, Jannetta told SFT that they were excluded from the federal bid itself. Argus and SMS swapped stock and retired some of SMS' bank debts in New Mexico. On March 1, 1999, SMS replaced SFT on the federal bid proposal, and the bid was submitted.

{45} Viewing the facts in the light most favorable to SFT, SFT has made a prima facie case of conspiracy for intentional interference with contractual relations. The facts presented in deposition testimony to the district court were sufficient to support reasonable inferences that an agreement existed among SMS, Burns, Jannetta, and DeNino to interfere with SFT's participation in the federal bid and that all parties knew that SFT would suffer economic injury in New Mexico. DeNino had approved the substitution of SMS, and SMS was aware of the deal between Argus and SFT because the SMS principals, prior principals in SFT and then current SFT shareholders, had been asked to vote on the merger, which they voted against. Indeed, Musnitsky's deposition testimony demonstrates the knowledge of SMS. Musnitsky testified that in February, when Argus contacted SMS, he "had been asked as [an SFT] stockholder to vote on a merger" between SFT and Argus and could "only think [the Argus–SFT deal] was in trouble if they're calling me."

{46} "A conspiracy may be established by circumstantial evidence; generally, the agreement is a matter of inference from the facts and circumstances, including the acts of the persons alleged to be conspirators." *Morris v. Dodge Country, Inc.*, 85 N.M. 491, 492, 513 P.2d 1273, 1274 (Ct.App. 1973). SFT is not required to prove this alleged conspiracy for personal jurisdiction purposes. We respectfully leave the merits of SFT's claims to the appropriate factfinder. *Cf. Stauffacher v. Bennett*, 969 F.2d 455, 459 (7th Cir.1992) (recognizing the difficulty that conspiracy theory of personal jurisdiction presents is that "it merges the jurisdictional issue with the merits").

{47} The contacts of SMS with New Mexico as a co-conspirator can be imputed to DeNino. All Defendants, except DeNino, have sufficient contacts with the state for the exercise of personal jurisdiction without conspiracy analysis as discussed above. Additionally, contacts by Malewicz imputed to Burns, Jannetta, Argus, and TL may also be imputed to DeNino by way of the conspiracy. We base jurisdiction over Defendants on their purposeful and concerted contacts with New Mexico, individually and together. As the court in *Stauffacher* stated, "[i]f through one of its members a conspiracy inflicts an actionable wrong in one jurisdiction, the other members should not be allowed to escape being sued there by hiding in another jurisdiction." *Id.* at 459. We agree and conclude that "traditional notions of fair play and substantial justice" are not offended by the exercise of personal jurisdiction over all Defendants by our New Mexico courts. *See Int'l Shoe Co.*, 326 U.S. at 316, 66 S.Ct. 154.

Fiduciary Shield Doctrine

{48} Jannetta argues in a footnote in his brief in chief that he, as an individual, is shielded from personal jurisdiction under the fiduciary shield doctrine. *See Allen v. Toshi-*

ba Corp., 599 F.Supp. 381, 384 (D.N.M.1984). We do not agree.

{49} The fiduciary or corporate shield doctrine prevents a state from exercising personal jurisdiction over individual officers or directors of a corporation based on actions they have taken in a fiduciary capacity for the corporation. *Id.* However, inasmuch as New Mexico exercises personal jurisdiction to the full extent the constitution allows, *see United Nuclear Corp.*, 91 N.M. at 42, 570 P.2d at 306, the fiduciary shield doctrine is not constitutionally required in New Mexico. An employee of a corporation subject to personal jurisdiction will not be shielded from jurisdiction if he or she is a "primary participant[ ] in [the] alleged wrongdoing intentionally directed" at the forum state, which activities formed the bases of the jurisdiction over the corporation. *Calder*, 465 U.S. at 790, 104 S.Ct. 1482; *see also In re Application to Enforce Admin. Subpoenas Duces Tecum of the Sec. & Exch. Comm'n v. Knowles*, 87 F.3d 413, 418 (10th Cir.1996). Argus has sufficient minimum contacts with New Mexico to support personal jurisdiction over it as a corporation. Jannetta's actions on behalf of Argus were integral to this finding of jurisdiction. Jannetta was then a primary participant. The exercise over Jannetta as an individual is reasonable. *See id.* at 418.

Arbitration

{50} Concurrently with their other motions to dismiss, Defendants filed motions to compel arbitration pursuant to the Agreement, which the district court denied. On appeal, Defendants argue that SFT's claims fall within the broad reach of the arbitration clause as they "aris[e] out of or relat[e] to" the Agreement and, thus, should be arbitrated. We disagree and affirm the district court.

{51} Arbitration is a form of dispute resolution highly favored in New Mexico. *Spaw-Glass Constr. Servs., Inc. v. Vista De Santa Fe, Inc.*, 114 N.M. 557, 558, 844 P.2d 807, 808 (1992). It promotes both judicial efficiency and conservation of resources by all parties. *See Casias v. Dairyland Ins. Co.*, 1999-NMCA-046, ¶ 7, 126 N.M. 772, 975 P.2d 385; *see also K.L. House Constr. Co. v. City of Albuquerque*, 91 N.M. 492, 493-94, 576 P.2d 752, 753-54 (1978). New Mexico's then effective Uniform Arbitration Act, NMSA 1978, §§ 44-7-1 to -22 (1971), states that:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 44-7-1. Thus, when parties have agreed to arbitrate, the courts must compel arbitration. *Pueblo of Laguna v. Cillessen & Son, Inc.*, 101 N.M. 341, 343, 682 P.2d 197, 199 (1984); *Bernalillo County Med. Ctr. Employees' Ass'n v. Cancelosi*, 92 N.M. 307, 308-09, 587 P.2d 960, 961-62 (1978). Whether the parties have agreed to arbitrate is a question of law; we review the applicability and construction of a provision requiring arbitration de novo. *Casias*, 1999-NMCA-046, ¶ 13, 126 N.M. 772, 975 P.2d 385; *Monette v. Tinsley*, 1999-NMCA-040, ¶ 7, 126 N.M. 748, 975 P.2d 361.

{52} As a contractual remedy, arbitration clauses are governed by contract law. *Casias*, 1999-NMCA-046, ¶ 11, 126 N.M. 772, 975 P.2d 385; *Christmas v. Cimarron Realty Co.*, 98 N.M. 330, 332, 648 P.2d 788, 790 (1982). A court will not rewrite a contract for the parties and, in its interpretation, the court will apply the plain meaning of the contract language. *Christmas*, 98 N.M. at 332, 648 P.2d at 790. "The terms of the agreement define the scope of the jurisdiction, conditions, limitations and restrictions on the matters to be arbitrated." *Id.* Therefore, the court's inquiry is whether the parties have agreed to arbitrate the matter under dispute. *See K.L. House Constr. Co.*, 91 N.M. at 494, 576 P.2d at 754. When a reasonable relationship between the subject matter of the dispute and the underlying agreement exists, the dispute is within the arbitration provision and should be arbitrated. *Id.*

{53} In this case, the Agreement provides that: "In the event of any breach, default, dispute, controversy, or claim arising out of or relating to this Agreement other than an action seeking preliminary or permanent injunctive relief, the Parties shall meet promptly through representatives with authority to resolve the dispute." Arbitration would be the "sole and exclusive remedy . . . respecting any dispute, protest, controversy, or claim arising out of or relating to this Agreement." As a result, our inquiry is whether SFT's claims "aris[e] out of or relat[e] to" the Agreement such that they are subject to arbitration.

{54} Defendants argue that the Agreement is broad enough to encompass SFT's claims in light of New Mexico's public policy favoring arbitration, and thus, arbitration is proper. They contend that SFT's own complaint demonstrates that its causes of action derive from the Agreement and that SFT's CEO Sangrey admitted that the two were related. Defendants argue that Sangrey's statements that the federal contract was the "principal objective of the plan to merge" and that "in all likelihood, the merger would not have gone through if the federal contract were not awarded to [SFT] or Argus" indicate that federal contract was "related to" the Agreement such that arbitration would apply to SFT's claims.

{55} Arbitration clauses such as the one before us are drafted with broad strokes and, as a result, require broad interpretation. Nonetheless, the scope of the clause itself is limited to the subject matter of the underlying contract. *See Christmas,* 98 N.M. at 332, 648 P.2d at 790; *K.L. House Constr. Co.,* 91 N.M. at 494, 576 P.2d at 754. Our review of the Agreement between SFT and Defendants reveals a contract describing a corporate merger, including stock exchange and warranties. The Agreement describes the potential business relationship and the conduct of the parties and sets out closing procedures. It consists of clauses describing stock transfers and warranties of the type that "[t]here are no PCBs or asbestos-containing materials located at or on Santa Fe's Facilities" and that SFT has complied with the Clean Air Act. It does not discuss the federal contract bid proposal or the parties' rights and responsibilities in its regard. When we hold SFT's claims up against the Agreement, we do not see overlap. SFT's claims that Defendants tortiously substituted another company and stole SFT's bid work for the federal contract do not implicate the rights and obligations set out by the Agreement. SFT's claims neither relate to the mechanics of the merger of two corporations nor arise from the performance or failure to perform the merger.

{56} Our case law requires a closer connection between the subject matter of the agreement and the subject matter of the dispute in question than that evinced in this case. In *K.L. House Construction Co.,* 91 N.M. at 494, 576 P.2d at 754, our Supreme Court concluded that an arbitration provision applied when the plaintiff had claims concerning a roof built pursuant to a construction contract containing an arbitration provision. The arbitration provision stated that "[a]ll claims, disputes and other matters in question arising out of, or relating to, this Contract" were subject to arbitration. *Id.* at 493, 576 P.2d at 753. The Court adopted the reasoning of a New York court, explaining that, in the evaluation of an arbitration provision, the inquiry is " 'whether the parties have agreed to arbitrate the particular dispute.' " *Id.* at 494, 576 P.2d at 754 (quoting *Nationwide Gen. Ins. Co. v. Investors Ins. Co.,* 37 N.Y.2d 91, 371 N.Y.S.2d 463, 332 N.E.2d 333, 335 (1975)). When the parties employ broad arbitration clauses, the subject matter of the underlying agreement determines the scope of the arbitration provision. *Id.* The Court thus concluded that, although warranty periods had expired, the plaintiff's claims regarding the roof were subject to arbitration as they had "a reasonable relationship to the subject matter of the contract." *Id.; see also Spaw-Glass Constr. Servs., Inc.,* 114 N.M. at 559, 844 P.2d at 809 (explaining that issue of whether a contractor was properly licensed had a reasonable relationship to the subject matter of construction contract and thus was subject to arbitration); *Monette,* 1999-NMCA-040, ¶¶ 21-22, 126 N.M. 748, 975 P.2d 361, (holding the plaintiffs' claim of misrepresentation concerning the defendants' employment obligation to one

plaintiff was subject to the arbitration provision of a manager-proprietor agreement, even though the alleged misrepresentations were made in anticipation of the agreement, unless the plaintiffs could claim fraud in the inducement).

{57} We deem it of utmost importance that the parties' Agreement does not state in an unlimited manner, as would be permitted by Section 44–7–1, that any disputes that may arise between the parties in the future shall be subject to arbitration. Instead, and more narrowly, it covers only those disputes arising out of or relating to the Agreement. Defendants' construct of the phrase "relate to" to include these claims gives it too broad an interpretation and goes beyond the agreement of the parties. *Cf. Breaker v. Corrosion Control Corp.*, 23 P.3d 1278, 1283–84 (Colo.Ct.App.2001) (explaining that arbitration provision of purchase agreement did not apply to claim of improper disclosure of confidential information under an employment agreement which was attached to the purchase agreement and the execution of which was an obligation arising out of the purchase agreement). SFT's claims do not "aris[e] out of or relat[e] to" the Agreement because no reasonable relationship between the two exists.

Conclusion

{58} We affirm the district court on all issues.

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

WE CONCUR: LYNN PICKARD, Judge and IRA ROBINSON, Judge.